



Huu-ay-aht First Nations Tribunal

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Chair: John R. Rich

Registrar: Deborah Smith

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May 29, 2015

HUU-AY-AHT FIRST NATION TRIBUNAL

**In the Matter of the Challenge by the Election Commissioner
to the Nomination of Johnson Ginger
Pursuant to Section 36(3) of the *Election Act***

Date of Hearing: May 27, 2015

Location: Port Alberni

Tribunal Member Hearing Application:

John Rich, Chair

Decision of Tribunal

A. THE ELECTION

1. Pursuant to the Huu-ay-aht First Nations (“HFN”) *Election Act*, an election for councillor to sit on the HFN Executive Council is scheduled to be held June 20, 2015.

B. THE NOMINATION

2. HFN citizen, Johnson Ginger, has been nominated to run for the position of councillor. The nomination of Mr. Ginger was submitted May 12, 2015 and was accepted by the Election Commissioner.

C. THE CHALLENGE

3. By letter dated May 15, 2015, HFN Executive Director, James Edwards, advised the Election Commissioner that Mr. Ginger is disqualified from holding public office pursuant to Section 23 of the *Code of Conduct and Conflict of Interest Act*, and Section 5 of the *Election Act*.
4. On May 16, 2015, the Election Commissioner made an application to the Tribunal, under Section 36(3) of the *Election Act*, challenging the nomination of Mr. Ginger. Section 36(3) of the *Election Act* provides:

Despite any earlier acknowledgement by the commissioner under section 33 (2) (a), the commissioner must immediately challenge a nomination if it appears to the commissioner that an individual is disqualified from nomination. (Emphasis added)

5. In accordance with Section 36, the Election Commissioner advised Mr. Ginger of the challenge to his nomination and the application to the Tribunal. Mr. Ginger responded the same date by advising the Tribunal that he wished the challenge to go to the Tribunal for a review and consideration.
6. Pursuant to Section 36(8) of the *Election Act*, the Tribunal determined that the application would be determined by oral submission at a hearing to be held May 27, 2015. The parties were duly notified and requested to provide to the Tribunal any documents on which they intended to rely by May 25, 2015.

D. THE HEARING

7. The Hearing of the matter was held May 27, 2015 at the offices of the HFN. The Tribunal was constituted as a panel of one, being the Tribunal Chair.

E. SUBMISSIONS OF THE PARTIES

Submissions of the Election Commissioner

8. The Election Commissioner submitted that he was obliged by Section 36(3) of the *Election Act* to challenge the nomination of Mr. Ginger on the basis that he had been advised that Mr. Ginger was disqualified from holding a position of a public officer and thus was not eligible for nomination under Section 5 of the *Election Act*
9. In support of his position, the Election Commissioner relied on an affidavit sworn by Executive Director, James Edwards, in which Mr. Edwards deposed that:
- (a) [in the fall of 2014] an investigation was conducted into allegations made against Mr. Ginger;
 - (b) He had reviewed the findings of this investigation and concluded that Mr. Ginger's conduct contravened (among other things) Section 12(3) of the *Code of Conduct and Conflict of Interest Act*;
 - (c) On December 2014 he notified Mr. Ginger that "he was disqualified under Section 23(1)(a) of the Code from holding his position as a public officer and dismissed from his position as Director of Government Services". (Emphasis added).¹

Submissions of Councillor Ginger

10. In response to the challenge, Mr. Ginger sought to dispute the basis for his dismissal and disqualification. However, he confirmed that he had not appealed Mr. Edwards' decision in December 2014 to disqualify him under Section 23 of the *Code*. Consequently, his disqualification was not open to question at this hearing. Mr. Ginger also sought answers to questions he had addressed to the Tribunal on May 25, 2015, when he had submitted

¹ I have emphasized the underlined portion of the quote from the affidavit above, since it appeared in the course of Mr. Ginger's submissions that, at the time of his dismissal, he was unaware of the consequences of "disqualification" in respect of his candidacy.

his documents. Mr. Ginger also asked whether he was disqualified forever. I advised that I would address these questions in the course of my written decision. The questions posed by Mr. Ginger were:

- (i) Why is the Executive Director allowed to interfere with the election process
- (ii) A challenger must be a[n] eligible voter which James Edwards is not
- (iii) Why is the Executive Director trying to have me disqualified as a nominee for the 2015 election when I am not an employee, I am a Huu-ay-aht Citizen.
- (iv) The Executive Director has made accusations that are unfounded.

F. RELEVANT STATUTORY PROVISIONS

Election Act

11. Section 5 provides for disqualification of a nominee:

- (2) An eligible voter is disqualified from being nominated as a candidate if that individual is any of the following:
...
 - (f) disqualified or prohibited from holding elected office under this Act, another Huu-ay-aht Act or otherwise disqualified by law;

12. Section 36 deals with challenges to nomination by the Election Commissioner:

- (3) Despite any earlier acknowledgement by the commissioner under section 33(2) (a), the commissioner must immediately challenge a nomination if it appears to the commissioner that an individual is disqualified from nomination.

13. Section 36 also directs the Tribunal:

- (9) Within 10 days of receiving the application, the tribunal must determine the matter and issue an order with written reasons, either:
 - (a) confirming the nominee is qualified to be nominated, or
 - (b) declaring the nominee is disqualified from nomination.

- (10) The onus is on the applicant to establish that a nominee is not qualified to be nominated.
- (11) If the tribunal finds that the evidence supports 2 or more different findings and that evidence is evenly weighted, the tribunal must resolve the matter in a manner that favours the nominee.
- (12) Until the tribunal determines otherwise, a nominee is qualified for nomination or a candidate in the election, as applicable.

Code of Conduct and Conflict of Interest Act

14. Section 3 defines public officer :

- (1) A public officer includes
 - (a) a government member,
 - (b) a director of a Huu-ay-aht body,
 - (c) a Huu-ay-aht employee or contractor, and
 - (d) volunteer who holds a prescribed position with a Huu-ay-aht body.

15. Section 12 deals with the Abuse of Power, and provides:

(1) In this section:

“ask” includes accept, demand or request, whether directly or indirectly;

“deny or delay” includes causing or attempting to cause a denial, interruption or delay;

“expedite” includes expediting or attempting to expedite;

“intimidate” means to do or threaten to do any of the following:

- (a) use force, violence or restraint against a person;
- (b) inflict injury, harm, damage or loss on a person or property;
- (c) take reprisal including cause the delay or denial of a benefit, service or program;
- (d) otherwise threaten a person;

“make or influence” includes participate in making, influencing or attempting to influence;

“money or favours” includes any private interest, advantage or benefit for a public officer or any other person.

(2) Public officers must not ask for money or favours from another person in exchange for using their position to

- (a) make or influence a decision of a Huu-ay-aht body, or
- (b) expedite, deny or delay any service or program provided by a Huu-ay-aht body.

- (3) Public officers must not intimidate, harass, assault, or sexually harass or assault anyone.
 - (4) Public officers who contravene this section are disqualified from holding their position.
16. Section 23 deals with contraventions of the *Act*:
- (1) Subject to this Act, public officers who contravene this Act may be subject to one or more of the following:
 - (a) disqualification from holding their position,
 - (b) dismissal or removal from their position, or
 - (c) termination of their contract.
 - (2) An individual disqualified under subsection (1) is disqualified from holding any position as a public officer.
 - (3) After a prescribed period of time, an individual disqualified under subsection (1) may apply to the tribunal to be eligible to become a public officer.²
17. Section 29 deals with disciplining a director:
- (1) In this section, “director” includes a former director under section 21 (3).
...
 - (4) A director who is found in contravention of this Act is subject to discipline including the penalties set out in section 23.
 - (5) Despite section 23 of the Tribunal Act, on an appeal to the tribunal from an administrative decision by the Huv-ay-aht body under subsection (3) or (4), the tribunal may either:
 - (a) affirm the administrative decision, or
 - (b) send the matter back to the administrative decision maker for reconsideration in accordance with any recommendations of the tribunal.

G. ANALYSIS

18. The undisputed evidence is that Mr. Ginger was disqualified from holding public office pursuant to Section 23 of the *Code of Conduct and Conflict of Interest Act* by the decision of Executive Director, James Edwards, in December 2014.
19. Mr. Ginger conceded at the Hearing that he had not appealed the decision of the Executive Director. Absent a successful appeal of the decision of the Executive Director, the Tribunal must accept that the disqualification remains in effect.

² At this time no period has been prescribed in relation to Section 23(3).

20. The consequence of the disqualification from holding public office pursuant to Section 23 of the *Code of Conduct and Conflict of Interest Act* is that Section 5(2)(f) of the *Election Act* applies and thus Mr. Ginger is not entitled to be nominated.

H. MR. GINGER'S QUESTIONS

Question One - Why is the Executive Director allowed to interfere with the election process?

21. It is not clear that the Executive Director has “interfered with the election process”. The Executive Director was entitled by virtue of his position to order the investigation in the fall of 2014, and to make an administrative decision which he believed to be appropriate respecting disqualification to hold public office. That decision was subject to appeal, but no appeal was taken. More recently, the Executive Director advised the Election Commissioner of the disqualification.

Question Two - A challenger must be an eligible voter which James Edwards is not?

22. Mr. Edwards is not a challenger in this matter. The challenge was made by the Election Commissioner pursuant to Section 36(3) of the *Election Act*. As stated by the Election Commissioner at the Hearing, he is obligated under Section 36(3) of the *Election Act* to make such an application if it appears that an individual is disqualified.

Question Three –Why is the Executive Director trying to have me disqualified as a nominee for the 2015 election when I am not an employee, I am a Huu-ay-aht Citizen?

23. The disqualification arises due to the decision of the Executive Director in December 2014, which, as already noted, has not been appealed. The consequence of that decision, as mandated by the *Code of Conduct and Conflict of Interest Act* and the *Election Act*, is disqualification from any public office position.

Question Four – The Executive Director has made accusations that are unfounded?

24. The accusations to which Mr. Ginger referred at the Hearing appeared to relate to the issue or issues that led to the investigation and the decision of the Executive Director to disqualify him. There is no evidence before the Tribunal of recent accusations, founded or not.

Further Question – Am I Disqualified Forever?

25. Section 23(3) of the *Code of Conduct and Conflict of Interest Act*, set out above, provides that, after a prescribed period of time an individual disqualified may apply to the Tribunal to be eligible to become a public officer. At this time no time has been prescribed, so an application could be made to the Tribunal at any time.

I. CONCLUSION

26. The challenge to the nomination of Johnson Ginger is allowed. The Tribunal declares that Mr. Ginger is disqualified to be nominated and his nomination is set aside.

Dated: May 29, 2015

A handwritten signature in black ink, appearing to read "J R Rich". The signature is written in a cursive, flowing style.

John R. Rich, Tribunal Chair