

MEMORANDUM

To: Huu-ay-aht First Nations Citizens
From: R. Brent Lehmann
Date: November 1, 2012
File: 12-0788-000

Economic Development Structuring

In connection with the upcoming meeting of the Peoples' Assembly on November 17, 2012, this memorandum gives an overview of the economic development structuring being implemented by Huu-ay-aht First Nations ("Huu-ay-aht") as approved by Executive Council on June 20, 2012, what steps have been implemented to date and what steps remain. As the implementation of one of the approved recommendations discussed below will consolidate all Huu-ay-aht law concerning economic development into a new Economic Development Act with consequential amendments to the Huu-ay-aht *Financial Administration Act*, in accordance with section 96 of the *Financial Administration Act* Executive Council is seeking approval of the People's Assembly to those amendments as outlined in this memorandum.

BACKGROUND

The trend around the world has been for governments to get out of the business of doing business. The last twenty years has seen this trend continue and grow, from the privatization of airlines, railways and other transportation ventures, to include what have been historically considered common government services, such as the delivery of mail and other communication services. Bucking this worldwide trend are aboriginal governments.

More and more, aboriginal governments are investing, and are directly involved, in business ventures. This increasing involvement in business ventures by aboriginal governments has many reasons, such as a desire to provide employment opportunities for members, alternate sources of cash flow as government equalization transfers decline or a desire to share in the wealth of the natural resources taken daily from their traditional territories. This trend is reflected in the various businesses carried on by the Huu-ay-aht, both before and after the effective date of the Maa-nulth First Nations Final Agreement (the "Treaty").

Whatever the reason, when Huu-ay-aht and other First Nations participate in the world of mainstream economic development, they should do so keeping in mind three primary considerations:

1. reducing liability exposure;
2. maximizing profits (by minimizing taxes and avoiding own source revenue claw backs by Canada); and
3. separating politics from business decisions.

For over 50 years Ratcliff & Company LLP has been assisting First Nations across British Columbia in structuring their economic development opportunities both on and off their reserve lands or treaty lands. Based on what we have learned from that experience and from our review of the Harvard Project¹ reports, we have developed a model for structuring economic development for First Nations that we believe is un-paralleled.

Our economic development structuring addresses the above three primary considerations through the following two components:

1. a corporate structure (the establishment of legal entities owned by the First Nation to carry out its economic development); and
2. a governance structure (the processes, roles and responsibilities of the key stakeholders in the First Nation's economic development).

We were pleased to assist HUU-ay-aht with implementing the first component of our recommended economic development structuring for HUU-ay-aht business enterprises effective April 1, 2011. We were not, however, involved in establishing the second component, the governance structure, implemented under HUU-ay-aht's *Financial Administration Act* and *Economic Development Policy Regulation* on the effective date of the Treaty. In February of this year we were asked to assess HUU-ay-aht's economic development governance structure and in this regard we:

1. reviewed HUU-ay-aht's governance structure for economic development;
2. identified certain issues that had arisen concerning that governance structure; and
3. made eight recommendations on necessary and desirable changes to that governance structure.

Our eight recommendations were approved by Executive Council on June 20, 2012, and again on September 28, 2012. On the latter date, Executive Council resolved to have the changes implemented by October 31, 2012. Prior to reviewing our eight recommendations and the status

¹ Founded by Professors Stephen Cornell and Joseph P. Kalt at Harvard University in 1987, the Harvard Project on American Indian Economic Development (Harvard Project) is housed within the Malcolm Wiener Center for Social Policy at the John F. Kennedy School of Government, Harvard University. Through applied research and service, the Harvard Project aims to understand and foster the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations. For over two decades, the Harvard Project has undertaken hundreds of research studies and advisory projects. Results of Harvard Project research are published widely. Summary treatments are provided in "Reloading the Dice: Improving the Chances of Economic Development on American Indian Reservations" (Cornell and Kalt) and "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (Cornell and Kalt). [Extract from <http://hpaied.org/about-hpaied/overview>.]

of their implementation, this memorandum discusses in detail the rationale behind the corporate structure and governance structure we recommend to our First Nation clients for structuring their economic development.

CORPORATE STRUCTURE

When implemented, our recommended corporate structure establishes legal entities owned by the First Nation to carry out its economic development and addresses the first and second primary considerations stated above when a First Nation participates in the world of mainstream economic development: reducing liability exposure and maximizing profits (by minimizing taxes and avoiding own source revenue claw backs by Canada). What follows is the rationale for the corporate structure and how it addresses the first and second primary considerations stated above.

Reducing Liability Exposure

The most common way to reduce liability exposure is to use a separate incorporated legal entity to pursue the economic development business opportunity, such as a corporation. The advantage of this is that, as shareholder of a corporation, the liability for the business operations remains with that separate legal entity and should not flow back to the owner. The disadvantage is that a corporation, in and of itself, is taxable. This conflicts with the first part of the second primary consideration referred to above (maximizing profits by minimizing taxes).

Avoiding Tax

Huu-ay-aht, under the terms of its Tax Treatment Agreement, is tax exempt as a “public body performing the function of government” under section 149(1)(c) of the *Income Tax Act* (Canada) (the “Income Tax Act”). For business opportunities on Huu-ay-aht treaty lands, this tax exempt status is extended to a corporation owned by Huu-ay-aht by section 149(1)(d.5) of the Income Tax Act, provided that 90% of the income is earned on Huu-ay-aht treaty lands and Huu-ay-aht maintains 90% ownership of the corporation. This exemption is further extended to a subsidiary of such a corporation by section 149(1)(d.6) of the Income Tax Act, provided that 90% of the income is earned on Huu-ay-aht treaty lands and the parent corporation maintains 90% ownership of that subsidiary. However, having more than one owner (if the second owner owns more than 10%) or having income of more than 10% earned off of Huu-ay-aht treaty lands, makes that corporation and all of its income fully taxable.

Utilizing only a corporation for business activities on Huu-ay-aht treaty lands provides limited liability protection to Huu-ay-aht (as owner) and should minimize any taxes that must be paid. However, utilizing corporations to pursue economic development off of Huu-ay-aht treaty lands or that involves other owners (like a business partner), does not provide any tax advantage because the corporation would not qualify to be tax exempt under section 149(1)(d.5) or (d.6) of the Income Tax Act because either the income is earned off of Huu-ay-aht treaty lands or because of the 90% ownership requirement. In those circumstances, in order to provide limited liability protection and maintain Huu-ay-aht’s tax advantage, it requires a different structure to be utilized.

Limited Partnerships, Liability and Tax

The structure that we have found the most successful for reducing liability exposure and maximizing profits (by minimizing taxes) is a limited partnership registered under the *Partnership Act* (British Columbia) (the “Partnership Act”). A partnership is a relationship (usually contractual) between partners doing business together. This relationship is governed by the Partnership Act and the contract (partnership agreement) that establishes the partnership. A limited partnership under the Partnership Act is required to be registered and have a general partner and at least one limited partner.

The general partner in a limited partnership is typically a corporation that holds the assets of the business and is subject to all the liabilities of the business. The limited partner, on the other hand, is only liable for the amount that it invests in the partnership. If the business fails or other liabilities arise, these liabilities cannot be traced back to the limited partner and they remain with the general partner. This limited liability protection for the limited partner continues as long as the limited partner does not engage in the management of the business (this is discussed further below). By using limited partnerships to pursue Huu-ay-aht economic development, we can address the first primary consideration referred to above (reducing liability exposure).

In addition to the liability protection a limited partnership provides to a limited partner, because of the way the Income Tax Act treats partnership income for tax purposes, it is possible to preserve a limited partner’s tax advantage if it has one. A partnership agreement can be structured in such a way that virtually all of the profit from the business is allocated to the limited partner if the limited partner provided the investment capital. Profits are allocated to each partner’s capital accounts for tax purposes in accordance with the terms of the partnership agreement. If a limited partner has an advantageous tax position (such as Huu-ay-aht under section 149(1)(c) of the Income Tax Act), then the profit can be earned on a tax free or tax reduced basis regardless of where the income was earned. By using limited partnerships to pursue Huu-ay-aht economic development, we can address the first part of the second primary consideration referred to above (maximizing profits by minimizing taxes).

Limited Partnerships and Own Source Revenue

Under the terms of Huu-ay-aht’s Own Source Revenue Agreement, its funding contributions from Canada are subject to reduction in an amount equal to a percentage of Huu-ay-aht’s own source revenue (“OSR”). This OSR reduction is phased in over a 20-year period after the Treaty effective date, with an exemption of 100% for the first five years, followed by a 3.3% increase each year thereafter up to a maximum of 50%. This OSR rate is applied to defined revenues to determine the annual reduction. Dividends from corporations and distributions from a partnership are two of these defined sources of revenue. However, dividends and distributions are not subject to OSR reduction until *actually paid* to Huu-ay-aht; in short, if they are never paid to Huu-ay-aht, it will never be subject to that OSR reduction. To avoid the OSR reduction, then, Huu-ay-aht must not receive distributions or dividends from the profit made by its business operations.

A limited partnership agreement can be structured in such a way that profit, although allocated to the limited partner for tax purposes, can be retained by the partnership to be utilized to expand

the current business or pursue new business opportunities. Any decision concerning distributions from the capital accounts to the partners is left to the general partner, which must consider the future needs of the partnership, both as to future operations and the future growth of the business. Having a limited partnership agreement that allows profit to be retained in the limited partner's capital account allows those profits to not actually be paid to the limited partner. Huu-ay-aht's corporate structure provides Huu-ay-aht with options to avoid OSR reductions because a limited partnership can retain profit from its business operations, rather than paying it to Huu-ay-aht as a distribution. This avoids Huu-ay-aht receiving OSR, which would reduce Canada's funding contributions. By using limited partnerships to pursue Huu-ay-aht economic development, we have addressed the second part of the second primary consideration referred to above (maximizing profits by avoiding OSR reductions by Canada).

Huu-ay-aht Corporate Structure

The attached chart entitled "HFN Corporate Structure" depicts Huu-ay-aht's corporate structure which includes one "holdings" limited partnership (HFN Development Limited Partnership ("HFNDLP")) with Huu-ay-aht as the limited partner and HFN Development Corp. ("HDC") as the general partner) and Huu-ay-aht's previous four limited partnerships continue as "operating" limited partnerships (HFN Forestry Limited Partnership ("Forestry LP") with 0568157 B.C. Ltd. as the general partner; HFN Gravel Limited Partnership ("Gravel LP") with 0845887 B.C. Ltd. as the general partner; HFN Fisheries Limited Partnership ("Fisheries LP") with 082721 B.C. Ltd. as the general partner; HFN Lands Limited Partnership ("Lands LP") with Huu-ay-aht Nisma Land Corp. as the general partner); and the recently created HFN Management Limited Partnership ("Management LP") with 0951938 B.C. Ltd. as the general partner). HFNDLP acts as the limited partner in each operating limited partnership. Huu-ay-aht (as represented by Executive Council), as shareholder of HDC (the general partner of HFNDLP), appoints the board of directors for HDC. HDC, on behalf of HFNDLP, is the shareholder of each of the general partners of the operating limited partnerships and HDC appoints the board of directors for each of their general partners (the "operating boards"). This structure also permits new operating limited partnerships to be added as new business opportunities are pursued.

There are six reasons for using this corporate structure:

1. The utilization of limited partnerships provides Huu-ay-aht with limited liability protection from its active business operations. There are two barriers of liability protection: one between the operating limited partnerships and HFNDLP and a second between HFNDLP and Huu-ay-aht.
2. The continuing of current business operations and implementation of new business opportunities as separate "operating" limited partnerships to pursue each business opportunity ensures that, if one business opportunity fails, it will not have a negative impact on all the other successful businesses. Since each general partner for each operating limited partnership is a separate legal entity, the liabilities and risks in pursuing each separate business opportunity are compartmentalized, isolating them from the others. This is discussed in greater detail under "Compartmentalization" below.

3. The utilization of limited partnerships allows profits earned by the operating limited partnerships to be allocated for tax purposes through HFNDLP (as the holdings limited partnership) back to HUU-AY-AHT which is tax exempt under section 149(1)(c) of the Income Tax Act, regardless of where that income is earned – this allows 99.98% of profits from active business operations to be earned tax free.
4. The utilization of limited partnerships allows profits earned by the operating limited partnerships, although allocated for tax purposes through HFNDLP back to HUU-AY-AHT where those profits are not taxed, to be retained by the operating limited partnership to expand its current business operations.
5. Having HFNDLP as a “holdings” limited partnership allows it to retain distributions it receives from the operating limited partnerships that are not required by HUU-AY-AHT government. This makes that profit available for future economic development opportunities, without having that profit distributed to HUU-AY-AHT as OSR. Also, this corporate structure allows profits from one operating limited partnership to be moved through HFNDLP to another operating limited partnership, without triggering any OSR reduction. Without the “holdings” limited partnership, there would be OSR implications if HUU-AY-AHT required profits from one of its business enterprises to invest in a new business opportunity.
6. Having HFNDLP provides for the further separation of business decisions from political influence. This is discussed in greater detail below.

Loss of Liability Protection

One of the risks First Nations must be aware of when using corporations and limited partnership structures to pursue economic development is what is known as “piercing of the corporate veil”. The limited liability protection offered by corporations and limited partnerships may be lost in the following three circumstances.

The first circumstance arises when people dealing with the business are not aware they are dealing with a limited liability entity. If the full and proper legal name and disclosure of limited liability status has not been clearly and consistently used and a person suffers loss, the courts will look to the shareholders or limited partner to cover that loss. This is discussed in greater detail under “Business Names” below.

Secondly, limited liability protection can be lost when it becomes unclear who is carrying out what business. This can happen when a First Nation has multiple companies, some with similar businesses, and it is not always kept perfectly clear which company is operating which business. If the separation is not perfectly clear at all times and there is confusion regarding who an individual is actually doing business with, the limited liability protection may be lost by a court saying all the companies are liable. This is discussed in greater detail under “Business Mandates” below.

The third circumstance under which limited liability protection may be lost is if a limited partner engages in the day-to-day operations of the business. Under section 64 of the Partnership Act, a

limited partner is not liable for the debts of the partnership "...unless he or she takes part in the management of the business." In order to maintain the limited liability protection companies and limited partnerships provide, it is important that Huu-ay-aht's government (both the political leadership and senior administration) not be seen to be engaged in the management of the business of HFNDLP and that the HDC board and senior management not be seen to be engaged in the management of Forestry LP, Gravel LP, Fisheries LP, Lands LP, Management LP or any other operating limited partnership created in the future. This is discussed in greater detail under "Business Management" below.

Consequences of Loss of Liability Protection

Whenever a business fails or suffers liability for harm it caused, or is found liable for, a creditor (such as a bank, other secured party or a judgment creditor) will seek a court order to seize the assets of the failed or liable business to be sold to cover the loss. The consequences of this are that all of the assets owned by the failed or liable legal entity are subject to seizure and sale and are lost to the business. As mentioned above, a court may also decide to "pierce the corporate veil" and "cast the net of liability" more broadly than just the legal entity that actually failed or caused the harm, finding the owners of that legal entity and related companies to also be liable. If it does, the assets of the owner and related companies will also be seized and sold to cover the loss.

The corporate structure for Huu-ay-aht economic development is designed to ensure that, in the event of a business failure or loss, only the assets of the failed or liable Huu-ay-aht business enterprise are subject to seizure and sale and not the assets of any other Huu-ay-aht business enterprise or of Huu-ay-aht itself. In order for the corporate structure to ensure that limited liability protection, a sound governance structure must be implemented and followed so the circumstances outlined above in which limited liability protection may be lost do not arise.

GOVERNANCE STRUCTURE

Before reviewing Huu-ay-aht's current economic development governance structure and our eight recommendations regarding the changes that we feel are necessary or desirable, we will review the rationale behind the governance structure model we recommend to our First Nation clients for structuring their economic development. When implemented, our recommended governance structure establishes the processes, roles and responsibilities of the key stakeholders in a First Nation's economic development and addresses the first and third primary considerations stated above when a First Nation participates in the world of mainstream economic development: reducing liability exposure and separating politics from business decisions. What follows is the rationale for our governance structure and how it addresses the first and third primary considerations stated above.

Common Problems

A number of common problems have been seen with First Nations economic development. These problems can be loosely grouped into two categories. The first category is the failure to "compartmentalize" separate business activities into separate legal entities and to clearly and methodically carry on those business activities separately from the others. The second category

is the failure to separate politics, political considerations and government administration from the business decision-making process, particularly from the making of day-to-day operational business decisions. These problems, if not corrected, not only make it more likely that the circumstances outlined above in which limited liability protection may be lost will actually arise, but it also increases the likelihood that the businesses of the First Nation will not succeed and more likely the businesses will fail.

Compartmentalization

Failure to compartmentalize business activities may take a number of different forms. An example may be where one legal entity carries out and owns the assets used in multiple and unrelated business activities (such as when a campground, a hotel, a construction business and a forestry business are all carried out in one company). At times, multiple legal entities may carry out exactly the same or very similar business activities and there is no clear separation between which legal entity is actually carrying out the activity at any given point in time. Other examples include where one business entity owns assets that are required by another business entity for its business activities, resulting in inter-company loans or accounts payable and receivable recorded in their respective financial statements as payment for the use of the assets. Another example is when there is no discernable separation between the First Nation and its business entities.

The circumstances above create situations where there is no “compartmentalization” of discreet business activities and the assets necessary to carry out those activities in separate legal entities. In those circumstances, unless diligent care is given, public perception can easily be blurred regarding which entity is carrying out which business activity. Any blurring of the corporate separation (the “corporate veil”) is more likely to result in the “piercing of the corporate veil” with its associated loss of limited liability protection.

Compartmentalization is not only necessary as between the various businesses owned by the First Nation, but as between the First Nation and the legal entities that carry out its economic development. To ensure the First Nation’s and each businesses’ limited liability protection remains intact, they must each be clearly seen as separate from the others. This requires separating the First Nation’s government and administration from business administration and by having separate management and separate employees, as well as separate bank accounts, separate accounting and financial records, separate signage, invoices, letterhead, business cards and promotional material (including their internet presence), etc.. This separation is important for maintaining the compartmentalization and limited liability protection for the First Nation and each of its businesses.

Advantages of Compartmentalization

The compartmentalization of different business activities, and the assets necessary to carry out those activities, into separate legal entities offers a number of advantages. Primarily, compartmentalization is more likely to ensure limited liability protection in the event one business activity fails or causes harm. If there has been no blurring of the corporate veil, a court is not likely to pierce that corporate veil and will limit the liability from the business failure or harm to the legal entity that failed or caused the harm. A failing business activity will therefore not affect the other successful business activities if it is carried out by a separate legal entity.

Compartmentalization also leads to more accurate and transparent financial reporting for each First Nation business activity. Having assets owned by one legal entity that are necessary for another legal entity to carry out its business activity may lead to a growing number of inter-company accounts payable and receivable or inter-company loans on the financial statements of the various First Nation businesses. This can, over time, become confusing and misleading to a reader and distort the true value of the First Nation business and the true cost of carrying out a particular business activity. Inter-company loans, accounts receivable and accounts payable are less likely to be required if each discreet business activity is carried out by one legal entity and it holds the assets necessary to carry out that business activity. Clarity concerning financial reporting (an integral part of transparency and accountability) is essential to establishing trust and confidence between a First Nation and its economic development arm.

Compartmentalization is more likely to provide greater organizational efficiencies by eliminating potentially costly duplication because the business activity is not spread out over multiple legal entities, each with their own administrative and servicing costs. This also provides greater transparency and accountability because the reporting on a particular business activity will more accurately reflect the cost of carrying out that business activity (rather than being spread out and “hidden” over multiple First Nation businesses).

Consequences of Failing to Compartmentalize

The consequences of not having each discreet business activity and its assets compartmentalized into separate legal entities may include the following:

1. Increased risk of the loss of business assets owned by a business carrying out multiple business activities because of the failure of one activity unrelated to the asset (the hotel is lost because the forestry business failed).
2. Potential loss of operational efficiencies with multiple businesses carrying out the same business activity.
3. Organizational confusion concerning which business is carrying out which activity, making it more difficult to communicate with members concerning economic development and potentially increasing a perception of a lack of transparency and accountability in economic development.
4. The above confusion may also result in an increased risk of a court “piercing the corporate veil” when it is unclear which business is carrying out the business activity that caused a loss or damage, so all are held liable for the loss or damage, including the First Nation.

Business Mandates

One tool we utilize in our governance structure to accomplish compartmentalization is that of the “business mandate”. As discussed above, the limited liability protection offered by our corporate structure may be lost when it becomes unclear which business entity is carrying out which business activity. This can happen when an owner has multiple companies, some with similar or

common businesses, and it is not always kept perfectly clear which company is operating which business. If the separation is not perfectly clear at all times and there is confusion regarding which legal entity is actually carrying out which business activity, the limited liability protection may be lost by a court saying all the companies are liable.

To ensure compartmentalization, our recommended governance structure for First Nations economic development establishes a business mandate for each operating limited partnership to carry out discreet, or closely related, business activities as a single business separate from any of the other operating limited partnerships' businesses. These business mandates must be broad enough to include all the business activities that are necessary or desirable for each operating limited partnership to function effectively and efficiently, but should also be narrow enough to ensure the transparency and accountability of its business operations. If a First Nation wishes to pursue economic development opportunities that do not fall logically into the business mandate of an existing operating limited partnership, then a new operating limited partnership should be created and assigned the business mandate to carry out that new economic development opportunity.

Determining business mandates for each Huu-ay-aht business enterprise and requiring them to only operate within their business mandates will compartmentalize discreet business activities into each Huu-ay-aht business enterprise. This will decrease the risk of a court "piercing the corporate veil" with its associated loss of limited liability protection, so that if one Huu-ay-aht business enterprise fails, it will not affect the other successful Huu-ay-aht business enterprises. Business mandates and adhering to those business mandates will also provide greater organizational efficiencies, transparency and accountability for all Huu-ay-aht business enterprises.

Business Names

Another tool we utilize in our governance structure to accomplish compartmentalization is that of the "business naming" protocol. As noted above, the limited liability protection offered by corporations and limited partnerships may be lost when people dealing with the business are not aware they are dealing with a limited liability entity.

The *Business Corporations Act* (British Columbia) (the "Business Corporations Act") requires corporations in British Columbia to have names that contain three elements: 1) a distinctive element (something that sets the name apart from all other names, such as "Huu-ay-aht"), 2) a descriptive element (something that describes the nature of the business activities, such as "Forestry" or "Fisheries") and 3) a corporate designation ("Ltd.", "Inc.", "Corp." or "Company" or similar words) that indicates it is a limited liability entity. A limited partnership must have the words "limited partnership" in its name.

In its business dealings, a limited liability entity is required, in order to maintain the limited liability protection companies and limited partnerships provide, that the full and proper name of the business, including the corporate designation or limited partnership designation, is always used. All signage, invoices, letterhead, business cards, promotional material (including its internet presence) etc. associated with the business activity must clearly indicate the full legal name of the entity carrying out the particular business activity. If it is not and a person suffers

loss, the courts will look to the shareholders or limited partner to cover that loss (thereby “piercing the corporate veil” with the loss of liability protection).

Name Branding

It is common in business that when someone owns a group of companies that they create a “look and feel” for those companies to communicate that, although they are all separate legal entities, they are all part of the same group of companies. This can be done through similar logos and through naming. This is often referred to as “common branding”. It must be kept in mind, however, that at all times it must be clear which entity is carrying out each separate business activity in order to ensure the “corporate veil” is not pierced. This can be done through variations to logos (such as using designs with readily noticeable differences, such as colour) and related but different names. Sometimes the connection is simply stating something like “a member of Huu-ay-aht business enterprises”.

Huu-ay-aht business enterprises are assets of Huu-ay-aht and are viewed as representative of Huu-ay-aht in the larger business community. As such, there is value in making that association with Huu-ay-aht and to the other Huu-ay-aht business enterprises more readily apparent through common branding. One of the tools for common branding is a naming protocol for the related businesses. The naming protocol for Huu-ay-aht business enterprises consists of the distinctive element “HFN”, a descriptive element of one word, such as “Forestry”, which describes the business activities that correspond to the Huu-ay-aht business enterprise’s activities (as required by the Business Corporations Act), and the corporate designation “Limited Partnership”.

The use of “HFN” in this naming protocol creates the common branding and associates the businesses with Huu-ay-aht. The use of one descriptive word and the corporate designation “Limited Partnership” makes it clear each Huu-ay-aht business enterprise is a separate legal entity from Huu-ay-aht and from other Huu-ay-aht business enterprises and is a limited liability entity. This is important for ensuring the limited liability protection provided by the corporate structure that has been implemented. As well, this naming protocol lends itself to the use of distinctive acronyms for each Huu-ay-aht business enterprise for ease of communications and reporting on Huu-ay-aht business activities in general.

Business Management

As noted above, one of the circumstances under which limited liability protection may be lost is if a limited partner engages in the management of the business. Under section 64 of the Partnership Act, a limited partner is not liable for the debts of the partnership “...unless he or she takes part in the management of the business.” A limited partner is a “silent investor” and must remain separate from the active business operations of the limited partnership. Failing to maintain that separation runs the risk of the limited partner losing its limited liability protection. Because Huu-ay-aht is the limited partner in HFNDLP, it is important, in order to maintain its limited liability protection, that the Huu-ay-aht government (both the political leadership and senior administration) not be seen to be engaged in the management or control of the business of HFNDLP. Likewise, because HFNDLP is the limited partner in each operating limited partnership, it is important, in order to maintain its limited liability protection, that HDC’s board

not be seen to be engaged in the management or control of the business of an operating limited partnership.

Court cases on this issue are relatively sparse, not only in British Columbia but across Canada, and there has been little judicial discussion of the topic in recent years. It is generally clear that a limited partner who controls aspects of the day-to-day operations of the limited partnership's business will be found to be taking part in the management of the business. A review of Canadian case law on the subject suggests the following to be forms of "management" or "control" that may cause a limited partner to lose its limited liability protection:

- a limited partner identifying themselves as an officer of the partnership;²
- a limited partner signing cheques or conducting bank transactions on behalf of the partnership;^{3,4}
- a limited partner making managerial decisions;⁵
- a limited partner acting as a general contractor for the partnership;⁶
- a limited partner negotiating agreements on behalf of the partnership;⁷
- a limited partner providing daily maintenance to the assets of the partnership;⁸
- a limited partner providing a guarantee on a partnership loan;⁹
- a limited partner paying for the expenses of the partnership;¹⁰
- a limited partner employing the manager of the partnership;¹¹
- a limited partner being paid for management services by the partnership;¹² and
- a limited partner registering property in its name that belongs to the partnership.¹³

It should be noted that the Partnership Act uses somewhat different language to address this subject from many other provinces' legislation so the examples identified above may or may not apply in British Columbia in all circumstances. The Partnership Act states that a limited partner is liable as a general partner where "he or she takes part in the management of the business." In contrast, other provincial legislation uses the word "control" of the business. Some observers have stated that this may set a somewhat different standard in British Columbia,¹⁴ however, it is

² *Haughton Graphic Ltd. v. Zivot*, [1986] O.J. No. 288 (Ont HC). Affirmed [1988] OJ No 2957, 38 BLR xxxiii (Ont CA), leave to SCC refused [1988] SCCA No 212, 38 BLR xxxiii (SCC). Reasoning adopted in *Nordile Holdings Ltd. v. Breckenridge* (1992), 66 BCLR (2d) 183 (BC CA).

³ *Ibid.*

⁴ *Laplante v. Canada*, [1994] TCJ No 1211, [1995] 1 CTC 2647.

⁵ *Nordile Holdings Ltd. v. Breckenridge* (1992), 66 BCLR (2d) 183 (BC CA).

⁶ *Laplante v. Canada*, [1994] TCJ No 1211, [1995] 1 CTC 2647.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *155569 Canada Ltd. v. 248524 Alberta Ltd.* (1996), 43 Alta. L.R. (3d) 189 (Alta QB).

¹¹ *Michel v. Lafrentz*, 1999 ABCA 38.

¹² *Michel v. Lafrentz*, 2000 ABQB 714.

¹³ *Re Forest & Marine Financial Corp.*, 2009 BCCA 319.

¹⁴ Maurice Coombs, *Halsbury's Laws of Canada – Partnerships*, accessed via Quicklaw on May 22, 2012, HPIJ-72.

difficult to say given the relatively limited commentary by the courts on the topic. Having a management limited partnership (discussed below) to provide the management services described above to Huu-ay-aht business enterprises assists in avoiding that problem.

Management Limited Partnership

Another tool we utilize in our governance structure to accomplish compartmentalization is that of the “management limited partnership”. Currently, no one Huu-ay-aht business enterprise can support providing its own management, administrative, financial, record keeping, accounting and advisory services in-house. Having HFN Management Limited Partnership provide those services to the other Huu-ay-aht business enterprises eliminates the need for them to provide those services in-house or to have them provided by the Huu-ay-aht government. In the interest of separating Huu-ay-aht government administration from business administration, it is prudent (from a liability perspective) and efficient (from a cost saving perspective) to have HFN Management Limited Partnership provide these services to the other Huu-ay-aht business enterprises. This also eliminates concerns regarding section 64 of the Partnership Act since HFN Management Limited Partnership is not a limited partner in any other partnership.

A management services agreement forms an integral part of our recommendations for implementation of our governance structure model. A management services agreement has been entered into between the HFN Management Limited Partnership and all of the other Huu-ay-aht business enterprises requiring those Huu-ay-aht business enterprises to utilize HFN Management Limited Partnership to provide management, administrative, financial, record keeping, accounting and advisory services to them. The purpose of the management services agreement is to document how those services are provided and to clearly set out the terms and conditions of those services, such as how time, fees and other expenses are allocated between the Huu-ay-aht business enterprises. Having the cost of providing those services charged to each Huu-ay-aht business enterprise for actual time spent on its behalf more accurately reflects the true cost of carrying out those business activities by that Huu-ay-aht business enterprise. This will provide more accurate financial reporting, leading to greater transparency and accountability for that Huu-ay-aht business enterprise as it fulfills its business mandate.

Separation of Politics and Business

One of the three primary considerations stated above when a First Nation participates in the world of mainstream economic development is the importance of separating politics from business. A common problem seen with First Nations economic development is there is often no clear separation between the First Nation’s government, both leadership and administration, and business administration. It is often First Nation employees that provide management, administrative, financial, record keeping, accounting and advisory services to the First Nation’s businesses. Often the businesses do not even have their own bank accounts, with income deposited into the First Nation’s bank accounts and expenses paid from those accounts. The only separation is in the general ledgers of the First Nation where the businesses are treated as separate departments of the First Nation government. As well, it is often the case that the First Nation senior administrator is also acting as the businesses’ chief executive officer.

The Harvard Project publications suggest that one of the keys to successful aboriginal economic development is competent business management free from political interference, in other words, the separation of politics from business. We agree, based on our experience, that this separation of politics from the day-to-day decision making of business is essential for successful First Nation economic development. A lack of separation between the First Nation administration and business administration blurs the separation (or “compartmentalization”) between the First Nation and its businesses that may lead to the “piercing of the corporate veil”, as we have discussed already at length, with its associated loss of limited liability protection. Separating First Nation administration from business administration by having separate management, separate employees, separate bank accounts, separate accounting and financial records, separate signage, invoices, letterhead, business cards and promotional material (including its internet presence), etc. is important for maintaining the compartmentalization and limited liability protection for the First Nation and its businesses.

In our recommended economic development structure, although ultimate ownership and control remains with the First Nation as the ultimate shareholder, its rights as shareholder under the common law and the Business Corporations Act are limited to, among other things, appointing and removing the holdings board, not actually being able to tell the holdings board what to do on a day-to-day basis. Investment decisions can therefore be made by the holdings board, separate from the politics of the First Nation’s government (either the elected members, appointed members or senior administration). Similarly, although the holdings board appoints the boards of the general partners of the operating limited partnerships (the “operating boards”), separate from the holdings board and twice separated from the First Nation’s government.

Political considerations seldom result in sound business decisions. Often, business requires tough decisions to be made which, at times, may be unpopular, particularly to politicians who, of necessity, are interested in maintaining popularity. Separation of politics and business ensures that day-to-day business decisions are made by people with business expertise and not by politicians influenced by political considerations. In our governance structure, the operating limited partnerships are left to pursue the business opportunities they have been tasked with in the manner the operating board thinks best. While under the normal governance requirements of the Business Corporations Act the operating boards are accountable to the holdings board and the holdings board is accountable to the First Nation’s government, the First Nation’s government’s power, as shareholder, is limited to replacing the holdings board if it is unhappy with decisions made by the holdings board. It is not open to the First Nation’s government to tell either the holdings board or the operating boards what decisions they must make.

Roles and Responsibilities

The Harvard Project publications also state that for aboriginal economic development to be successful, the roles and responsibilities of the key participants (the First Nation’s government, boards of directors and senior business management) must be clearly written out and adhered to. Tensions and mistrust can develop when people perceive others intruding on their areas of responsibility, stepping outside their roles or lacking in transparency or accountability. Where such behaviours like this take place, senior business management spends more time dealing with government administration and politics than on running successful businesses.

The Harvard Project suggests that the proper role of the aboriginal government is to determine the vision, mission and values of, and set the strategic direction for, its economic development. The proper role of a board of directors is to implement the First Nation's vision and mission for its economic development in accordance with the approved values, oversee senior business management, make major operational decisions, approve policy and procedure for the businesses and to report on the business operations to the First Nation government. It is the proper role of senior business management to oversee the day-to-day operations of the businesses, including human resource decisions, implement the policies and procedures approved by the board of directors and to report to the board of directors on business operations.

Governance and Fiscal Agreement and Economic Development Act

One of the matters that we have found helpful for First Nation clients is having the roles and responsibilities of key stakeholders in First Nation's economic development set out in a specific written agreement called a Governance and Fiscal Agreement. The roles and responsibilities of the First Nation's government, the holdings board of directors, the various operating boards of directors, the First Nation's economic development officer and senior business management are all very different. The process of developing the Governance and Fiscal Agreement with a First Nation is a very productive, informative and instructional tool for having discussions with all these participants regarding who is, or should be, responsible for the various decisions and activities involved in economic development and what each of their respective roles and responsibilities are as part of that endeavour.

A Governance and Fiscal Agreement also sets out reporting and profit sharing expectations that differ from the Business Corporations Act, which are necessary given the unique role First Nation's corporations play in its economic development. This helps to ensure the transparency and accountability that is necessary for First Nation's economic development. Our Governance and Fiscal Agreement template addresses the following matters:

- limited role of government in business operations (exercising common law shareholder rights as owner and approving major decisions such as structural changes, operational anomalies and annual plans);
- annual planning requirements;
- profit sharing and distribution processes;
- reporting requirements;
- role of boards and senior management;
- appointments to, and removal from, the operating boards with a right of appeal;
- how management services are provided; and
- requirements for certain corporate policies and procedures to be implemented.

We have developed templates for the corporate policies and procedures that set out in greater detail the expectations on how the board of directors and senior business management of each business should conduct their affairs.

For treaty First Nations, we have also developed an Economic Development Act and related regulation which govern the First Nation government's role in economic development as well as establishing certain reporting, transparency and accountability requirements and operational

restrictions for the operating limited partnerships. This is not possible with bands under the *Indian Act* (Canada) who do not have the authority to enact such laws. The advantage of an Economic Development Act is that the provisions of such an act have the force of law that may be helpful in ensuring the separation of politics from business while maintaining the transparency and accountability of the treaty First Nation's businesses. As well, an Economic Development Act can set out the business mandates for the treaty First Nation's businesses that can provide a greater incentive for them to remain true to their intended purpose. Our Economic Development Act template addresses the following matters:

- the mission and values for economic development;
- requirements for a five year economic development plan;
- the role of government in economic development (Legislature, Executive Council, Economic Development Committee and Economic Development Officer);
- restrictions on the role of government in business operations;
- research and development requirements for new businesses (feasibility studies and business plans); and
- penalties and offences.

It is sometimes suggested that the roles and responsibilities of all key participants in First Nation economic development need only be set out in policies and procedures of the First Nation. While this may be true in some circumstances, the fact remains that policies and procedures do not have the force of law and can be changed by the First Nation without any consultation or due process. The contractual nature of the Governance and Fiscal Agreement ensures that those roles and responsibilities, as well as the systems and procedures that separate politics and business, cannot be unilaterally changed and require consultation and due process to be amended. For a treaty First Nation with legislative authority over its assets, the Economic Development Act, with prohibitions against political interference in the day-to-day operations of the First Nation's businesses, has the force of law and is a useful tool ensuring the separation of politics from business.

Capacity Concern

One of the concerns expressed at times regarding our recommended corporate structure and governance structure is the number of individuals required to serve on the holdings board and the various operating boards. This is particularly so because of the concern discussed above regarding section 64 of the Partnership Act and a limited partner being prohibited from engaging in the management of the business of the partnership. It is for this reason that the members of the First Nation's government (either the political leadership or senior administration) must not form the majority of the holdings board and that members of the holdings board must not form the majority of an operating board. As discussed above, with multiple operating limited partnerships required to separate each active business opportunity from the others, how can a First Nation, particularly a small First Nation, have the capacity to fill all those positions?

The answer to this question lies in the fact that one does not necessarily require different individuals on each operating board. It is possible for individuals to sit on more than one operating board at a time. The attached chart entitled HFN Governance Structure shows how this overlap works in practice for Huu-ay-aht business enterprises. In these circumstances,

however, it is important for individuals with multiple roles and responsibilities to be very clear at all times in their communication and documentation which role and which responsibility they are fulfilling at any given point in time.

CURRENT HUU-AY-AHT GOVERNANCE STRUCTURE

As stated above, although we were involved in establishing HUU-ay-aht's corporate structure in anticipation of the Treaty effective date on April 1, 2011, we were not involved in establishing the governance structure for HUU-ay-aht economic development that also came into effect on that date. In February of this year we were asked to assess HUU-ay-aht's economic development governance structure in light of the governance structure model we have described above. Our assessment included discussions with the chair of the HUU-ay-aht economic development committee, other HUU-ay-aht government representatives and the chief executive officer of the HUU-ay-aht business enterprises which identified areas of concern. This assessment resulted in eight recommended changes to the governance structure for HUU-ay-aht economic development that we are of the opinion are either necessary or desirable. The eight recommendations were approved by Executive Council on June 20, 2012. Before reviewing our eight recommendations regarding the recommended changes, the following is a summary of the current governance structure for HUU-ay-aht economic development.

Under section 8 of the HUU-ay-aht *Financial Administration Act* (the "FAA"), an Economic Development Committee (the "EDC") is created which consists of a chair appointed by the Chief Councillor and 3 to 5 other members appointed by the Executive Council. Under section 9 of the FAA, the mandate of the EDC is to advise the Executive Council on economic development; give direction to HUU-ay-aht staff and consultants assisting with HUU-ay-aht economic development; identify, review and recommend to Executive Council the priority and implementation of, new business opportunities to be implemented by HUU-ay-aht business enterprises; and oversee current HUU-ay-aht business operations. Under section 57 of the FAA, the EDC must serve as the HDC board and the chair of the EDC must serve as the chair of the HDC board. As well, under that section the HDC is required to be the owner of all HUU-ay-aht business enterprises. Section 71 of the FAA requires Executive Council to adopt an economic development policy by regulation, which it did on the effective date of the Treaty. This regulation is called the Economic Development Policy Regulation (the "EDPR"). **THESE SECTIONS WILL BE REPEALED AND THEIR SUBSTANTIVE CONTENT CONSOLIDATED INTO THE NEW ECONOMIC DEVELOPMENT ACT DISCUSSED BELOW.**

Section 4 of the EDPR establishes the principles on which HUU-ay-aht economic development is based, which includes the development of business cases, business plans and a reasonable return on investment. As well, section 6 of the EDPR sets out the stages through which HUU-ay-aht economic development projects must proceed before implementation approval and the content and processes involved in each of those stages. Section 7 of the EDPR sets out the mandate of HDC's Chief Executive Officer (the "CEO"), which is to manage and oversee all HUU-ay-aht business enterprises, and requires HDC to employ or contract the CEO to provide those management services to the other HUU-ay-aht business enterprises. This will be discussed again below.

Section 2(d) of the *Huu-ay-aht Cash Management Policy Regulation* applies that regulation to Huu-ay-aht business enterprises. Likewise, section 2(c) of the *Purchasing Policy Regulation* and section 1(c) of the *Risk Management Policy Regulation* apply these regulations to Huu-ay-aht business enterprises.

RECOMMENDATIONS ON NECESSARY AND DESIRABLE CHANGES

Our review of the current governance structure for Huu-ay-aht economic development identified a number of concerns resulting in our eight recommended changes. We discuss below each recommendation as made on June 14, 2012, and its rationale. These were approved by Executive Council on June 20, 2012, and again on September 28, 2012. On that latter date, Executive Council resolved to have the recommended changes implemented by October 31, 2012. Following each recommendation and rationale below is a status update on the implementation of the recommendation, indicating to what degree the recommendation has been implemented.

1. Section 64 and CEO Employment:

Recommendation: The Chief Executive Officer (“CEO”) of the Huu-ay-aht First Nations business operations should be hired by an operating limited partnership and, in our view, this partnership should be a new management limited partnership (discussed above).

Rationale: The requirement by section 7 of the Economic Development Policy Regulation (“EDPR”) that Huu-ay-aht Development Corporation (“HDC”) hire the CEO who is responsible for the management of the operating limited partnerships raises the concern that HFNDLP (which is the limited partner in each operating limited partnership) is at risk of losing its limited liability protection because of section 64 of the Partnership Act which prohibits a limited partner from engaging in the management of the business.

Implementation: The CEO contract was assigned from HDC to HFN Management Limited Partnership effective November 1, 2012 – **recommendation fully implemented.**

2. Section 64 and the Operating Boards:

Recommendation: HDC, on behalf of HFNDLP, should exercise its shareholder voting rights to appoint to the board of directors of each general partner (“operating board”) of each operating limited partnership (HFN Forestry Limited Partnership, HFN Gravel Limited Partnership, HFN Fisheries Limited Partnership and HFN Lands Limited Partnership) individuals who, a majority of which, do not sit on the HDC board and who bring a particular skill or expertise to the board that relates to the business conducted by that operating limited partnership.

Rationale: We understand there may not be a clear separation between the HDC board and the various operating boards with members of the HDC board comprising the whole or a majority of the operating boards. Because of section 64 of the Act and the risk of HFNDLP losing its limited liability protection as a limited partner, this must be corrected.

Implementation: Operating boards were appointed by the HDC board on October 18, 2012, and a majority of the members of the operating boards are not on the HDC board – **recommendation fully implemented.**

3. **Separate Administration:**

Recommendation: (a) HFNDLP and each operating limited partnership have its own bank accounts and management, development and financial administration and reporting as well as separate signage, invoicing, letterhead and business cards. (b) To the extent that a particular HUU-AY-AHT business enterprise cannot support its own management, development and financial administration, those services should be provided, not by HDC or HFNDLP but, by another operating limited partnership and, in our view, this should be a new management services limited partnership (discussed below).

Rationale: Because of concerns regarding (i) section 64 of the Partnership Act and the “piercing of the corporate veil” by a court and based on the outcomes of the Harvard Project, (ii) our experience with First Nations economic development, and (iii) feedback from the chair of the HUU-AY-AHT economic development committee and CEO, it is our opinion that, to the greatest extent possible, there needs to be a clearer separation between the HUU-AY-AHT government and HUU-AY-AHT business enterprises and between each of the HUU-AY-AHT business enterprises from the other.

Implementation: Signing authorities on HUU-AY-AHT business enterprises bank accounts were individuals who were either members of Executive Council or HUU-AY-AHT government administration. As of October 31, 2012, we understand the documentation necessary to change the authorized signatories to non-government individuals has been signed and is now with the bank and nearly complete. Separate signage, invoicing, letterhead and business cards have been designed and are currently being used by each HUU-AY-AHT business enterprise. The operating boards approved in principle 11 corporate governance policies on October 18, 2012, including fiscal management policies, to provide appropriate business specific corporate transparency and accountability requirements and are requiring the CEO to operate within the spirit of those policies – **recommendation substantially implemented.**

4. **Legislative References to HDC:**

Recommendation: The FAA and EDPR, along with any other HUU-AY-AHT enactment that refers to HDC and dividends, should be amended to refer to HFNDLP and distributions.

Rationale: The FAA and EDPR refer to HDC and dividends and not to HFNDLP or distributions. In order for the corporate structure implemented by HUU-AY-AHT to ensure the avoidance of taxes and OSR it must be clear at all times that it is the various limited partnerships (and not just their general partners) who are engaged in economic development on behalf of HUU-AY-AHT.

Implementation: HDC legal counsel is currently reviewing HUU-AY-AHT laws and preparing recommended amendments for consideration by the HUU-AY-AHT Legislature at its next sitting and by Executive Council – **recommendation not yet implemented.**

5. Governance Structure Model:

Recommendation: Council should enact an Economic Development Act (to more clearly set out the role and responsibility of the Huu-ay-aht government in economic development) and Huu-ay-aht, along with each Huu-ay-aht business enterprise, should enter into a Governance and Fiscal Agreement (to more clearly set out the roles and responsibilities of the Huu-ay-aht business enterprises in economic development, including transparency and accountability provisions, profit sharing expectations and processes and provisions for appointing and removing directors from office).

Rationale: The alternate governance structure model as discussed above and approved by the Huu-ay-aht Executive Council more clearly sets out the roles and responsibilities of the key stakeholders in Huu-ay-aht economic development than currently exists. The Harvard Project reports on what makes aboriginal economic development successful states repeatedly that having these roles and responsibilities clearly set out in written form reduces the potential for conflict, blaming and mistrust that arises when roles and responsibilities are not clear. This also increases the likelihood of those responsibilities being carried out more effectively and efficiently, leading to more successful economic development. Having these roles and responsibilities set out in law and in contract gives their provisions enforceability and, in our view, a greater likelihood of being adhered to. The Economic Development Act and Governance and Fiscal Agreement, along with an enabling Governance and Fiscal Agreement Regulation, are, in our view, the key and most important components to the vision of separating politics from business described in the Harvard Project reports and form an integral and inseparable aspect of the model we have developed over the past eight years for our first nation clients and their economic development structuring.

Implementation: A Governance and Fiscal Agreement has been approved by the HDC board and by the operating boards. HDC legal counsel is currently drafting an Economic Development Act for consideration by the Huu-ay-aht Legislature at its next sitting. HDC legal Counsel is drafting a Governance and Fiscal Agreement Regulation for consideration by Executive Council once the Economic Development Act comes into force – **recommendation partially implemented.**

6. Role of Council:

Recommendation: Council [as the Huu-ay-aht Legislature] should be provided a role in Huu-ay-aht economic development by having Council [as the Huu-ay-aht Legislature] approve an Economic Development Act containing the mission and values of Huu-ay-aht economic development as well as having Council [as the Huu-ay-aht Legislature] approve the economic development plan to be updated annually.

Rationale: In Huu-ay-aht's current governance model for economic development the role of the Huu-ay-aht government is exercised by the Economic Development Committee and Executive Council and there is no role for Council [as the Huu-ay-aht Legislature]. Council [as the Huu-ay-aht Legislature] is the primary legislative voice of Huu-ay-aht and under the Maa-nulth First Nations Final Agreement is the ultimate steward of Huu-ay-aht assets, including Huu-ay-aht business enterprises. The Harvard Project publications suggest that

there is a role for the Council [as the Huu-ay-aht Legislature] of an aboriginal government and that role is to approve the mission, values and strategic direction for economic development. Our alternate governance structure model includes a role for a treaty First Nation's legislative body by having it approve, through the Economic Development Act, the mission and values for economic development as well as an economic development plan with annual updates, which sets the strategic direction for its economic development.

Implementation: HDC legal counsel is currently drafting an Economic Development Act, including the mission and values for Huu-ay-aht economic development, for consideration by the Huu-ay-aht Legislature at its next sitting which will provide that the economic development plan and any changes to it must be approved by the Huu-ay-aht Legislature – **recommendation not yet implemented.**

7. **Management Services:**

Recommendation: An HFN Management Limited Partnership should be created as an operating limited partnership to provide management, development and financial administration services to all Huu-ay-aht business enterprises in accordance with a management services agreement.

Rationale: Because of our recommendations in 1 and 3 above, the question arises as to which operating limited partnership should hire the CEO (HFN Forestry Limited Partnership, HFN Gravel Limited Partnership, HFN Fisheries Limited Partnership, HFN Lands Limited Partnership or a new operating limited partnership). Since the CEO's mandate is to oversee all Huu-ay-aht business enterprises, the CEO's position does not, in our view, fit nicely with any existing operating limited partnership. Further, based on the principle of separating politics from business (and government administration from business administration), it may be helpful to have an operating limited partnership that provides management, development and financial administration services to all the Huu-ay-aht business enterprises.

Implementation: HFN Management Limited Partnership was registered on October 29, 2012, under registration number LP594527. A Management Services Agreement was approved by the Huu-ay-aht operating boards on October 18, 2012, and will soon be signed – **recommendation substantially implemented.**

8. **Application of Laws to Businesses:**

Recommendation: Remove the application of the *Cash Management Policy Regulation*, *Purchasing Policy Regulation* and *Risk Management Policy Regulation* to Huu-ay-aht business enterprises and require the board of directors of each Huu-ay-aht business enterprise to develop their own similar policies in consultation with the Economic Development Committee.

Rationale: In order to fully separate politics from business consideration has to be given as to whether or not it is appropriate to have the Huu-ay-aht *Cash Management Policy Regulation*, *Purchasing Policy Regulation* and *Risk Management Policy Regulation* apply to Huu-ay-aht business enterprises. To be clear, this is not to suggest these are unimportant regulations as we recognize in the context of government administration that these

regulations are necessary for transparency and accountability purposes. The reality, however, is business at times needs to adapt more quickly to changing circumstances than government regulations might allow. Further, what is necessary or desirable for government, is not necessarily helpful for making a business profitable or successful. In our view, business should be allowed, and in certain circumstances required, to have their own policies on these topics and it should be left to the board of directors to determine what those policies are. The Governance and Fiscal Agreement discussed above contemplates certain mandatory policies to be prepared in consultation with the Economic Development Committee.

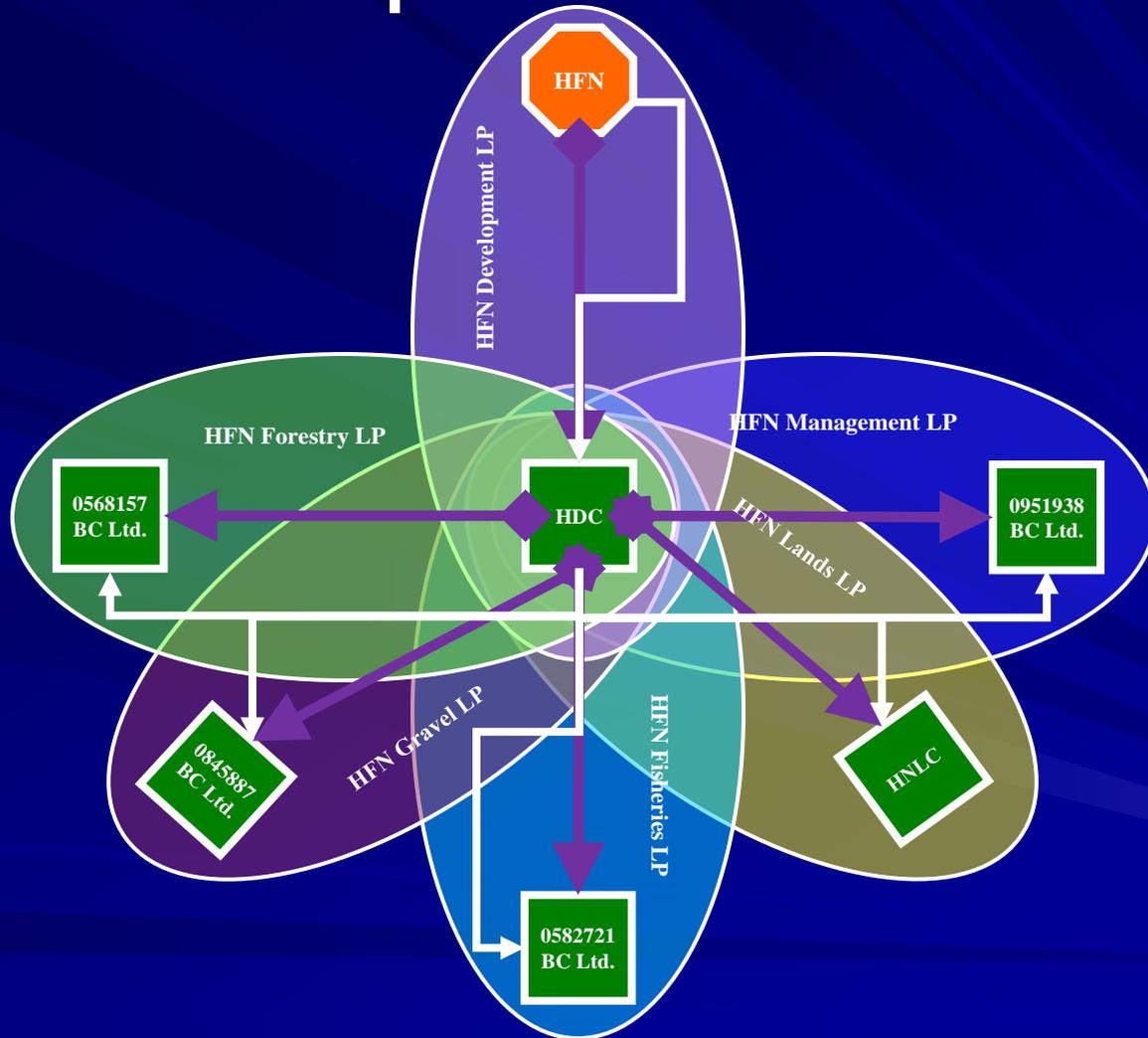
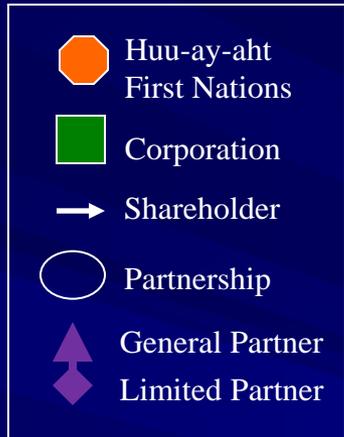
Implementation: HDC legal counsel is currently drafting amendments to the FAA for consideration by the HUU-AY-AHT Legislature at its next sitting. Required consultation with the People's Assembly concerning those amendments will occur on November 17, 2012. HDC legal Counsel is drafting amendments to a number of regulations for consideration by Executive Council. The operating boards approved in principle 11 corporate governance policies on October 18, 2012, including fiscal management policies, to provide appropriate business specific corporate transparency and accountability requirements and are requiring the CEO to operate within the spirit of those policies – **recommendation partially implemented.**

CONCLUSION

The above recommendations concerning the governance structure for HUU-AY-AHT economic development are intended to compliment and build on the corporate structure already approved and implemented on behalf of HUU-AY-AHT and to implement changes to the current governance structure that are necessary or desirable. Some changes are necessary to ensure the limited liability protection intended in the corporate structure is maintained while others are desirable to better separate politics from business in HUU-AY-AHT economic development while maintaining transparency and accountability.

With these structures, the three primary considerations of limiting liability, maximizing profits (by minimizing taxes and avoiding OSR) and separating politics from business decisions are accomplished. The utilization of corporations and limited partnerships creates a double barrier intended to prevent liability from flowing back through to HUU-AY-AHT while allowing 99.98% of the profits to be allocated back to HUU-AY-AHT on a tax exempt or tax reduced basis and avoiding OSR reductions. As well, utilizing the alternate governance structure model we recommend in the Economic Development Act and Governance and Fiscal Agreement serves to further separate political influence from the important business decisions that must be made in order to pursue successful economic development opportunities for HUU-AY-AHT while ensuring those businesses remain transparent in their activities and are held accountable.

HFN Corporate Structure



HFN Governance Structure

