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Via Email: tribunal@huuavaht.org

Huu-ay-aht First Nations Tribunal
Government Office
170 Nookemus Road
Anacla, BC

Attention: Tribunal Chair

Dear Sirs/Mesdames:

Re: Tribunal Applications of S. Charles (2014-001 - 2014-007)

The Applicant Ms. Charles has requested independent legal advice and representation on the basis that she believes it is necessary for a fair and equal hearing, since the Executive Director has legal representation. With respect, the Applicant's stated position does not meet the requirements set out in the *Tribunal Act*, s. 15.

The Act does not provide that independent legal representation should be provided in the interests of fairness, nor that it should be provided when the administrative decision-maker has legal representation. The Act provides two bases upon which the chair may recommend to Executive Council that an individual be provided with legal advice and representation for a matter:

- 1) Where the chair reasonably believes the matter is unusually complex; or
- 2) Where the chair reasonably believes the matter has significant implications for the Huu-ay-aht (*Tribunal Act*, s. 15(1)).

As is set out in greater detail below, it is the Respondents' position that neither condition is met in respect of any of the Applications.

The chair must reasonably believe that a matter meets the requirements of s. 15(1) for an individual to be provided with independent legal advice and representation in respect of the matter. Thus, each of the seven Applications brought by the Applicant must be considered separately to determine whether it meets the requirements of s.15(1). As such, each Application is addressed separately below. However, it is useful to first set out some general comments applicable all of the Applications:

- 1) None of the Applications raise matters that are unusually complex, either factually or legally. The specific matters put at issue in each Application are addressed below.
- 2) Nor do the matters raised in any of the Applications have “significant implications for the HUU-ay-aht” within the meaning of the provision. It could be said that almost any appeal putting in issue a decision of the Executive Director—as the senior administrator of the HUU-ay-aht government—potentially has, by its very nature, significant implications for the HUU-ay-aht. But that cannot be what is meant section 15 of the *Tribunal Act*. The Legislature cannot have intended that any citizen who sought to appeal a decision of the Executive Director would be provided with independent legal advice and representation, or the provision would state as much with considerably more clarity. In order to give effect to the Legislature’s intention, the provision must be interpreted to mean that the matter at issue of must, at a minimum, have some particularly significant implication for the HUU-ay-aht over and above those that necessarily attach to the impugning of decisions that the Executive Director has made in the course of his or her administration of government or implementation of directions of Executive Council.

In order to determine what the implications for the HUU-ay-aht of each Application may be, it is useful to focus on the specific relief that may result from each Application. This is the approach taken below.

1) Application # 2014-001

a) Complexity

A contravention of the *Financial Administration Act*, s. 68(2) and a possible contravention of the *Purchasing Policy Regulation*, s. 4(1)(b) are alleged in this Application.

The relevant requirements of both legislative provisions are straightforward:

Financial Administration Act:

- 68** (2) Every agreement providing for expenditure in excess of a \$ 10 000 in a fiscal year must be
- (a) specified in the description of a budget line item, or
 - (b) authorized by Executive Council.

Purchasing Policy Regulation:

- 4** (1) Subject to section 5, every purchase of goods or services, including capital goods, with a cost of more than
- ...
- (b) \$25 000 in a fiscal year must not be made until an open competition has been held and the resulting proposals evaluated.

The questions of fact arising from the alleged contraventions are also simple: 1) was Executive Council authorization of the expenditure at issue in place in compliance with s.68(2) of the *Financial Administration Act*? and 2) was the expenditure at issue greater than \$25,000?

Neither the questions of law nor the questions of fact put in issue can be said to be complex and they certainly do not meet the requirement of unusual complexity.

b) Significance

The Applicant seeks to have the decision affirmed, varied or set aside and a declaration that it was illegal.

The decision at issue was to enter into an agreement for the expenditure of funds to a consultant for staff training. The consultant has already rendered services that were the subject of the agreement and been paid. From a practical perspective, this cannot be undone. The outcome of this Application cannot thus be said to have significant implications for the *Huu-ay-aht* within the meaning of s. 15.

2) Application # 2014-002

a) Complexity

It is alleged that no Executive Council authorization was in place in respect of two actions taken by the Executive Director. The basic facts do not appear to be in dispute except for the question of whether a resolution was in place in respect of the options agreement. This is a simple factual question.

In respect of entering into discussions with Island Timberlands in respect of the possibility of a land acquisition, there is a legal question as to whether Executive Council approval was required for the action taken by the Executive Director.

Neither the question of fact nor of law at issue is unusually complex.

b) Significance

The Applicant seeks to have the decisions affirmed, varied or set aside and a declaration that they were illegal.

The practical outcome of a tribunal ruling to vary or set aside either the decision to implement Executive Council's direction by entering into the options agreement or the decision—to the extent that there was one—to engage in discussions about the possibility of a land acquisition from Island Timberlands or declare that one or both of them was illegal will not have the requisite significant implications to the *Huu-ay-aht*. The agreement has already been entered into and the discussions have already taken place.

3) Application 2014-003

a) Complexity

In it is alleged that the Executive Director has failed to comply with the *Government Act*, s. 55.

The requirements of this provision are clear:

- 55**
- (1) The Executive Director has the authority and responsibility to ensure that decisions and resolutions of Executive Council are implemented in accordance with their terms and that related actions are completed within specified time frames.
 - (2) If for any reason, the Executive Director determines that it is not reasonably possible to comply with subsection (1), the Executive Director must report that in writing to Executive Council.

The question of fact is a simple one: is there a direction or resolution of Executive Council in place that the Executive Director failed to implement?

Neither the factual nor legal issues raised are unusually complex.

b) Significance

The Applicant seeks to have the decision affirmed, varied or set aside and a declaration that it was illegal. There is no decision of the Respondent to be affirmed, varied, set aside or declared illegal. As such, the matter before the tribunal cannot be said to have the requisite significance to the *Huu-ay-aht*.

4) Application 2014-004

a) Complexity

The primary issues are whether the Applicant has standing to bring the Application and whether the tribunal has jurisdiction to provide “accountability that the ED follows the HR policy to ensure transparency”. Neither is an unusually complex question of law.

b) Significance

The Applicant seeks to have the decisions affirmed, varied or set aside, a declaration that they were illegal and “accountability that the ED follows the HR policy to ensure transparency”.

At issue here is whether the posting and hiring of a receptionist was done in accordance with *Huu-ay-aht*’s human resources policy. While these matters may be very significant to those directly affected by the issues raised—in particular, the Executive Director and the receptionist—they cannot be said have the requisite significant implication for the *Huu-ay-aht* as a whole, as required by section 15 of the *Tribunal Act*.

5) Application 2014-005

a) Complexity

A contravention of the *Financial Administration Act*, s. 68 and a possible contravention of the *Purchasing Policy Regulation*, s. 4(1) are alleged.

Both legislative provisions are straightforward:

Financial Administration Act:

- 68** (1) Every expenditure in excess of \$1 000 in a fiscal year must be
- (a) authorized by a written agreement, or
 - (b) required by Huu-ay-aht legislation.
- (2) Every agreement providing for expenditure in excess of a \$ 10 000 in a fiscal year must be
- (a) specified in the description of a budget line item, or
 - (b) authorized by Executive Council.

Purchasing Policy Regulation:

- 4** (1) Subject to section 5, every purchase of goods or services, including capital goods, with a cost of more than
- (a) \$1 000 in a fiscal year must not be made until at least 3 quotes have been received and considered, and
 - (b) \$25 000 in a fiscal year must not be made until an open competition has been held and the resulting proposals evaluated.
- 5** Section 4 (1) does not apply if
- ...
 - (b) a contract existed within the past year to provide the goods or services, and under which those goods or services were provided to the reasonable satisfaction of the body contracting for them,

The issues are as follows: 1) was Executive Council authorization of the expenditure at issue in place in compliance with s.68(2) of the *Financial Administration Act*? and 2) were the requirements of s. 4(1) of the *Purchasing Policy Regulation* met? These are not unusually complex matters.

b) Significance

The decision at issue was to agree to the expenditure of funds to a consultant to conduct a risk management survey. The agreement has been entered into, the services have been rendered and the consultant has been paid. From a practical perspective, it cannot be undone. The outcome of

this Application thus cannot be said to have significant implications for the HUU-AY-AHT within the meaning of s. 15.

6) Application 2014-006

a) Complexity

A contravention of the *Financial Administration Act*, s. 68 and a possible contravention of the *Purchasing Policy Regulation*, s. 4(1) are alleged.

Both legislative provisions are straightforward:

Financial Administration Act:

- 68** (1) Every expenditure in excess of \$1 000 in a fiscal year must be
- (a) authorized by a written agreement, or
 - (b) required by HUU-AY-AHT legislation.
- (2) Every agreement providing for expenditure in excess of a \$ 10 000 in a fiscal year must be
- (a) specified in the description of a budget line item, or
 - (b) authorized by Executive Council.

Purchasing Policy Regulation:

- 4** (1) Subject to section 5, every purchase of goods or services, including capital goods, with a cost of more than
- (a) \$1 000 in a fiscal year must not be made until at least 3 quotes have been received and considered, and
 - (b) \$25 000 in a fiscal year must not be made until an open competition has been held and the resulting proposals evaluated.
- 5** Section 4 (1) does not apply if
- ...
 - (c) the Executive Director, or in the case of a HUU-AY-AHT public body or business enterprise the head of the HUU-AY-AHT public body or the Chief Executive Officer of the HUU-AY-AHT Development Corporation, as applicable, reasonably believes only one supplier is able to provide the goods or services, or

At issue is: 1) whether the commencement of work by a consultant prior to an agreement being in place constitutes a contravention by the Executive Director of s. 68 of the *Financial Administration Act* s. 68; and 2) whether the requirements of s. 4(1) of the *Purchasing Policy Regulation* were met?

These matters are not unusually complex.

b) Significance

The decision at issue was to agree to the expenditure of funds to a consultant to provide services in respect of forestry cutting permits. The agreement has been entered into, the services have been rendered and the consultant has been paid. From a practical perspective, the decision cannot be undone. The outcome of this Application thus cannot be said to have significant implications for the *Huu-ay-aht* within the meaning of s. 15 of the *Tribunal Act*.

7) Application 2014-007

a) Complexity

In it is alleged that the Executive Director has failed to comply with the *Government Act*, s. 55.

The requirements of this provision are clear:

- 55**
- (1) The Executive Director has the authority and responsibility to ensure that decisions and resolutions of Executive Council are implemented in accordance with their terms and that related actions are completed within specified time frames.
 - (2) If for any reason, the Executive Director determines that it is not reasonably possible to comply with subsection (1), the Executive Director must report that in writing to Executive Council.

The issues that arise are: 1) Did the Executive Director fail to comply with the requirements of the *Government Act*, s. 55? 2) Can the Executive Director be held responsible by the tribunal for Executive Council's decision to amend its earlier resolution? 3) Does the tribunal have jurisdiction to otherwise create accountability for the Executive Director as sought?

These issues are not unusually complex; they can be resolved based on uncontroverted facts with reference to a handful of straightforward legislative provisions.

b) Significance

The Applicant seeks to have the decision affirmed, varied or set aside and a declaration that it was illegal. There is no decision of the Respondent to be affirmed, varied, set aside or declared illegal. As such, this aspect of the Application cannot be said to have the requisite significant implications for the *Huu-ay-aht*.

To the extent that the Applicant seeks "accountability for the ED", the matter could potentially have significant implications for the Respondent, but not for the *Huu-ay-aht* as whole, as required under s. 15 of the *Tribunal Act*.

Time limit

In addition to the matters set out above, the Respondent has asserted that all of the Applications except for 2014-003 were brought outside of the applicable time limit. The Respondent's position is the same in respect of the complexity of this aspect of each of the Applications:

a) Complexity

The factual question of whether this the time limit has expired in each instance is not complex.

Under s. 21(2) of the *Tribunal Act*, the tribunal may extend the time to submit a notice of appeal, if the tribunal is satisfied that special circumstances exist. This does not give rise to unusually complex factual or legal issues.

b) Significance

Whether the requirements of s.21 have been met in respect of each of the Applications may have significant implications for one or both of the parties, but cannot be said to have significant implications for the HUU-AY-AHT as a whole.

As such, it is the Respondent's position that the issues around time limits do not satisfy the requirements of s. 15 of the *Tribunal Act* in respect of any of the Applications.

Conclusion

The Respondent respectfully submits that:

- 1) the only bases upon which the chair may recommend independent legal advice and representation be provided to the Applicant are as set out in s. 15 of the *Tribunal Act*:
 - a) Where the chair reasonably believes the matter is unusually complex; or
 - b) Where the chair reasonably believes the matter has significant implications for the HUU-AY-AHT (*Tribunal Act*, s. 15(1));
- 2) these conditions must be met in respect of each matter in respect of which the chair recommends independent legal advice and representation be provided; and
- 3) these conditions are not satisfied in respect of any of the Applications.

Yours truly,

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