huu ay aht
ANCIENT SPIRIT, MODERN MIND

Huu-ay-aht First Nations Tribunal
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TRIBUNAL APPLICATION NO. 2019-01

BETWEEN:

DUANE NOOKEMIS

APPLICANT

AND:

HUU-AY-AHT FIRST NATIONS

RESPONDENT

DECISION

TRIBUNAL MEMBER:	Brent Mullin, Vice Chair
DATE OF DECISION:	June 28, 2019
DATE OF HEARING:	May 22, 2019
PLACE OF HEARING:	Port Alberni, BC
APPEARANCES:	Duane Nookemis, for himself Melinda Skeels, for the Respondent

SUMMARY OF DECISION

Section 7(3) of the *Election Act* requires an HFN citizen who is an employee of the HFN Government to take an unpaid leave of absence from his or her job during the election campaign period in order to run for elected office in the HFN Government.

Mr. Duane Nookemis was subject to this requirement having been nominated to run in the 2019 election for the Huu-ay-aht First Nations Executive Council. He applied to the HFN Tribunal asking that the unpaid leave requirement in section 7(3) of the *Election Act* be struck down on the basis that it is discriminatory, since incumbent HFN Councillors are not subjected to the unpaid leave requirement, and that it unfairly produces a hardship to those HFN citizens employees of the government who wish to run for election.

The HFN Government said the unpaid leave requirement is warranted and necessary, including the blanket nature of its application to all employees of the HFN Government who choose to run for office.

In this decision the Tribunal finds as follows:

1. Section 7(3) of the *Election Act* is not discriminatory. Although incumbent Councillors running for election are not subject to section 7(3) and are not required to give up the remuneration they receive as Councillors during the campaign period, their circumstances are different than other HFN citizen employees running for elected office. In particular, in contrast to government employee candidates on unpaid campaign leave, incumbent Councillors do not have a guaranteed job to return to in the event they are not re-elected. As a result, the different treatment of incumbent Councillors in these different circumstances is not discriminatory.

2. However, the unpaid campaign leave in section 7(3) of the *Election Act* produces a hardship upon HFN Government employees who wish to run for office. It results in a loss of income for candidate employees and thus potentially operates as a disincentive to run for election. In Mr. Nookemis' case, he was forced to use his accrued vacation leave to provide income during his unpaid campaign leave instead of using that accrued entitlement to take time off for the birth of his granddaughter, as he had originally planned to do.

3. The hardship created by section 7(3) of the *Election Act* is inconsistent with Mr. Nookemis' constitutional right to "participate in Huu-ay-aht First Nations political activities, elections and government" (s. 1.4(a) of the HFN Constitution) as well as his constitutional right to "express opinions and views on Huu-ay-aht First Nations affairs" (s. 1.4(d) of the HFN Constitution).

4. The legislative objective of section 7(3) is to ensure the neutrality and perceived neutrality of the HFN public service and to avoid actual or perceived conflicts of interest in the equal delivery of services and benefits to HFN citizens. It was not disputed that this is a pressing and substantial objective of the HFN Government. However, when considering conflicts of interest in the context of a self-governing, modern treaty Nation with a small electorate, a

flexible and practical approach must be taken. Thus, the all-encompassing unpaid campaign leave requirements which may be appropriate in the much larger context of provincial, federal or municipal governments, are not necessarily appropriate in the context of a comparatively small First Nations electorate.

5. Because of the blanket nature of the unpaid leave requirement in section 7(3) of the *Election Act*, it cannot be demonstrably justified as a reasonable limit upon the constitutional rights of political participation and expression in s. 1.4 of the HFN Constitution. Even if some of the reasons put forward by the HFN government to justify the unpaid leave requirement were to be accepted, the unpaid leave in section 7(3) applies to all employees in the HFN government without regard, for instance, to the nature of their responsibilities, the degree of discretion they exercise, or the level, visibility or importance of their role within the administration. As such, section 7(3) is over-inclusive and overbroad and is not carefully designed to impair constitutional rights as little as reasonably possible. As well, when considered in the unique context of HFN self-government, the negative effects of the hardship imposed by the unpaid leave requirement (depriving employee candidates of employment income and potentially discouraging them from candidacy in HFN elections) outweigh the benefits of a blanket requirement of unpaid leave to ensure the neutrality of the public service.

6. As a result, pursuant to section 3.4 of the *HFN Constitution Act*, the unpaid leave requirement in section 7(3) of the *Election Act* is declared to be of no force and effect in respect to Mr. Nookemis' position as Community Maintenance Supervisor.

7. Mr. Nookemis sought a declaration that section 7(3) of the *Election Act* was invalid generally in its application to all employees of the government. I have declined to make such a declaration, having found it was not possible or appropriate to make any further determination on the basis of the evidence before me. The case was brought and heard in an expedited procedure within the election period. The expedited nature of the proceedings did not provide an evidentiary basis upon which to make a determination in respect to the full range of positions within the HFN administration (60 positions in total). Consequently, I have not granted Mr. Nookemis' request to strike down the unpaid leave requirement in section 7(3) in its entirety.

8. As only Mr. Nookemis' position is affected by this declaration, all other positions in the HFN administration remain subject to potential challenge by individuals facing mandatory unpaid leave in the next election. Further litigation on that issue would be regrettable. Instead, as the parties themselves stated at the hearing, there should be discussions, and hopefully agreement, as to which positions should not be subject to the unpaid leave requirement. These discussions could be assisted by facilitation or mediation.

* * *

REASONS

THE APPLICATION AND POSITIONS OF THE PARTIES

Mr. Duane Nookemis applies to the Huu-ay-aht First Nations Tribunal challenging the validity of section 7(3) of the *Election Act*, HFNA 6/2011. Section 7(3) requires that a Huu-ay-aht government employee must take an unpaid leave of absence for, roughly speaking, the campaign period if he or she wishes to be nominated as a candidate for an elected office as Councillor of the Huu-ay-aht Executive Council. The relevant provisions of the *Elections Act* are as follows:

> **Candidate qualifications**
>
> **5**(1) Subject to subsection (2), an eligible voter may be nominated as a candidate.
>
> (2) An eligible voter is disqualified from being nominated as a candidate if that individual is any of the following:
>
> (j) a Huu-ay-aht employee, unless the Huu-ay-aht employee has complied with section 7; . . .
>
> **Huu-ay-aht employees as candidates**
>
> **7** (1) A Huu-ay-aht employee who is otherwise qualified to be nominated as a candidate under section 5 must comply with the requirements of subsections (2) and (3) to be eligible as a candidate in an election.
>
> (2) Before being nominated for an elected office, a Huu-ay-aht employee must give notice in writing to his or her employer of the Huu-ay-aht employee's intention to consent to nomination.
>
> (3) After giving notice under subsection (2), the Huu-ay-aht employee is entitled to, and must take, a leave of absence from his or her position for a period that, at a minimum,
>
> (a) begins on the first day of the nomination period or the date on which the notice is given, whichever is later, and
>
> (b) ends, as applicable, if the individual
>
> (i) is not nominated before the end of the nomination period, on the day after the end of that period,
>
> (ii) withdraws as a candidate in the election, on the day after the withdrawal,
>
> (iii) is declared elected, on the day the individual resigns in accordance with subsection (5) or on the last day for taking office before the individual is disqualified for a failure to make the oath of office within the time specified under section 21 of the Government Act,
>
> (iv) is not declared elected and an application for a recount is not made to the tribunal, on the last day on which an application for a recount may be made, or
>
> (v) is not declared elected and an application for recount is made, on the date when the results of the election are determined by or following the recount.

Mr. Nookemis' Position

Mr. Nookemis says the requirement in section 7(3) to take an unpaid leave of absence during the campaign period works an inappropriate hardship on citizens who are employees of the Huu-ay-aht government. He also says the requirement is inefficient, as the work of the employees on unpaid leave must be done by other employees.

He further says this requirement discriminates against new candidates for office as it gives an advantage to incumbent Executive Council members, who continue to receive remuneration for their position within the HFN Government during this campaign period.

Mr. Nookemis notes the situation of the HFN is much different than that of the federal and provincial governments in Canada (some of which have similar unpaid leave requirements) because they have much larger populations and civil services.

In contrast, Mr. Nookemis points out that other First Nations such as the Nisga'a and the Tsawwassen First Nations, do not have unpaid leave requirements in their self-government legislation.

The HFN's Position

The HFN responded to Mr. Nookemis' application in detail through counsel and the evidence of its Executive Director, Ms. Trudy Warner. The HFN says its government has the power to make the law in question. That power derives from the Maa-nulth First Nations Final Agreement (the "Treaty"), section 13.11.1 and the HFN *Constitution Act* HFNA 1/2011 (the "HFN Constitution"), sections 3.1 and 3.2 (b) and (gg).

> **Maa-nulth First Nations Final Agreement**
>
> 13.11.1 Each Maa-nulth First Nation Government may make laws in respect of the election, administration, management and operation of that Maa-nulth First Nation Government, including:
>
> a. the establishment of Maa-nulth First Nation Public Institutions, including their respective powers, duties, composition and membership, but the registration or incorporation of Maa-nulth First Nation Public Institutions will be under Federal Law or Provincial Law;
>
> b. the establishment of Maa-nulth First Nation Corporations, but the registration or incorporation of Maa-nulth First Nation Corporations will be under Federal Law or Provincial Law;
>
> c. the powers, duties, responsibilities, remuneration, and indemnification of members, officials, employees and appointees of that Maa-nulth First Nation Government or its Maa-nulth First Nation Public Institutions;
>
> d. financial administration of that Maa-nulth First Nation Government, its Maa-nulth First Nation Public Institutions and the applicable Maa-nulth First Nation; and
>
> e. elections, by-elections and referenda.

HFN Constitution Act

> 3.1 The Huu-ay-aht First Nations Government shall have the right to assume and exercise all law-making authority set out in the Maa-nulth Treaty and any law-making authority set out in non-Treaty agreements with Canada or British Columbia.
>
> 3.2 As of the Effective Date of the Maa-nulth Treaty, and in accordance with the respective provisions of the Maa-nulth Treaty, the Huu-ay-aht First Nations Council shall have the authority to make laws pertaining to: . . .
>
> > (b) Huu-ay-aht First Nations Government structures and procedures;
> > . . .
> > (gg) Any other law-making authority set out in the Maa-nulth Treaty or in any non-Treaty agreement with Canada or British Columbia.

Through the evidence of Ms. Warner, the HFN says the unpaid campaign leave requirement in section 7(3) of the *Election Act* is both warranted and necessary. The HFN also says the requirement is consistent with the protection of expression and political rights in the HFN Constitution and the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 ("the Charter").

An expedited hearing was held in this matter on May 22, 2019 at the HFN's Port Alberni Government Office. Both parties' evidence and submissions were forthright and helpful and I thank them for that.

THE CONTEXT

The HFN Government administration has 60 employees, 30 of whom are Huu-ay-aht citizens and thus eligible to run as candidates in HFN elections.

The HFN has 840 citizens, 585 of whom are eligible to vote in HFN elections.

Mr. Nookemis is a Huu-ay-aht citizen and is employed by the HFN Government as a Community Maintenance Supervisor in the public works department (department of Infrastructure and Capital Projects). In this capacity, Mr. Nookemis interacts with the public and HFN citizens. In doing so, he provides materials to people when needed. His evidence, which I accept, is that he will provide these materials directly to citizens himself if it is a small thing, (for example, a sheet of plywood or a tarp for an emergency repair) and if the material is readily accessible ("lying around," as he put it). However, if it is something he would need to purchase, he discusses that with his boss, whom I understand from the organizational chart provided at the hearing to be the Asset Manager in the department of Infrastructure and Capital Projects. The Asset Manager is the third level down from the Executive Director on the organizational chart. As the Community Maintenance Supervisor, Mr. Nookemis is one of five positions reporting to the Asset Manager.

Under section 11 of the *Election Act*, elections for the Executive Council are held every four years on the third Saturday in June. 2019 is an election year with the election having been held on Saturday June 15, 2019.

This was the third election since the establishment of the HFN's self-government under the Treaty and the HFN Constitution.

The 2019 Elections Timetable established by the HFN indicates that the candidate nomination period ran from April 29 to May 9, 2019 and the campaign period ran from May 17 to June 15, 2019. In his testimony, Mr. Nookemis said everyone believed the campaign period ran from May 9, 2019. This difference in view is not important for the purposes of this decision. What is of significance is that during this time, government employees who ran for office were required to take an unpaid leave of absence from their employment in accordance with Section 7(3) of the *Election Act*.

Mr. Nookemis was successfully nominated to run as a candidate for elected office in the 2019 election and was thus required to take an unpaid leave of absence from his employment in accordance with section 7(3) of the *Election Act*. In order to provide income during this period of leave, he decided, in consultation with his family, to use his accrued vacation and overtime entitlement even though he had been saving it for the birth of his granddaughter expected later in the year. He described the arrival of his granddaughter as a significant family event, with family being very important to the Huu-ay-aht people. However, he and his family discussed the matter and decided that running for office in the Huu-ay-aht government was also critically important and that as a result he should use his accrued overtime and vacation leave to provide income during the otherwise unpaid campaign leave.

In her evidence, Ms. Warner explained that there were five HFN citizens, including Mr. Nookemis, who are government employees and who ran for office in the 2019 election. Ms. Warner further explained in her affidavit of May 22, 2019 (para 15):

> While employees are not paid for the time that they are on campaign leave, they are able to access pay for accrued overtime and annual leave (vacation) while on campaign leave. The availability of such funds to the five employees currently on campaign leave runs the gamut from almost none to more than enough to fully cover the campaign period and beyond. Duane [Nookemis] and one other employee on campaign leave could access funds sufficient to cover the entire campaign period should they so choose. One employee has virtually no accrued overtime or annual leave available. The fourth employee could access fund[s] sufficient to cover almost one week of pay and the final could access a slightly over two weeks' pay.

In the expedited context of the application and hearing, we did not have evidence of the positions or personal circumstances of the other Huu-ay-aht employee candidates running in this election beyond the information in Ms. Warner's affidavit set out above.

THE ISSUES OF DISCRIMINATION AND HARDSHIP

Mr. Nookemis does not challenge the HFN's jurisdiction to legislate on the subject matters covered by section 7(3) of the *Election Act*, but he says that the section as it currently stands is unfair and

discriminatory and works an inappropriate hardship on the HFN citizens who are employees of the HFN Government.

As noted above, he also says the unpaid leave requirement is inefficient. I find, however, that I do not need to directly deal with that argument as it does not rest on a right by which the law could be challenged. As well, in my view, whether the law is inefficient or not is a matter that falls within the discretion of the HFN legislature, which should both be recognized in this context and accorded deference.

Returning to Mr. Nookemis' other points, I will deal first with the issue of discrimination.

Does Section 7(3) Operate in a Discriminatory Manner?

Incumbent Councillors continue to receive remuneration for their positions in the government during the election campaign period. Mr. Nookemis asserts that is discriminatory in relation to the government employees who are subject to section 7(3) of the *Election Act*.

I am not convinced that section 7(3) is discriminatory because of the differential treatment accorded to the incumbent Councillors. Section 42(3) of the *Election Act* states:

> 42(3) During the campaign period, Executive Council and the Executive Director must not engage in, or travel on, government business unless reasonably required for the proper functioning of government.

Ms. Warner explains as follows in her affidavit of May 22, 2019 (at para 16):

> During the lead up to an election, the work of government employees shifts in many ways. In addition to the requirement that government employees standing for office take a campaign leave of absence, there is also a "blackout period" during the campaign period that applies to the Executive Council and the Executive Director. We are not permitted to engage in, or travel for the purposes of, government business unless reasonably required for the proper function of government (*Election Act*, HFNA 6/2011 s. 42(3)). The practical effect of the blackout period on the administration is that there are almost no committee meetings, meetings of Executive Council or work-related travel for the Executive Director or Executive Council during the campaign period. This allows for a shift in the duties performed by any staff whose regular role includes providing support to individual members of Executive Council, Executive Council as a whole or committees. There are also extra duties associated with preparing for and publicizing the election.

Ms. Warner acknowledged that the remuneration of members of Executive Council (including Councillors running for re-election) is continued during this "blackout" period, although she would characterize their remuneration as being "more akin to a salary or set honorarium than to hourly wages" (affidavit of Trudy Warner, para 27).

In explaining the differential treatment of employee candidates and incumbent Councillors during the election campaign, counsel for HFN explained that there are various trade-offs in the two situations. Whereas employee candidates, such as Mr. Nookemis, have the right to return to their

jobs if they are not elected, the incumbent Councillors have no such right and job to return to if they are not elected. Instead, they receive three months' remuneration intended to help them transition to new employment and income.

For the purposes of establishing a case of discrimination, I find the situation of incumbent Councillors running for re-election is not comparable to that of other government employees running for election. I accept that the HFN Government must continue in some limited form through the campaign period. Whereas some may feel that incumbent Councillors are treated more favourably than other government employees in these circumstances, as does Mr. Nookemis, in my view it does not amount to discrimination. The treatment is different but not discriminatory. The legislation responds to the unique circumstances of the Councillors during an election campaign and in my view falls with a range of potential, reasonable responses which could be chosen by the Huu-ay-aht legislature.

Does section 7(3) of the Election Act impose a hardship?

Mr. Nookemis says that section 7(3) imposes a hardship on several bases:

1. It results in a loss of income for candidate employees during the campaign period.
2. Even where a candidate employee may have enough accrued vacation entitlement to cover their income loss during the unpaid leave period, it still imposes hardship. In his own case, Mr. Nookemis points to the fact that he had to forego taking a vacation during an important family event, the birth of his granddaughter, in order to maintain an income during the campaign period.
3. It could create a potential hardship in regard to the provision of important services to citizens as a result of a government employee being on a leave absence.

Dealing with the third point, Mr. Nookemis used the example of water testing, suggesting there would be no one with the necessary expertise to replace the water tester in the event the tester decided to run for office. In her role as Executive Director, Ms. Warner has responsibility for implementation, administration and oversight of Huu-ay-aht laws and government policies. Ms. Warner said that it is the responsibility of the Executive Director to ensure that such services be provided, and she was confident that would occur under the legislation as it currently stands. I accept Ms. Warner's evidence on this point and consequently do not find that the unpaid leave requirement creates a hardship in respect to the provision of services to Huu-ay-aht citizens.

However, dealing with the first two points, I find that the mandatory unpaid leave in section 7(3) of the *Election Act* does create a hardship for Huu-ay-aht government employees who wish to run for elected office. It imposes an impediment to their political participation which is not imposed on other HFN citizens. The campaign leave requirement deprives candidate employees of their means of income during the campaign period and thus operates as a significant disincentive to their full participation in Huu-ay-aht self-government, which is a right guaranteed to them in section 1.4(a) of the HFN Constitution. In Mr Nookemis' case, the unpaid leave requirement has

meant he had to choose between running for election or being present with his family at the time of the birth of his granddaughter.

I will now turn to the constitutional issues raised in this case.

CONSTITUTIONAL CHALLENGE TO SECTION 7(3) OF THE *ELECTION ACT*

The fundamental issue in this case is whether section 7(3) of the *Election Act* should be declared invalid as being inconsistent with the individual rights in section 1.4 of the HFN Constitution.

It was properly accepted that the HFN has the jurisdiction to legislate upon the subject matters it has in the *Election Act*. That power flows from the Treaty and is put into effect through the HFN's consultative legislative process which involves both the HFN legislature and the HFN citizenry. This is a power which is consistent with section 35 of the Canadian *Constitution Act 1982* (being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11) and very much deserving of respect.

The constitutional issue in this case must be approached on the basis of respect for the unique position of legislative bodies. This approach is reflected in the principle of judicial deference to the determinations made by a legislative body which best reflect its view of the particular social, economic or political context at issue. In general, a legislature's determination on social, economic or political policies is to be respected and upheld as long as it falls within what can be seen as a reasonable range of alternatives in the circumstances: *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

At the same time, this law-making power is also subject to the rights of citizens. In the present matter, the HFN's legislative powers are subject to the HFN Constitution and the rights of HFN citizens as Canadians under the Charter. It is those rights which underpin the challenge raised by Mr. Nookemis.

First, the HFN Constitution guarantees HFN citizens certain individual rights. Of concern here are the political participation rights and the expression rights in subsections 1.4(a) and 1.4(d) of the HFN Constitution.

As Ms. Warner explained in her affidavit, after the Treaty was initialled in December 2006, the HFN Constitution was developed following significant community engagement and consultation. It was approved by Huu-ay-aht members in April 2007 with 82% of voters voting in favour. Huu-ay-aht laws, including the *Election Act*, were then prepared between 2008 and 2011 and enacted April 1, 2011. The HFN Constitution is a foundation piece for these laws.

As Canadian citizens, Huu-ay-aht citizens also have the rights set out in the Charter. Those rights include the right of freedom of expression in section 2(b) of the Charter and certain political rights in section 3 of the Charter.

The Huu-ay-aht laws enacted April 1, 2011 include the *Tribunal Act* which creates the Tribunal and, among other matters, gives it jurisdiction to review the validity of Huu-ay-aht laws (section 17(1)(b)) and to determine questions involving the HFN Constitution and the Constitution of

Canada (section 18(1)), which includes the Charter. The *Tribunal Act* and the Tribunal it creates are a part of Huu-ay-aht self-government.

Mr. Nookemis challenges the validity of the unpaid leave requirement in section 7(3) of the *Election Act*. In legal terms his challenge rests on two bases: the political rights guarantee in section 1.4(a) of the HFN Constitution and section 3 of the *Charter*; and the freedom of expression rights in section 1.4(d) of the HFN Constitution and section 2(b) the *Charter*. The relevant constitutional provisions are as follows:

> **HFN Constitution**
>
> 1.4 Subject to paragraph 1.2 and to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, all Huu-ay-aht citizens are equal under this Constitution and, based on this equality and in accordance with Huu-ay-aht customary law, possess:
>
> (a) the right to participate in Huu-ay-aht First Nations political activities, elections and government as set out in Huu-ay-aht First Nations law;
>
> . . .
>
> (d) the right to express opinions and views on Huu-ay-aht First Nations affairs;
>
> 1.3 Every Huu-ay-aht citizen enjoys all of the individual rights and freedoms guaranteed under the Constitution of Canada and by the various instruments of human rights in international law.
>
> **The Charter**
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression . . . .
>
> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

THE CASE LAW

Counsel for the HFN referred to several court decisions dealing with constitutional challenges to provisions similar to the unpaid campaign leave requirement in section 7(3) of the *Election Act*. These cases consider provincial legislation regulating the political activities of government employees in the provincial and municipal civil service, and, in one case, school board employees. The decisions include: *Jones v. Ontario (Attorney General)* (1988), 65 O.R. (2d) 737, 53 D.L.R. (4th) 273 (HCJ); *Jones v. Ontario (Attorney General) & Rheaume v. Ontario (Attorney* General), [1992] OJ No. 163 (leave to appeal to SCC denied); *O.P.S.E.U. v. Ontario (Attorney General)* (1995) 65 O.R. (2d) 689 (Ont H.C.J.); and *Baier v. Alberta*, [2007] 2 S.C.R. 673. .

In each of these cases the courts found that provisions mandating an unpaid campaign leave did not violate freedom of expression under s. 2(b) of the Charter. Though finding no breach of section 2(b), the courts in all but the *Baier* case went on to consider the justification test under section 1. They concluded that if the unpaid leave requirement were presumed to violate s. 2(b), the violation could be justified as a reasonable limit under section 1 as being a necessary and proportionate means to advance the legislative objective of maintaining the neutrality, impartiality and perceived neutrality and impartiality of the public service. In reaching this conclusion the courts relied in part on the longstanding Canadian constitutional convention of a neutral and impartial civil service which, they found, was incorporated into the Canadian constitution in 1867.

I find these court decisions to be distinguishable from the circumstances in the present matter on several bases.

First, these cases are based on the broad Charter right to freedom of expression under section 2(b) and are not, in my view, necessarily determinative in respect to the more focussed right of expression in s. 1.4(d) of the HFN Constitution. That right is uniquely articulated in the HFN Constitution as the right to express "opinions and views on Huu-ay-aht First Nations affairs." In my view, given its specific focus on HFN affairs, this right is deserving of its own interpretation and application within the particular context of the HFN's self-government.

Second, the determination as to whether a legislative infringement of expression rights can be justified under section 1 is heavily context dependent: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 para 87. I find the context and circumstances in the court decisions cited above to be distinguishable from the unique facts in this case. In short, the court decisions concern provincial and municipal governmental bodies which have much larger constituencies and public service workforces than the Huu-ay-aht. The analyses in these decisions are not necessarily applicable to the Huu-ay-aht context where there are 840 Huu-ay-aht citizens, 585 eligible voters, and only 60 Huu-ay-aht government employees, 30 of whom are Huu-ay-aht citizens.

As well, the historical context is different. The legislative provisions challenged in the court cases were based, in part, upon an historical constitutional convention in Canada regarding the duty of loyalty expected of public servants dating back to before the founding of the country in 1867. In contrast, Huu-ay-aht self-government under the Treaty not only emerged more recently but also specifically incorporates Huu-ay-aht customary law.

Lastly, I find the Supreme Court of Canada's decision in *Baier* to be distinguishable as it concerns school board elections. Huu-ay-aht self-government is not comparable to a school board, which is merely a creature of provincial legislation. As explained above, the HFN has its own constitution and significant legislative power, as recognized in the Maa-nulth Treaty (Preamble, paragraph D):

> The Maa-nulth First Nations assert that they have an inherent right to self-government, and the Government of Canada has negotiated self-government in this Agreement based on its policy that the inherent right to self-government is an existing aboriginal right within section 35 of the Constitution Act, 1982.

As Ms. Warner attested, in exercising these powers of self-government, the HFN Government provides a wide range of functions and services, including: "providing support to citizens from when they are babies in the womb until they are elder in need of care, delivering food fish, providing educational support and funding and considering lands department applications" (affidavit of Trudy Warner, para 23).

It is evident that the elections for school trustee positions in the *Baier* case are in no way comparable to the elections for HFN self-government.

For the reasons given above, I find the court decisions are not directly applicable or determinative of the constitutional issues before me. Instead, a more nuanced analysis needs to be undertaken considering the unique HFN constitutional rights in the context of HFN self-government and the specific circumstances of this case.

ANALYSIS OF THE CONSTITUTIONAL ISSUES

Does section 7(3) of the Election Act infringe on Political Participation Rights in s. 1.4(a)?

The first individual right enumerated in section 1.4 of the HFN Constitution is the right to participate in "Huu-ay-aht First Nations political activities, elections and government":

> 1.4 Subject to paragraph 1.2 and to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, all Huu-ay-aht citizens are equal under this Constitution and, based on this equality and in accordance with Huu-ay-aht customary law, possess:
>
> (a) the right to participate in Huu-ay-aht First Nations political activities, elections and government as set out in Huu-ay-aht First Nations law; . . . .

I find this right of political participation provides the strongest support for Mr. Nookemis' position that section 7(3) of the *Elections Act* violates his individual rights.

It is arguable that section 3 of the Charter (which guarantees "the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein") also applies if the Huu-ay-aht the Executive Council were to be considered "a legislative assembly" within section 3 of the Charter. However, it is not necessary for me to pursue that question here because, in my view, the political participation right in section 1.4(a) of the HFN Constitution provides a stronger basis upon which to support Mr. Nookemis' position than section 3 of the Charter.

Turning to section 1.4(a), counsel for the HFN argued that the phrase "as set out in Huu-ay-aht First Nations law" at the end of section 1.4(a) qualifies the nature of the political participation rights, in effect supporting and even insulating section 7(3) of the *Election Act* from review because the *Election Act* is a law "set out in Huu-ay-aht First Nations law." Counsel noted that this phrase or its equivalent is seldom found in the HFN Constitution and thus where it is found, as in section 1.4(a), it must be given meaning.

I cannot accept the entirety of that position. I find the HFN Constitution must be read as a whole and must be understood in light of its history and function within Huu-ay-aht laws and government overall. Reading the HFN Constitution as a whole, section 3.4 is critical. It states:

> 3.4 In the event of an inconsistency or conflict between this Constitution and the provisions of any Huu-ay-aht First Nations law, the Constitution prevails and the Huu-ay-aht First Nations law is, to the extent of the inconsistency or conflict, of no force or effect.

Thus the HFN Constitution and the rights it guarantees prevail over specific HFN laws. This is in accord with the basic function of a constitution and with the development of the HFN Constitution, as an overriding foundational document, before the specific Huu-ay-aht laws which followed.

As a result, the political participation rights in section 1.4(a) of the HFN Constitution will override any specific Huu-ay-aht law "to the extent of the inconsistency or conflict" (section 3.4, HFN Constitution).

Accordingly, the meaning I would attribute to the phrase "as set out in Huu-ay-aht First Nations law " is that it is a reference to the very specific nature of the Huu-ay-aht government, which includes, for instance, such distinctive components as the Ha'wiih Council and the People's Assembly. I cannot give meaning to that phrase in such a way as to insulate section 7(3) of the *Election Act* from review under section 1.4(a) of the HFN Constitution.

I also find that section 1.4(a) of the HFN Constitution is a particularly strong articulation of political participation rights. It is, for example, more expansive and more broadly expressed than the political rights in section 3 of the Charter, which is limited to "the right to vote and qualify for membership in elections of the House of Commons or of a legislative assembly" (emphasis added). In contrast, HFN citizens' political rights are broadly cast as "the right to participate in Huu-ay-aht First Nations political activities, elections and government" (emphasis added).

I find this more expansive expression of political rights in the HFN Constitution to be readily understandable given the unique nature and history of Huu-ay-aht First Nations self-government. It is not surprising that the right of political participation is placed first among the rights enumerated in section 1.4 of the HFN Constitution given its importance to the development and success of the Huu-ay-aht's self-government.

Political participation is also typically seen as the highest form of expressive activity which in turn is viewed as a core constitutional right. Mr. Nookemis' assertion that HFN Government employees should be able to run for political office unhindered by the unpaid leave requirement thus rests upon rights of the highest order and significance.

On that basis, and the hardship the unpaid leave provision imposed upon him, I find that section 7(3) of the *Election Act* infringes upon Mr. Nookemis' right of political participation in section 1.4(a) of the HFN Constitution.

Can the infringement of Mr. Nookemis' right of political participation be justified under section 1.4?

Section 1.4 of the HFN Constitution incorporates the phrase "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," which is taken directly from section 1 of the Charter. This is a deliberate invocation of the long-established *Oakes* test for justifying infringements of individual rights under the Charter: *R. v Oakes*, [1986] 1 S.C.R. 103.

By virtue of this phrase, the rights guaranteed to HFN citizens in s. 1.4 of the HFN Constitution are not absolute and they can be infringed upon if the infringement can be reasonably and demonstrably justified in accordance with the *Oakes* test. That test can be summarized as follows:

1. Pressing and substantial legislative objective – the objective of the law must be sufficiently important and necessary to warrant overriding a constitutionally protected right.
2. Proportionality Analysis - the means chosen by the legislator to meet the legislative objective must be reasonable and demonstrably justified, involving a proportionality analysis with three components:
   (i) *rational connection* - the provision that limits the constitutional right must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to that objective.
   (ii) *minimal impairment* - the provision should impair the right as little as reasonably possible.
   (iii) *proportionate effects* - there must be proportionality between the deleterious (unfavourable) effects of the law and salutary (beneficial) effects of pursuing the legislative objective; the more severe the deleterious effects of a measure, the more important the objective must be.

As noted above, the *Oakes* analysis must be made contextually in relation to the specific Huu-ay-aht circumstances.

There was little dispute at the expedited hearing regarding the HFN's legislative objective in section 7(3) which is to ensure a neutral public service and to avoid actual, potential or perceived conflicts of interest in the delivery of services to Huu-ay-aht citizens. Rather, the argument centered on the proportionality analysis: whether the means employed in section 7(3) of the *Election Act* is the least intrusive means to achieve this objective, and whether its deleterious effects are proportionate to the importance of the objective.

During the hearing, it was suggested that a tailored or selective approach to the campaign leave requirement (whereby only positions of a certain nature, responsibility or level within the administration would be subject to the leave requirement) could achieve the objective in a more minimally impairing fashion.

In her evidence, Ms. Warner maintained that a selective system of unpaid campaign leave would be unworkable and recommended against it for several reasons.

First, a selective system would make it necessary to monitor the workplace conduct of those candidate employees permitted to work during the campaign period to ensure they follow the campaign conduct rules and do not engage in campaigning during working hours nor use government offices or resources for campaign purposes.

Second, Ms. Warner maintained that a selective system of unpaid campaign leave would compromise HFN public confidence in the administration and raise concerns, real or perceived, about the equal provision of public services to all citizens in accordance with their constitutional right in section 1.4(f) of the HFN Constitution. Of particular concern for Ms. Warner were employees who have public-facing positions within the HFN Government, namely those whose primary role is to engage with, or provide services and benefits to, HFN citizens. Employees who must make discretionary decisions allocating resources or conferring benefits upon HFN citizens could be perceived to be making their decisions in a manner designed to curry favour with voters.

Ms Warner also stated that because of the small size of the HFN administration and electorate on the one hand and the wide range of services and benefits provided to HFN citizens on the other, there is frequent interaction between government employees and the electorate. As a result, the majority of government employees "directly provid[e] services to citizens for one reason or another." Ms. Warner's evidence was that approximately 31 of the 60 government employees were in public-facing roles and interact with citizens with some degree of regularity.

Finally, Ms. Warner was concerned that a selective system of unpaid campaign leave would create division within the relatively small Huu-ay-aht Government workforce and would give rise to perceptions of unfairness between those employees required to take unpaid campaign leave and those not required to do so.

In response, Mr. Nookemis submitted that the rules of conduct to be followed during an election campaign are known and clear and that government employees can and should be trusted to act in the best interest of the Huu-ay-aht people in their employment duties, including during the campaign period.

In weighing the salutary (beneficial) effects against the deleterious (unfavourable) effects of the law in the proportionality analysis of the *Oakes* test, counsel for the HFN submitted the salutary effects were:

- the blanket requirement in section 7(3) results in there being no conflict of interest concerns that would otherwise arise;
- the blanket requirement in section 7(3) ensures there is no perception that service would be delivered preferentially;
- the blanket nature of the approach results in there being no issues as to which positions should or should not be subject to the unpaid campaign leave requirement;
- as part of the section 7(3) approach, the employees are guaranteed the ability to return to their jobs if they are not elected or do not assume office; and
- though the leave is unpaid, the granting of the leave is guaranteed.

Counsel noted the deleterious effects as follows:

- the employees subject to the unpaid leave requirement must have accrued overtime or vacation entitlement they can and are willing to use, otherwise they face loss of income during the campaign period;
- as in the case of Mr. Nookemis, he was forced to use his vacation entitlement in order to continue receiving income during the campaign period, rather than use that vacation entitlement for an important family event, the birth of his granddaughter;
- the unpaid leave provision requires other employees to provide coverage for the work of the candidate-employees on leave; and
- most deleterious, the possibility that some employees may have chosen not to seek to participate as a candidate because of the requirement to take unpaid leave.

Along with the basic position and arguments he had raised all along, Mr. Nookemis said that if section 7(3) resulted in even one person deciding not to run in the election then that hurts both "them" and "us". In other words, broad citizen participation in the political processes of the HFN self-government is something Mr. Nookemis feels enhances not only the individual but also the collective strength of the Huu-ay-aht First Nation.

I have considered the positions and arguments of the parties and have read the cases, the affidavit and supporting materials submitted to me in this matter.

Taking a practical approach responsive to the HFN's circumstances, there are several distinguishing circumstances worth noting.

The first is the relatively small size of the Huu-ay-aht First Nations population in contrast to the federal, provincial, municipal or even school board contexts. There are 840 citizens, 585 eligible voters, and 60 Huu-ay-aht Government employees, only 30 of whom are citizens and subject to section 7(3) of the *Election Act*.

Another unique consideration is the significance of the HFN's achievement of self-government. While its population may be comparatively small, the importance and accomplishment of the Huu-ay-aht people in the development of their self-government is momentous.

Equally clear, I believe, is that the support and participation of Huu-ay-aht citizens in that self-government is critical. That accords with the prominence given to the political participation rights of the citizens as the first right enumerated in section 1.4(a) of the HFN Constitution. It also accords with the practical reality that HFN self-government is, relatively speaking, in its early days as this is only the third election for the Huu-ay-aht people.

Inherent within the unpaid campaign leave provision is a conflict of interest concern. It is often expressed in the cases as a need for public servants to be, and to be seen to be, neutral and impartial. Properly and helpfully put before me was a case dealing with alleged conflict of interest in a First Nations context: *Assu v. Chickite,* 1998 CanLII 3974 (BCSC). That case stressed that conflicts of interest must be viewed through a practical lens and emphasized the need to apply a flexible, rather

than strict, approach to conflict of interest questions in the context of a First Nation with a comparatively small number of citizens.

I find that flexible approach to be appropriate here. While a blanket rule (imposing an unpaid leave requirement on all government employee candidates regardless of the nature of their position) may be justified in the much larger federal, provincial or municipal contexts, I am not persuaded that such a blanket rule can be demonstrably justified as a reasonable limit on individual constitutional rights in the Huu-ay-aht context. I find that given the smaller number of electors and government employees involved in the present case, the importance of citizen political participation in Huu-ay-aht self-government as reflected in section 1.4(a) of the HFN Constitution, and the hardship that the unpaid campaign leave provision imposes, the blanket approach in section 7(3) of the *Election Act* is not justified.

Mr. Nookemis' situation is instructive. His evidence was that he and his family were forced to choose between using his accrued overtime and vacation entitlement for the birth of his granddaughter or using it to provide income during the campaign period. He and his family chose the latter because of the importance of political participation in Huu-ay-aht self-government, even in light of the high value placed on family in the Huu-ay-aht culture (one of the HFN's key values being respect for "our elders, our children, our families, our future generations and our kinship system"). But it was obviously a hardship; the choice itself was a hardship. That was particularly the case given the weak conflict of interest evidence or rationale in respect to his position as Community Maintenance Supervisor (the nature of which position I have described above).

I was helpfully provided with an organizational chart of the HFN Government administration. As noted earlier, given the expedited context in which both the application and hearing in this matter arose, we did not have evidence of the other positions in the organizational chart. However, when I asked about the rationale for requiring the Anacla school bus driver, for instance, to take an unpaid campaign leave in the event she or he sought elected office, it was apparent that there was no rationale for applying the leave requirement to that position.

In *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69, the Supreme Court of Canada considered broad exclusionary language, in that case a prohibition upon all civil servants from working for or against a political party or candidate. By banning all partisan-related activities by all public servants, without regard to their relative role, level or importance in the public service hierarchy, the Court found the restriction could not be justified under the proportionality test in *Oakes* test for the following reasons (per Sopinka J. at para. 61):

> The result of this broad general language is that the restrictions apply to a great number of public servants who in modern government are employed in carrying out clerical, technical or industrial duties that are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy. As stated by Dickson C.J. in *Fraser*, supra: "It is implicit throughout the Adjudicator's reasons that the degree of restraint which must be exercised is relative to the position and visibility of the civil servant" (p. 466). To apply the same standard to a deputy minister and a cafeteria worker appears to me to involve considerable overkill and does not

> meet the test of constituting a measure that is carefully designed to impair freedom of expression as little as reasonably possible.

Sopinka J. went on to observe that "common sense" should come into play, concluding that the restrictions in *Osborne* were "over-inclusive and go beyond what is necessary to achieve the objective of an impartial and loyal civil service."

For much the same reason, I conclude that the blanket nature of the unpaid leave requirement of section 7(3) of the *Election Act* in the context of the HFN Government is over-inclusive and overbroad and is not carefully designed to impair the section 1.4(a) political participation rights of government employees as minimally as reasonably possible.

Even if I were to accept some of the bases upon which the HFN Government says the unpaid leave requirement is merited, the leave requirement in section 7(3) of the *Election Act* is imposed in a blanket fashion upon all positions within the HFN government without regard to the nature of the position, the level of the position within the administration's hierarchy, the visibility and public interaction of the position, or the discretion exercised (if any) in the position.

I find the deleterious effects of the unpaid leave requirement (depriving government employee candidates of their means of income during the election campaign and potentially discouraging them from candidacy in HFN elections) outweigh the benefits of effectiveness, uniformity, and easy enforceability which the HFN says are the salutary effects of a blanket requirement of unpaid leave for all government employee candidates.

Accordingly, I am not convinced that the blanket nature of the unpaid leave requirement is a demonstrably justified and reasonable limit upon the right of political participation in section 1.4(a) of the HFN Constitution.

Does 7(3) of the Election Act violate section 1.4(d) of the HFN Constitution?

Having reached the conclusion that the unpaid campaign leave requirement in section 7(3) of the *Election Act* infringes upon Mr. Nookemis' political participation right in section 1.4(a) of the HFN Constitution, I need not belabour the analysis in respect to expression rights in section 1.4(d) of the HFN Constitution. Like the right of political participation in section 1.4(a), the right of expression in section 1.4(d) is a focussed provision, guaranteeing HFN citizens the right to "express opinions and views on Huu-ay-aht affairs" (emphasis added). This focus on the affairs of the HFN in section 1.4(d) is reflective of the importance which is placed upon individual participation in HFN self-government, consistent with section 1.4(a).

In my view, the same analysis and conclusion regarding political participation right in section 1.4(a) of the HFN Constitution is applicable to the expression right in section 1.4(d). I find that the unpaid campaign leave requirement in section 7(3) imposes a hardship on Mr. Nookemis' ability to engage in one of the highest forms of expressive activity - running for elected office – and is inconsistent with Mr. Nookemis' right to express views and opinions on HFN affairs under section 1.4(d) of the HFN Constitution.

I further find that this limitation on the section 1.4(d) right is overly broad for the reasons set out above.

REMEDY

I have concluded that the blanket nature of the unpaid leave in requirement in section 7(3) of the Election Act is overbroad and over-inclusive in relation to the important political participation and expression rights in sections 1.4(a) and (d) of the HFN Constitution.

That raises a critical point as to what should be the proper relationship between the Huu-ay-aht legislature and legislative process, on the one hand, and the HFN Tribunal on the other.

Mr. Nookemis is correct when he says there is a role for the Tribunal in reviewing the validity of HFN law. That is established in sections 17(1)(b) and 27 of the *Tribunal Act*:

> **Tribunal jurisdiction**
>
> 17 (1) Subject to this Act, the tribunal has jurisdiction to inquire into and
>
> . . .
>
> (b) hear and decide challenges to the validity of and references regarding Huu-ay-aht law, ...
>
> **Tribunal decision on challenge to Huu-ay-aht law**
>
> 27 (1) On an application under section 17 (1) (b), the tribunal may decide to
>
> (a) dismiss the challenge to the validity of the Huu-ay-aht law, or
>
> (b) declare the Huu-ay-aht law or any portion of it invalid.
>
> (2) The tribunal may suspend the effect of a declaration under subsection (1) (b) for a reasonable time to allow government sufficient time to remedy the defect in the Huu-ay-aht law.

However, there is a concomitant need for great care and restraint in the exercise of these powers by the Tribunal and for deference to the important legislative processes set out in the HFN Constitution and laws in the exercise of self-government. The Huu-ay-aht people, themselves and through their elected officials, have the best insight into their needs in the development of their laws. Where a particular law falls within the range of legitimate, reasonable alternatives in the circumstances, the judgement of the HFN legislature should not be second-guessed by the Tribunal.

In the present matter, I have found the blanket requirement of unpaid leave in section 7(3) of the *Election Act* to be inconsistent with the rights in section 1.4(a) and (d) of the Constitution and, in respect to Mr. Nookemis' position, it cannot be justified. On the basis of the nature of his duties, the level of his position within the administration, the visibility of his position and the limited discretion he exercises in carrying out his duties, I have found the application of section 7(3) to Mr. Nookemis' position as Community Maintenance Supervisor is in conflict with his rights in section 1.4(a) and 1.4(d) of the HFN Constitution and to that extent, pursuant to section 3(4) of the HFN Constitution, is of no force or effect.

Mr. Nookemis is not requesting a monetary remedy in this case and thus there is no need to consider his circumstances further. However, he did request that the unpaid leave requirement in section 7(3) as it applies to all other government employees be struck down in its entirety.

I am not prepared to do that on the basis of the necessarily limited evidence and arguments that were before me in the expedited hearing. While there were discussions at the hearing regarding the Anacla school bus driver position which would suggest that position should also not be subject to section 7(3) of the *Election Act*, there was limited evidence pertaining to any other specific positions within the HFN administration.

It may be, as asserted in Ms. Warner's affidavit, that those positions which are "the most obviously public facing" and which "have citizen-facing roles and responsibilities" should fall under the unpaid campaign leave requirement in section 7(3) of the *Election Act* in order to maintain the neutrality and impartiality, and perceived neutrality and impartiality, of the HFN administration. In her further explanation of that, Ms. Warner included in that category those employees "whose primary role is citizen engagement" (para 21), those "with discretion over the provision of emergency social services funding to citizens" (para. 22) and those who are the "bearer of resources to citizens" (paras. 22 and 23). The HFN submitted that to allow employees to continue in those roles while campaigning would produce actual or perceived conflict of interest concerns, monitoring and enforcement difficulties, and potential, "perceptions of preferential treatment and unfairness" among HFN citizens.

While these concerns may be applicable to certain positions or departments in the administration, there was an insufficient basis before me to make findings regarding these other departments and positions in the organizational chart. That is understandable, given the expedited nature of the proceedings, but regrettable in terms of coming to a full and final resolution of which positions within the Huu-au-aht government administration should be subject to section 7(3) of the *Election Act* and which should not.

In these circumstances, and acting with appropriate deference to the Huu-ay-aht's own knowledge and their legislative powers, in my view the matter ought to be returned to the Huu-ay-aht legislative process to determine which positions, in accordance with this decision, should be subject to the unpaid leave requirement in section 7(3) of the *Election Act* and which positions, like those of Mr. Nookemis and potentially the Anacla school bus driver, should not.

As things stand now there could simply be further applications brought by affected employees as and when the issue arises again in a future election. In my view, dealing with the issue in that *ad hoc* manner would be inefficient and not the most practical approach. The better option would be to resolve the matter through discussions, which both parties at the hearing agreed would be the desirable approach following the election. I highly encourage that and note that facilitation or mediation may be of assistance to those discussions.

Brent Mullin
Tribunal Vice-Chair