IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Harpe* v. *Massie and Ta'an Kwäch' än Council*, 2006 YKSC 39

Date: 20060605
Docket No.: S.C. No. 05-A0080
Registry: Whitehorse

Between:

BONNIE HARPE

Plaintiff

And

RUTH MASSIE and THE TA'AN KWÄCH'ÄN COUNCIL

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

André W.L. Roothman — Counsel for Bonnie Harpe
Debra L. Fendrick — Counsel for Ruth Massie and The Ta'an Kwäch'än Council

REASONS FOR JUDGMENT
(Interim Costs)

INTRODUCTION

[1] This is an application by Bonnie Harpe for interim costs against the Ta'an Kwäch' än Council. The case involves the interpretation of a written Yukon First Nation constitution and the role played by customs and traditions of the elders in that interpretation. On October 12, 2005, I dismissed this application for interim costs as this case does not have the special public importance required to apply the unusual measure of ordering the costs of a party to be paid in advance. These are my reasons.

FACTS

[2] The Ta’an Kwäch’än Council is the government of the Ta’an Kwäch’än people, a Yukon First Nation situated at Lake Laberge, near Whitehorse, Yukon Territory. There are about 432 Ta’an Kwäch’än citizens. Approximately 400 of these citizens are members of one of the six traditional families.

[3] On January 13, 2002, the Ta’an Kwäch’än Council signed the Ta’an Kwäch’än Self-Government Agreement with the governments of Canada and the Yukon. The general purpose of the Ta’an Kwäch’än Self-Government Agreement is to support the contemporary and traditional political institutions and processes of the Ta’an Kwäch’än.

[4] The Ta’an Kwäch’än Council originally had a Hereditary Chief appointed by the Elders Council. That style of governance was changed at a General Assembly in November 2003 when the citizens of Ta’an Kwäch’än Council amended their Constitution to abolish the position of Hereditary Chief and create the elected positions of Chief and Deputy-Chief (the 2004 Constitution).

[5] On February 19, 2004, the Board of the Ta’an Kwäch’än Council passed the Ta’an Kwäch’än Council Amended Election Rules (Election Rules).

[6] The date of the election of Chief and Deputy-Chief was April 30, 2004. Ruth Massie was elected as Chief by a two-vote margin over Bonnie Harpe.

[7] The Deputy-Chief, who was acclaimed, resigned on June 1, 2004. The Board has not called a by-election, as required by the 2004 Constitution, to replace the Deputy-Chief. Section 8.13 of the 2004 Constitution states “Upon resignation or removal of the Chief or Deputy-Chief, a by-election shall be held forthwith to serve for the remainder of the term.”

[8] Bonnie Harpe filed an appeal of the April 30, 2004 election to the Judicial Council, a tribunal created to adjudicate alleged violations of the laws of the Ta'an Kwäch'än Council. She alleged certain irregularities and the ineligibility of a third candidate for the office of Chief. On May 16, 2005, one year later, the Judicial Council decided, in a written judgment, that the third candidate was ineligible. The delay between the filing of the appeal and the judgment was caused by a difficulty in obtaining certain records. The Judicial Council ordered that the election of Ruth Massie on April 30, 2004 "be voided and a new election for Chief be held".

[9] The result of this ruling of the Judicial Council was that the Board of the Ta'an Kwäch'än Council did not have a quorum as there was no elected Chief or Deputy-Chief. Section 8.6 of the Constitution requires the presence of either the Chief or Deputy Chief as part of the quorum for all meetings of the Board. There is no specific provision in the Constitution of the Ta'an Kwäch'än Council setting out a procedure to appoint an Acting Chief or Deputy-Chief.

[10] On May 19, 2005, the Elders Council approved a resolution appointing Ruth Massie as Acting Chief. Bonnie Harpe alleges that this resolution is not valid thereby leaving the Board of the Ta'an Kwäch'än Council without a quorum to act.

[11] By letter dated July 19, 2005, six directors of the Board informed the citizens of Ta'an Kwäch'än Council that the Elders Council appointed Ruth Massie as Acting Chief and ordered that elections for Chief and Deputy-Chief be held no later than October 30, 2005.

[12] One of the undercurrents in this litigation relates to the traditional families. The structure of the 2004 Constitution is based upon the six traditional families that are

defined as the Chief Jim Boss family, the Maggie Broeren family, the Jenny Dawson Family, the Susie Jim family, the Undeheal family and the Jenny Lebarge family.

[13] Ms. Harpe is a member of the Susie Jim family. Ms. Massie is a member of the Jenny Lebarge family. Ms. Harpe has filed an extensive affidavit which claims that the Jenny Lebarge family is not a traditional family despite the express wording of the 2004 Constitution.

[14] Bonnie Harpe applies for an order for the following relief, among other things:

(a) to set aside the resolution of the Elders Council appointing Ruth Massie as Acting Chief and setting an election date;

(b) to prohibit the Board of the Ta'an Kwäch'än Council from acting until a Chief or Deputy-Chief is elected;

(c) to appoint an Administrator for the Ta'an Kwäch'än Council until a Chief or Deputy-Chief has been elected; and

(d) to prohibit the holding of the election for Chief and Deputy-Chief until the Court has ruled on her judicial review proceeding.

[15] Ruth Massie and the Ta'an Kwäch'än Council submit that the elders have the traditional power to appoint an Acting Chief in these circumstances. Bonnie Harpe submits that the 2004 Constitution represents a clean move away from the traditional appointment of a chief to the democratic election of Chief and there is no provision in the 2004 Constitution for the appointment of an Acting Chief.

The Financial Circumstances of Bonnie Harpe

[16] Bonnie Harpe is currently employed as the Yukon Region Director of the Yukon River Inter-Tribal Watershed Council. She is a single parent of a 12-year-old daughter.

[17] She has an income in the range of $48,000 and her financial contribution to this litigation to date is $7,000 with credit for a further $15,000 with her lawyer.

[18] Her income and expenses are not adequate to fund this litigation which could cost in the range of $60,000 to $70,000.

[19] She is not eligible for legal aid.

[20] This litigation is not suitable for a contingency agreement as there is no financial claim.

ISSUE

[21] The sole issue to be determined is whether this is a suitable case for an award of interim costs.

THE LAW

[22] The traditional rule is that costs are a discretionary matter for the trial judge to award. Generally speaking, costs are awarded to the successful party after the trial is completed to compensate the winner for costs incurred. The word “costs” is a term of art based upon a tariff set out in the Supreme Court Rules. It is not necessarily synonymous with legal fees and disbursements and is often only a portion of the latter.

[23] The tradition of awarding costs to the successful party has been evolving to the point where the British Columbia Court of Appeal stated that “the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements

incurred is now outdated" (see *Skidmore* v. *Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28). In that case, the court awarded costs to a self-represented litigant.

[24] *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, 2003 SCC 71 is a watershed case that considers when it is appropriate to pay costs in advance to ensure a party can participate in a legal proceeding. In that case, members of four Indian Bands began logging on Crown land without provincial authorization. The Minister of Forests filed stop-work orders and commenced court proceedings to enforce them. The Bands claimed aboriginal title and the right to log without provincial authorization. The Bands applied for an order for interim costs requiring the Crown to pay their legal fees and disbursement in advance.

[25] The trial judge denied the application, although he recognized that the Court had a discretionary power to make an order for interim costs in exceptional circumstances. The Court of Appeal found that constitutional principles, and the unique nature of the Crown and Aboriginal peoples, created the exceptional and unique circumstances to order interim costs.

[26] The Supreme Court of Canada agreed that an order for interim costs for the Indian Bands was appropriate.

[27] The Supreme Court reviewed the traditional principle of awarding costs to the winning litigant at the conclusion of the hearing to indemnify expenses incurred. It also reviewed the use of interim costs as a policy instrument to ensure access to justice. As stated by LeBel J. in *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, at para. 31:

> "Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. …"

[28] LeBel J. identified the criteria that must be present to justify an award of costs at paragraph 40:

> "1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases."

[29] At paragraph 41, LeBel J. stated even if that the above criteria were met, it is not necessarily sufficient to make such an award. The court still retains discretion on whether costs should be awarded in a particular case.

[30] LeBel J. applied his criteria at paragraph 46 as follows:

> Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both Aboriginal and non-Aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-

> Aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

ANALYSIS

[31] My assessment of the application of the three criteria set out in *British Columbia (Minister of Forests)* v. *Okanagan Indian Band* is as follows:

1. I have no doubt that Bonnie Harpe genuinely cannot afford to pay for this litigation without going into substantial debt as she already has at this point. Her financial situation is distinguishable from the plaintiffs in *Gitxsan First Nation* v. *British Columbia (Minister of Forests)*, 2005 BCSC 994. In that case, the plaintiffs represented some 4,000 Gitxsan people and the court found that they were unwilling, as opposed to unable to finance the litigation. In this case, Bonnie Harpe appears to be bearing the cost of financing this litigation personally, although she no doubt has the backing of her family in pursuing the litigation. Although it cannot be said that this litigation categorically would not proceed without an interim costs order, I am of the view that the first criteria is met to all intents and purposes. Ms. Harpe genuinely cannot afford to pay for this litigation without seriously impoverishing her family for a considerable length of time.

2. The claim that is put forward by Ms. Harpe is *prima facie* meritorious, which I interpret to mean that she has an arguable case of some merit. There is no doubt that the 2004 Constitution does not expressly empower the elders to appoint an Acting-Chief. There is a constitutional gap and the issue is worthy

of being pursued. However, it is not an issue that could be categorized as "special" or "extreme" in the sense meant by Justice LeBel.

3. The third criteria is whether the issue of the role that customs and traditions of the Ta'an Kwäch'än elders play in the 2004 Constitution transcends the individual interests at stake. The customs and traditions of First Nations have been recognized and incorporated into Canadian common law for some time (see *Bigstone* v. *Big Eagle*, [1992] F.C.J. No. 16). Arguably, this particular case is somewhat unique in the sense that it addresses the role of the customs and traditions of elders in the context of a First Nation that has adopted a written constitution. Although individual interests are at play, there is the larger issue of the role of customs and traditions of elders in constitutional interpretation.

[32] However, when comparing this issue to the dispute in the *Okanagan Indian Band* case, this issue is not of the same magnitude of public importance. The *Okanagan Indian Band* case dealt with the power to regulate the forest resource in British Columbia. It would have an impact on all citizens of British Columbia, whether aboriginal or non-aboriginal.

[33] In contrast, the issue in this case only affects the internal operations of this First Nation. It may conceivably affect the constitutions of other First Nations but that is only a possibility and not a certainty. It does not affect non-aboriginals in the Yukon.

[34] Counsel for Ms. Harpe submits that the issue she brought to court was a relatively straightforward issue of constitutional interpretation. Counsel submits that the Ta'an Kwäch'än First Nation has turned the case into a complex constitutional question

involving the relationship between customs and traditions of the elders in the context of a written constitution. I do not find this submission persuasive as it is Bonnie Harpe that has commenced the litigation. The fact that the Ta'an Kwäch'än First Nation wishes to defend its position should have been anticipated as a normal course of litigation.

[35] Finally, even if all the criteria were met, I would be reluctant to exercise my discretion to award interim costs in this case. It is arguably a case of public importance, but it ultimately remains an internal dispute of a First Nation. It does not meet the special or extreme circumstances required to order interim costs.

[36] The application for interim costs is dismissed.

VEALE J.