



## **Huu-ay-aht First Nations Tribunal**

Government Office: 170 Nookemus Rd, Anacla, BC

**Mailing Address: 3483 - Third Ave., Port Alberni, BC V9Y4E4**

Chair: John R. Rich

Registrar: Deborah Smith

*tribunal@huuayaht.org*

June 23, 2014

### **HUU-AY-AHT FIRST NATION TRIBUNAL**

**Application No. 2013-002 and 005**

**Date(s) of Hearing: June 10 – 11, 2014**

**Location: Port Alberni**

#### **Tribunal Members Hearing Application:**

**John Rich, Chair**

**Trudy Warner, Member**

**Florence Wylie, Member**

**Decision of Tribunal**

**A. SUMMARY**

1. Huu-ay-aht First Nation citizen, Charlene Kruse, has brought two applications before the Tribunal alleging breaches of HFN law by the Executive Council and Executive Director. The first application alleges an unlawful removal of the position of Director of Finance, contrary to the HFN Human Resources Policy Regulation. The second application claims that the Executive Council made an unlawful appointment to the position of Economic Development Officer.
2. After Ms. Kruse raised these issues, the Executive Council made an appointment to the position of Director of Finance, and rescinded their appointment of the Economic Development Officer. Subsequently, in February 2014, the Executive Council amended the Human Resources Policy Regulation to eliminate the position of Director of Finance and to modify the position of Economic Development Officer.
3. Consequently, there is no longer any live issue between Ms. Kruse and the Executive Council or the Executive Director. There is no claim that the changes to the Human Resources Policy Regulation are not lawful. Thus, the Tribunal has been asked to rule on a matter that is moot – there will be no practical benefit to any such ruling. The applications are dismissed.
4. Since the applications are dismissed on the basis of mootness, there is no requirement or utility in determining the other matters which have been raised, including the lawfulness of the Executive Council decision, the late filing of the applications, and whether declarations would be appropriate.
5. Although not necessary to the decision, as this is the first contested matter to come before the Tribunal, the Tribunal makes a number of observations about the Tribunal process for the benefit of Huu-ay-aht citizens in future.

**B. THE APPLICATIONS**

6. In November 2013, Huu-ay-aht citizen, Charlene Kruse, filed five applications with the Tribunal, naming the Executive Council and the Executive Director James Edwards, as Respondents. Three of these applications were settled by the parties prior to the hearing.

Only Applications 2013-002 and 2013-005 (the “Applications”) were heard by the Tribunal.

*Application 2013-002*

7. Application 2013-002 appealed a decision of the Executive Council:

Purported amendment to HUU-ay-aht administrative organizational structure, made on or about June 5, 2013, eliminating the position of Director of Finance and requiring Finance Department staff to report directly to Executive Director.

8. The relief sought was:

A declaration that the purported amendment to the HUU-ay-aht administrative organization structure by the Executive Director and/or the Executive Council on or about June 5, 2013 eliminating the position of Director of Finance was unlawful (pursuant to s.24(a) of the *Tribunal Act*).

9. The Respondents, Executive Council, Executive Director James Edwards, responded to Application 2013-002 on the basis that:

- (a) The amendments to the administrative organizational structure, made by the Executive Council were lawful.
- (b) The application is moot, as the organizational structure of the HFN administration has been changed significantly since 2013.
- (c) Any declaration is not appropriate, since there is no interest in the applicant affected, and the declaration would be of no practical value.
- (d) The application was filed outside of the time limit prescribed in the *Tribunal Act*, by over three months.

*Application 2013-005*

10. Application 2013-005, appealed a decision of the Executive Council:

Purported appointment by the Executive Council of the Executive Director as the Economic Development Officer on August 27, 2013 (Resolution #2013-145).

11. The relief sought was:

A declaration that the purported appointment of the Executive Director as Economic Development Officer was unlawful (pursuant to s.24(a) of the *Tribunal Act*).

12. The Respondents, Executive Council and Executive Director James Edwards responded to Application 2013-005 on the basis that:
  - (a) A declaration sought was of no practical value, there is no issue between parties and no right or interest to the application is affected, and
  - (b) The application is moot as the purported appointment is no longer in effect.

**C. TRIBUNAL HEARING**

13. The applications were heard at Port Alberni, June 10 and June 11, 2014, following lengthy case management, which is discussed below.

**D. BACKGROUND/HISTORY**

14. As noted above, in November 2013, Huu-ay-aht citizen Charlene Kruse filed five applications with the Tribunal.
15. In January 2014, Huu-ay-aht Citizen and Executive Councillor Sheila Charles filed seven applications with the Tribunal.
16. All of the applications, of both Mr. Kruse and Ms. Charles, involved various allegations of failure by the Executive Council to follow Huu-ay-aht First Nation laws.

*Case Management Conference*

17. A case management conference was convened in respect of the applications of both Mr. Kruse and Ms. Charles on January 28, 2014, with the Tribunal Chair presiding.
18. A number of matters were discussed at the case management conference, including:
  - (a) clarification of the applications;
  - (b) the potential for engaging in a dispute resolution process, such as mediation;

- (c) the possibility of summary dismissal of the applications, suggested by the Respondents;
  - (d) whether the Applicants required legal counsel; and
  - (e) a date for hearing.
19. A number of directions were provided by the Tribunal at the Case Management Conference:
- (a) a schedule was set for the parties to clarify the applications and responses; and
  - (b) a schedule was set for submissions by the Applicants and Respondents respecting a provision of legal counsel to the Applicants.
20. With respect to the suggestion of the chair that a dispute resolution process might be entered into, both Applicants confirmed they wished to have their applications adjudicated by the Tribunal.
21. With respect to the suggestion by the Respondent's counsel that Summary Dismissal pursuant to the Tribunal Rules was appropriate, the Tribunal declined to consider that at the Case Management Conference, but proposed that written submissions be filed if the Respondents wished to pursue summary dismissal. No formal application was made to the Tribunal for summary dismissal of the applications.
22. Given the similarity of subject matter, the Chair determined that all of the applications of Ms. Kruse and Ms. Charles would be heard together. A date for hearing was set for three days commencing March 18, 2014.

*Request for Legal Counsel*

23. Subsequent to the case management conference, both applicants requested that legal counsel be appointed pursuant to the *Tribunal Act* section 15.
24. On February 21, 2014, the Tribunal recommended to Executive Council that legal counsel be provided to the Applicants.
25. The recommendation of the Chair is attached as **Schedule "A"** to this decision.

*Hearing*

26. The hearing of these matters was adjourned twice at the request of the counsel for the Applicants. As a result, the hearing commenced June 10, 2014.
27. On June 6, 2014, the Tribunal was advised, by a letter from counsel for Ms. Charles, that all of the Charles applications had been settled between the parties. No details of this settlement were provided to the Tribunal.
28. On the date of hearing, counsel for Ms. Kruse advised that three of the five applications, Applications 2013-003, 2013-004 and 2013-006 had been settled between the parties. No details of the settlement were provided to the Tribunal.
29. The hearing proceeded on Applications 2013-002 and 2013-005.

**E. POSITION OF THE PARTIES - GENERALLY**

*The Applicant*

30. Applicant Charlene Kruse testified that, as a HUU-ay-aht citizen, she believes that it is fundamentally important that all actions of the HFN Executive Council and Executive Director are in accordance with HFN law.
31. Both applications of Ms. Kruse alleged breaches of HUU-ay-aht law in respect of human resources matters.
32. Ms. Kruse sought declarations from the Tribunal respecting her complaints, regardless of whether subsequent decisions and actions of the Executive Council may have made the actions complained of moot (that is, no longer a live controversy between the parties).

*Respondents*

33. The Respondents say there was nothing unlawful respecting the actions of the Executive Council and Executive Director complained of in application 2013-002, and that the violation of HFN law complained of in application 2013-005 was corrected forthwith once the issue was raised by Ms. Kruse.

34. The Respondents say further that the Tribunal should dismiss both applications on the doctrine of mootness, that under the circumstances, declaratory relief is not appropriate, and that the applications were filed out of time.

**F. APPLICATION 2013-002**

*Facts*

35. At the December 8, 2012 People's Assembly, Duane Nookemis put forward a motion that was adopted by the People's Assembly, recommending that Executive Council take steps to change the organizational structure of the Huu-ay-aht administration.
36. James Edwards, then the Director of Finance and Government Services, was promoted on an interim basis to the role of Executive Director on April 15, 2013. The Director of Finance and Government Services position was not filled and Mr. Edwards continued to be responsible for the powers, duties and functions of that position in addition to taking on the role of Executive Director.
37. Executive Council hired Mr. Edwards as Executive Director on a permanent basis on May 15, 2013. It was the understanding of Executive Council and Mr. Edwards that he would continue to fulfill the duties of the Director of Finance and Government Services, pending the outcome of the organizational renewal process that was then underway, which was anticipated to result in the permanent removal of that Director position.
38. On June 4, 2013, the Executive Council discussed a draft *Report of Executive Council on People's Assembly Administrative Organizational Structure*, dated May 21, 2013. This draft report was to be finalized for presentation to the June 22, 2013 People's Assembly.
39. The draft report included a statement under "INFORMATION/UPDATE":
- Further, the position of Director of Finance and Government Services will be removed by the structure and replaced with a managerial position.
40. Following the June 4<sup>th</sup> Executive Council meeting, the draft report was revised and finalized. Among the changes made to the draft report was a revision to the reference to

the position of Director of Finance and Government Services, set out above, so that the final report read:

Further, with the departure of the previous Executive Director, a director level position will be removed on a permanent basis. The position of Director of Finance and Government Services has been eliminated from the organizational chart with duties absorbed by the new Executive Director.

41. The report also included a “draft HFN organizational chart”, which did not include the position of Director of Finance and Government Services.
42. The *HFN Human Resources Policy Regulation*, in effect in June 2013 included an organizational chart at section 5(6). This chart identified four directors, one of which was a Finance Director.
43. The People’s Assembly scheduled for June 22, 2013 was cancelled due to lack of a quorum, and rescheduled for November 2013.
44. The applicant brought her concerns that the elimination of the Director of Finance position was unlawful, to the Executive Council’s attention on October 31, 2013.
45. On November 15, 2013, Mr. Edwards was confirmed in the Executive Director position by Executive Council. Also in November 2013, Executive Council decided to advertise the position of Director of Finance and Government Services on an interim basis, contrary to the position which had been taken the previous May/June.
46. Councillor John Jack testified:

Following Mr. Edwards six-month performance review in November 2013, we decided to attempt to fill the position of Director of Finance and Government Services on an interim basis until the structural component of the organizational review project was completed.

47. The temporary contract position for Director of Finance and Government Services was posted November 19<sup>th</sup> and subsequently filled on December 10, 2013 by Kim Chretien who was already a Huu-ay-aht employee.

48. On January 30, 2014 Executive Council enacted a regulation to amend the Human Resources Regulation, officially putting in place a new departmental structure effective February 3, 2014 (the “2014 Amendment”). The 2014 Amendment reflects major changes in the administrative structure of HFN, including a revision to the organization chart, which no longer makes any reference to the position of Director of Finance.

Issues – Stated by Applicant

49. The Applicant says the issue in this application is:

did the Executive Director and Executive Council unlawfully purport to amend the HFN administrative organizational structure and then eliminate the position of Director of Finance in or around June 2013?

Issues – Stated by Respondents

50. The Respondents state the issues:

- (a) were the actions of the Executive Director or Executive Council unlawful?
- (b) whether the matter is moot and should not be considered by the Tribunal?
- (c) whether declaratory relief is appropriate?
- (d) whether the time limit for filing the application should be extended?

**G. ANALYSIS – APPLICATION 2013-002**

51. As noted above, various issues are raised by the Applicants and Respondents in respect of application 2013-002.
52. If the Tribunal determines that the application is moot, other issues identified by the parties will not have to be determined. Thus, these reasons will deal with the question of mootness first.

Mootness

53. In *Borowski v. Canada Attorney General*, [1989] 1 SCR 342, the Supreme Court of Canada established a framework for determining mootness.
54. The court described the doctrine of mootness:

[15] The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter. (Emphasis added)

55. The full process for dealing with claims of mootness was described by the court:

First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. In other words, is there a “live controversy”?

Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. In answering the second question, there are three factors to consider:

- (a) The court's competence to resolve legal disputes is rooted in the adversary system; a full adversarial context where both parties have a full stake in the outcome is fundamental to our legal system.
- (b) Judicial economy - in the circumstances of the case is it worthwhile for the court to allocate scarce resources to resolve the moot issue?
- (c) The effectiveness or efficacy of judicial intervention and the judiciary's role in our political framework.

56. In the present case, the Applicant Ms. Kruse, succeeded in her complaints, but sought declarations from the Tribunal regardless. That is, following Ms. Kruse's complaint that the Director of Finance position had been eliminated unlawfully, the Executive Council advertised and filled the position of Director of Finance. Subsequently, lawful amendments were made to the HFN Government organization, so that the questions which had been raised by Ms. Kruse became academic.

57. Thus, the answer to the first question is affirmative. There has not been a “live controversy” between the parties since a Director of Finance was appointed in December

2013. However, if there is doubt in this regard, it is fully resolved by the lawful organizational change in February 2014.

58. Now that there is no requirement to appoint a Director of Finance, the issue whether the Executive Council properly decided not to fill that position in June 2013 is academic.
59. Thus, it is necessary to consider the second branch of the process established by the Supreme Court of Canada. That is, is there any reason to depart from the usual practice that a court or tribunal will not decide issues which are moot?
60. Counsel for the Executive Council urged the Tribunal to have regard the fact that the issue of appointments under the Human Resources Policy Regulation will not re-occur, since specific positions have now been eliminated from that Regulation.
61. Counsel also urged the Tribunal to have regard to judicial economy.
62. The Tribunal agrees with these submissions, and in particular, recognizes that Tribunal proceedings involve the use of HFN resources. The Tribunal should be reluctant to consider issues which are moot for that reason.
63. More generally, the Tribunal finds that there is no compelling reason to go beyond the finding that the issue raised is moot.
64. In conclusion, the Tribunal finds that Application 2013-002 is moot, and is dismissed on that basis.

#### Lawful Amendment

65. Given the conclusion of the Tribunal on mootness, it is not necessary to decide whether the June 2013 amendment to the Human Resources Organization Chart, eliminating the position of the Director of Finance, was lawful.

#### Declaratory Relief

66. Given the Tribunal's conclusion on mootness, there is no question of issuing a declaration, and none will be issued.

Time Limit

67. Given the Tribunal's conclusion on mootness, it is not necessary to determine whether time should be extended for the filing of this application.

**H. APPLICATION 2013-005**

Facts

68. The *Economic Development Act* came into force in April 2013, however no spending authority for the Economic Development Officer position was granted in the Budget Act 2013 or otherwise. Consequently, the Economic Development Officer position was not filled.
69. In August 2013, the Executive Director brought the vacancy to the attention of Executive Council and put forward two options:
- (a) that he would be directed to undertake a recruitment process, identifying suitable candidates and the budget required to meet the responsibilities of the position; or
  - (b) that he be appointed to the role of Economic Development Officer.
70. On August 27, 2013, the Executive Council passed a resolution to appoint the Executive Director to the position of Economic Development Officer.
71. The Applicant became aware of this appointment when she conducted a review of the minutes of the August 27<sup>th</sup> Executive Council meeting, on October 25, 2013.
72. The Applicant brought her concerns that the appointment was unlawful, to Executive Council's attention on October 31, 2013.
73. Following the Applicant's expression of concern, the Respondents sought advice and moved to address Ms. Kruse's concerns.
74. Chief Councillor Cook advised the Applicant by way of an email dated November 13, 2014 that Executive Council recognized the error and would be rescinding or otherwise modifying the motion of August 27, 2013.

75. The Applicant filed her application with the Tribunal on November 26, 2013, after receiving the advice from the Chief Councillor that the Executive Council did not have authority to appoint the Economic Development Officer, but before the purported appointment was rescinded.
76. On December 10, 2013 Executive Council rescinded its motion appointing Mr. Edwards as the Economic Development Officer.
77. After the motion appointing Mr. Edwards as the Economic Development Officer was rescinded, the Executive Director purported to assign the powers, duties and functions of the Economic Development Officer to himself, pursuant to s. 12(3) of the *Economic Development Act*.
78. The position of Project Manager/Economic Development Officer was created during the structural reorganization process, completed in February 2014, and was funded in the Budget Act, 2014. A hiring process is underway to fill the position.

Issues – Stated by Applicant

79. The Applicant says that the issues in this application are:
  - (a) was it unlawful for the Executive Council to appoint the Executive Director as Economic Development Officer on August 27, 2013?
  - (b) if so, why?

Issues – Stated by Respondents

80. The Respondents state the issues:
  - (a) is the matter moot?
  - (b) is declaratory relief appropriate?

**I. ANALYSIS – APPLICATION 2013-005**

81. As with Application 2013-002, Ms. Kruse succeeded in her complaint but sought declarations from the Tribunal regardless. Upon receiving Ms. Kruse's complaint that the appointment of the Economic Development Officer was unlawful, the Executive

Council rescinded their motion. Subsequently, lawful amendments were made to revise the position, and the new position is in the process of being filled. Thus, the issue which was raised by Ms. Kruse is academic.

82. The analysis of mootness, cited above in respect of Application 2013-002 is equally applicable to Application 2013-005.
83. Any live dispute between the Applicant and Executive Council was resolved in December 2013, when the Executive Council rescinded the August 27, 2013 Resolution purporting to appoint an Economic Development Officer. Any doubt in this regard has been fully resolved by the organizational changes made in February 2014.
84. The Tribunal concludes that Application 2013-005 is moot, and is dismissed on that basis.
85. Consequently, it is not necessary to decide the issue of lawfulness of the appointment of the Economic Development Officer, the availability of declaratory relief, or issues respecting late filing.

**J. COSTS**

86. At the hearing, counsel for the Executive Council and Executive Director requested that costs be awarded in “an amount reflective of the complexity of the matters”.
87. The Tribunal declined to consider the matter of costs, at the hearing, but advised that counsel for the Executive Director and Executive Council could address the matter of costs once the Tribunal’s Reasons have been released should they wish to do so.

**K. OBSERVATIONS OF TRIBUNAL**

88. Although not necessary to this decision, as this is the first contested matter to come before this Tribunal, the following observations are included for the purpose of clarification of the Tribunal role in the HFN government, for the guidance of HFN citizens who may be considering bringing matters to the Tribunal.

89. It is intended that these observations will be of assistance to HFN citizens, should issues arise in respect of the lawfulness of government action.

90. Section 1 of the *Tribunal Act* provides:

The purpose of this Act is to establish an independent tribunal to

- (a) Ensure government decision-making is lawful and in the best interests of the Huu-ay-aht, and
- (b) Provide for the just, timely, cost-effective and final resolution of Huu-ay-aht disputes.

91. Section 1 creates a potential tension between the objective of the Tribunal to oversee government decision-making on the one hand, and to ensure timely and cost effective of resolution of disputes on the other. That is, the Tribunal recognizes that proceedings before the Tribunal create a significant cost for the Huu-ay-aht Government, so that only matters which are both serious and “live” should be considered by the Tribunal.

#### *Mootness*

92. The present case is illustrative of circumstances where the initial application to the Tribunal may have been appropriate but the pursuing of the application to a hearing was not. Regardless of the merit of the complaints which were the source of the applications, the matters at issue were resolved before the matter was brought to a Tribunal hearing. Generally, even though a complaint may have merit, it is not appropriate to continue the process before the Tribunal once matters have been resolved.

#### *Legal Counsel*

93. In the present case, the Tribunal recommended to Executive Council, pursuant to Section 15 of the *Tribunal Act*, that legal counsel be appointed for the applicants, Charlene Kruse and Sheila Charles. The Tribunal’s recommendation in this regard is attached to these Reasons as **Schedule “A”**.

94. It is noteworthy that, at the time of recommendation, there were twelve applications being put forward by the two applicants, which, taken together, were complex.

95. Additionally, as noted in the recommendation, these were the first citizen applications to come before the Tribunal.
96. As noted by the Tribunal at the time, the February 21<sup>st</sup> recommendation should not be considered as a precedent, and HFN citizens should not assume that the Tribunal will recommend legal counsel in future proceedings. Any future application will have to be considered on its own merit.

*Costs*

97. As noted above, the Executive Council and Executive Director may seek costs in Applications 2013-002 and 2013-005. If they do so, then the Tribunal will decide whether costs should be awarded, and what amount, and will provide Reasons for that decision.
98. In the event that no application for costs is pursued, the Tribunal wishes to ensure that HFN citizens are aware of the potential that citizens bringing claims to the tribunal that are unfounded or unnecessary could have costs awarded against them

*Time for Filing*

99. The *Tribunal Act* at paragraph 21(1) provides:

A notice of appeal respecting an administrative decision must be submitted to the tribunal within 60 days of the decision appealed, unless HUU-ay-aht legislation provides otherwise.
100. Given that the Tribunal has decided that these applications are moot, it has not been necessary to decide whether the 60-day time limit for filing applications, provided by the *Tribunal Act*, should be extended in this case.
101. However, citizens should be aware of the 60-day time limit when challenging a decision of the HFN Government. The failure to meet this time limit will usually result in a claim being dismissed.

**L. CONCLUSION**

102. Applications 2013-002 and 2013-005 are dismissed. If the Respondents seek to pursue costs against the Applicants, they may file written submissions in this regard within ten days of the date of these Reasons. Counsel for the Applicant will have seven days to respond, and the Respondents will have seven days to provide a reply, if any.

103. The Tribunal thanks counsel for their helpful submissions.

Dated: June 23, 2014

A handwritten signature in black ink, appearing to read "J. R. Rich". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John R. Rich, Tribunal Chair

I concur:  
Florence Wylie, Tribunal Member

I concur:  
Trudy Warner, Tribunal Member

## SCHEDULE "A"



### **Huu-ay-aht First Nations Tribunal**

Government Office: 170 Nookemus Rd, Anacla, BC

Mailing Address: 3483 - Third Ave., Port Alberni, BC V9Y4E4

Chair: John R. Rich

Registrar: Deborah Smith

*tribunal@huuayaht.org*

### **Recommendation to Executive Council February 21, 2014**

**Re: Application Numbers: 2014-001, 2014-002, 2014-003,  
2014-004, 2014-005, 2014-006 and 2014-007  
Requests for Legal Advice and Representation**

Applicants Charlene Kruse and Sheila Charles have each requested that independent legal counsel be provided pursuant to s.15 of the Tribunal Act.

This recommendation to Executive Council is made pursuant to s.15 of the Act, and applies to both Applicants.

This recommendation is based on the provisions of the Tribunal Act, and the respective Applications and Responses of the parties. The Tribunal has made no assessment of the merits of any of the Applications, nor made any assumptions respecting their probability of success. All consideration of the merits will await the hearings of the Applications, set for March 18, 2014, (Kruse), and March 19-20 (Charles).

#### TRIBUNAL ACT

Section 15 provides:

##### Independent advocate

- 15(1) If the chair reasonably believes that a matter before the tribunal is unusually complex or has significant implications for the Huu-ay-aht, the chair may recommend to Executive Council that an individual be provided with independent legal advice and representation for the matter.
- (2) Executive Council must take the steps necessary to pay the cost of independent legal advice for an individual under subsection (1).

Section 1 of the Act is also relevant:

#### Purpose

- 1 The purpose of this Act is to establish an independent tribunal to
  - (a) ensure government decision-making is lawful and in the best interests of the HUU-AY-AHT, and
  - (b) provide for the just, timely, cost-effective and final resolution of HUU-AY-AHT disputes.

### **SUBMISSIONS**

In separate letters to the Tribunal, each Applicant bases her request on principles of fairness.

The Respondents in all Applications oppose the requests on various grounds, in particular s.15 of the Act, set out above. The submissions of the Respondents are discussed below.

### **FAIRNESS**

Allegations of unlawful conduct on the part of government, or government officials are serious matters. They need to be resolved to the satisfaction of all HUU-AY-AHT First Nations (HFN) citizens. Justice must not only be done, it must be seen to be done. It is unlikely this will be achieved if the process before the Tribunal is not perceived by all to be fair.

In the view of the Tribunal, the requests based on fairness have merit. These citizens, having limited resources and no legal training, are raising issues respecting the proper administration of HFN Laws. Defending these claims, the HFN administration has significant resources, including legal advice and representation. It is clearly "an uneven playing field" as asserted by Ms. Kruse.

However, while fairness is an essential aspect in seeking justice and upholding the Rule of Law, it alone cannot be the basis of a recommendation pursuant to s.15 of the Act.

### **TRIBUNAL ACT PROVISIONS**

The Respondents submit that any recommendation to provide legal representation is governed by s.15 of the Act. I agree.

Pursuant to s.15(1), the matters raised by the Applications must be either unusually complex, or have significant implications for the HFN.

However, the statute must be read as a whole, and the Tribunal must also have regard to s.1, set out above. Ensuring that Government decision making is lawful is fundamental to the establishment of the Tribunal. Ensuring that proceedings are "just, timely and cost effective" must be kept in mind when considering s.15.

### **COMPLEXITY**

The Respondents say that these proceedings are not unusually complex within the meaning of s.15.

The Applications raise issues respecting the adherence of HFN Administration to HFN laws. Generally speaking, resolution of the claims will involve identification of the relevant laws and determining whether they have been breached. While acknowledging that there may be issues of interpretation and potentially conflicting evidence, I cannot conclude that these matters are "unusually complex" as contemplated by the statute.

Other issues, collateral to the substantive claims and defences may be more complex, however. For example, in the present submissions, the Respondents suggest that some applications do not relate to "decisions", within the meaning of the Act. The Respondent states that in Application 2014-04, standing is an issue. The Respondents also say that where actions have been taken and money spent, there cannot be significant implications for the HFN.

These points foreshadow arguments relating to statutory interpretation respecting the requirement for a "decision", and questions of standing and mootness, all of which are complex legal issues, for lawyers, and even more so for laypersons.

Another factor that adds to the complexity in these cases is the fact that these Applications are the first to be brought before the Tribunal by citizens, so that there is no precedent or guidance available to deal with some of these issues.

### **CONCLUSION ON COMPLEXITY**

Thus, it cannot be said that the matters before the Tribunal, including issues likely to arise at the hearings, are not complex. However, the requirement of s.15 is "unusually complex".

On balance, given the record to date, what may be anticipated going forward, and the fact that these are the first citizen Applications before the Tribunal, I consider that legal advice is warranted on the basis of unusual complexity.

## **IMPLICATIONS - GENERAL**

The Respondents also argue that the Applications do not have significant implications for the HFN.

Generally, I disagree.

At this stage of the proceedings it is not possible to determine "implications" with precision, since adjudication remains in the future. However, that must always be the case where the Tribunal is considering a recommendation under s.15. The determination here must be based on the Applications, Responses, and various submissions made to date.

HFN Laws have been in effect for less than three years. In that time there have been no citizen applications questioning the adherence to those laws by HFN Administration. Rulings of the Tribunal on the present Applications could establish precedents for future Tribunal applications.

Further, in the event the Applications, or any of them, are determined by the Tribunal to be well founded, the consequences for the HFN Administration are potentially serious.

## **IMPLICATIONS - RESPONDENTS' SUBMISSIONS**

### **Charles Applications**

The Respondent argues that none of the seven Applications by Ms. Charles have significant implications for the HFN.

With respect to three of the Applications, the Respondent bases this argument on the assertion that there has been no decision on which the Application may be brought. However, without deciding this issue, I note that there is case authority to suggest that review of government conduct may proceed regardless of an identified "decision": see e.g. *Huu-ay-aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 and *Krause v. Canada*, [1999] F.C.J. No. 179 (FCA). Thus, I do not agree that the lack of a "decision" is sufficient to conclude that the Application will have no significant implications.

In respect of another three Applications, the Respondent says that money has been spent and work done, so there can be no significant implications. This may be correct, if indeed the complaints have been rendered moot. However, as I have noted above, mootness is a complex legal issue, which will only be determined on hearing the Applications (see e.g. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, *Schlenker v. Torgrimson* 2013 BCCA 9, *Sandhu v. BC (Provincial Court)* 2013 BCCA 88, *Campbell v. British Columbia (Forest and Range)* 2012 BCCA 274).

Respecting the remaining Application, the Respondent says that the hiring of a receptionist has implications only for those involved in the hiring, who are "directly affected". However, that would not be the case if there were improprieties in the process which would affect the confidence of HFN members in the government administration.

I am not persuaded by the Respondents' submissions to alter my view that the Charles Applications have potentially significant implications for the HFN.

### Kruse Application

The Respondents argue that none of the matters raised in the Kruse Applications have significant implications for the HFN. They argue strongly that the claims and any potential remedies are insignificant.

As with the arguments in the Charles Applications, issues are raised relating to mootness and the lack of a decision being challenged.

I am not persuaded by these submissions to alter my view, expressed above.

## **CONCLUSION ON IMPLICATIONS**

I find that the potential for serious consequences, together with the importance that all government conduct be lawful, means that these Applications have significant implications for the HFN

### **S. 1 CONSIDERATIONS**

I also find that s.1 of the Act supports my assessment under s.15.

Section 1(a) establishes that the Tribunal is to ensure that government decision making is lawful. This is the issue raised in the Applications. If it is determined that the Applications, or any of them, are without merit, then HFN citizens may be confident in the management of HFN affairs. However, if that should not be the case, implications could be very significant. These important determinations will be best served by having legal counsel on both sides.

Section 1(b) directs that the Tribunal is to ensure that disputes are to be resolved in a manner that is "just, timely and cost-effective". Each of these objectives will be met if all parties have legal representation.

"Just" includes the concept of fairness, discussed above. Legal representation will ensure fairness.

Legal representation will likely result in a timely and cost-effective proceeding. Although there will be the cost of paying for a lawyer for the Applicants, there will be a saving in Tribunal time, and thus expense. If, as suggested by counsel at the Case Management Conference, the Applications have little merit, legal advice will deter the Applicants from wasting time on hopeless causes. On the other hand, if the Applications have merit, legal representation should ensure that evidence and argument are presented efficiently.

Section 1 also bears on the Respondent's argument, in respect of both Applicants, that the question of a s.15 recommendation should be considered separately for each "matter" raised. I disagree. Not only does this suggestion run counter to practicality, it is inconsistent with s.1(b).

### **PRECEDENT**

Given that these are the first citizen Applications before the Tribunal, the recommendation made here should not be taken as a precedent in future applications, which should be considered on their merits.

### **RECOMMENDATION**

The Tribunal recommends that Applicants Charlene Kruse and Sheila Charles be provided with legal advice and representation, pursuant to s.15 of the Tribunal Act.

### **ONE LAWYER**

There is no evident conflict between the claims of the two Applicants, rather their Applications appear to have similar thrust, challenging government procedure and decision making. There would be no disadvantage, and considerable efficiency gained by having one lawyer represent both Applicants. In my view this would be fully in compliance with s.15, having regard to s.1 of the Act.

### **TRIBUNAL ASSISTANCE**

The Tribunal is prepared to assist the parties in obtaining legal representation. In this regard, I suggest that a conference call be arranged with Tribunal counsel, the Applicants, and Respondent's counsel. I will request Tribunal counsel to contact each of the parties in this regard.



John Rich  
Tribunal Chair