

**IN THE MATTER OF AN ARBITRATION  
PURSUANT TO THE CUSTOM ELECTION CODE (the “Code”)  
OF THE SHACKAN INDIAN BAND**

**BETWEEN:**

**Anthony Percy Joe**

**Applicant**

**AND:**

**Chief Arnold Lampreau**

**Respondent**

Arbitrator: John R. Rich

Date: January 3, 2023

**DECISION ON COSTS**

1. At the conclusion of the hearing of this matter, December 12, 2022, counsel for the Respondent, Chief Lampreau, raised the issue of costs. With the agreement of the parties, I ruled that costs could be considered following the issuance of my decision on the merits of the application.

**THE CODE**

2. Paragraph 23.13 of the Code states:

“The Arbitrator shall make such order regarding costs of the application as he or she deems appropriate. The Arbitrator’s fee and all reasonable expenses shall be the responsibility of the Band unless otherwise ordered by the Arbitrator.”

3. Other than section 23.13, the Code provides no guidance on the matter of costs.

**SUBMISSIONS OF THE PARTIES**

4. A conference call was held to hear submissions of the parties on the matter of costs, December 22, 2022.

***Submissions of the Respondent, Chief Lampreau***

5. Counsel for Chief Lampreau referred to the BC Arbitration Act, SBC 2020, c. 2, which provides at s. 50:

**“50** (1) A costs award may be made at any time during arbitral proceedings, including at the termination of the proceedings, and may be made payable at any time.

(2) Unless otherwise agreed by the parties, the costs of an arbitration are in the discretion of the arbitral tribunal, which may, in awarding costs,

(a) include the following as costs:

- (i) the fees and expenses of the arbitrators and expert witnesses;
- (ii) legal fees and expenses;
- (iii) any administration fees of an institution;
- (iv) any other expenses incurred in connection with the arbitral proceedings,

(b) specify the following:

- (i) the party entitled to costs;
- (ii) the party who must pay the costs;
- (iii) the amount of costs or method of determining that amount;
- (iv) the manner in which the costs must be paid,

(c) determine the amount of a costs award by reference to actual reasonable legal fees, expenses and witness fees, and

(d) summarily determine the amount of costs.

6. Counsel submitted that s. 50 provided guidance on the matter of costs, but that costs are in the complete discretion of the Arbitrator.
7. Counsel also submitted that a cost award should reflect the actual cost to the Respondent, Chief Lampreau, who had incurred significant expenses in responding to the application to remove him as Chief.
8. Counsel put forward two arguments in support of his position:
  - i. As a consequence of the potentially serious consequence of being removed from his position as Chief, the Chief was obligated to retain legal counsel, at significant expense, which should be recognized in the cost award.
  - ii. The cost award should consider deterrence. Given the various allegations put forward by the applicants, which were found to be inadmissible, there is a significant concern that another complaint could be brought forward. Additionally, complaints, particularly those without a proper basis, have a negative impact on the Band as a whole.

### ***Applicant's Submissions***

9. Mr. Joe, speaking on his own behalf, emphasized s. 23.13 of the Code, which contemplates the Band paying the costs of the arbitration. Mr. Joe submitted that Band members will pay

for the arbitration in any event, whether costs are awarded or not. He stated that all costs should be borne by the Band.

10. Mr. Joe submitted that it was unlikely that another application to remove the Chief would be made, that he would not be involved in any such application, and that the community wished to put this matter behind them.

### ***Actual Legal Fees***

11. Counsel for the Chief advised that the actual legal fees of the Chief, plus disbursements and tax, were in the range of \$20,000.

### **ANALYSIS**

12. In determining a cost award, I have considered several factors:

#### ***Success***

13. Chief Lampreau was ultimately successful in this matter, in that I have ruled pursuant to s. 23.12 of the Custom Election Code that the application for removal is denied.
14. The applicants were successful in establishing that Chief Lampreau had breached the Custom Election Code on two occasions. However, those breaches were not sufficiently serious to warrant removal of the Chief.

#### ***First Application***

15. This is the first application to remove a Councillor pursuant to the Custom Election Code and consequently the applicants had no guidance whether breaches, if established, would be sufficient to remove the Chief.

#### ***Serious Consequence***

16. I agree with the submission of Counsel for Chief Lampreau that it was reasonable that he retain a lawyer, given the potential consequence of losing his position as Chief.

#### ***Deterrence***

17. I note that the Custom Election Code was ratified in November 2017, five years ago, and this is the first application under s. 23. That there have been no previous applications over a five year period raises the question whether deterrence is a significant issue.
18. Counsel for the Respondent Chief submitted that deterrence ought to be considered in support of the cost award to the Chief. Counsel submitted there was a significant concern that further complaints would be brought forward against the Chief, and that complaints without a proper basis have a negative impact on the Band as a whole. The Applicant, Mr. Joe,

expressed his view that the community had moved past these issues and further applications under the Code before the next election were very unlikely.

19. I note that deterrence is a factor which cuts both ways. On the one hand, the prospect of becoming liable for a significant cost award will undoubtedly act as a deterrent to Shackan members bringing frivolous applications. On the other hand, the prospect of a substantial cost award may deter Shackan Band members from bringing legitimate complaints forward.
20. The Custom Election Code has established a process for enforcement of the Oath of Office with costs left to the Arbitrator's discretion. In my view, exercise of that discretion should not unduly impede Band members' resort to the Code to ensure compliance with the Oath of Office. However, I also agree that the prospect of an adverse cost award may be an appropriate deterrent to frivolous applications.

#### ***Precedent – Code***

21. As noted, this is the first application under the Code, which was adopted in 2017. Thus, there is no precedent as guidance for a cost award under the Code.

#### ***Precedent – Commercial Arbitration Costs***

22. The general rule in commercial arbitrations is that the successful party is entitled to full payment of their costs by the unsuccessful party.
23. However, this Arbitration is not a commercial Arbitration, and thus I find that the general rule does not apply and decisions of the courts respecting cost awards in commercial arbitrations are of little value in this case.

#### ***Precedent – Court Costs***

24. Absent exceptional circumstances, cost awards to a successful party in a court proceeding are generally only a fraction of actual costs.
25. However, this arbitration is not a court proceeding and thus I find that court decisions respecting costs are of little value in this case.

#### **DISCRETION**

26. I have considered the provisions of the Custom Election Code, the *BC Arbitration Act*, and the submissions of Counsel for Chief Lampreau, and conclude that, as an Arbitrator, I have complete discretion in the matter of costs, subject only that the discretion be exercised judicially and in accordance with the Code.

## CONCLUSION

### *Arbitrator's Fees*

27. Pursuant to s. 23.13 of the Custom Election Code, I conclude that the Arbitrator's fees and all reasonable expenses are the responsibility of the Shackan Band.

### *Cost Award to Chief*

28. Pursuant to s. 23. 13 of the Custom Election Code, the Applicants are ordered to pay costs to Chief Lampreau in the lump sum of \$10,000.00. This amount has been determined taking into account the factors listed above and applying 50 percent to the estimated fees and expenses submitted by Respondent's Counsel.

29. Given the submissions of Mr. Joe, that he was speaking on behalf of numerous Shackan members, I expect that those persons will share in payment of this award of costs, however, I make no order in this regard.



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John Rich  
Arbitrator  
January 3, 2023