



huu ay aht

ANCIENT SPIRIT, MODERN MIND

**HUU-AY-AHT FIRST NATIONS
TRIBUNAL**

Tribunal Application #2023-01

BETWEEN:

Connie Waddell

APPLICANT

AND:

John Jack, Brad Johnson, Kit Spence, and Kimberley MacDonald

RESPONDENTS

REASONS FOR DECISION

*In Respect of an Application for Declaration of Invalid Election
[pursuant to the *Election Act*, ss. 70, 71]*

TRIBUNAL MEMBERS: John Rich, Chair

DATE OF DECISION: June 28, 2023

DATE OF HEARING: June 27, 2023

PLACE OF HEARING: Videoconference (Zoom)

APPEARANCES: Connie Waddell, Applicant
Benjamin Isitt, for the Respondent, John Jack
Kit Spence, Respondent
Brad Johnson, Respondent
Kimberley MacDonald, Respondent

The Application

1. The Applicant, Ms. Waddell, brings this application for a declaration that the Huu-ay-aht First Nations (“HFN”) election for Chief and Councillors, held June 17, 2023, be declared invalid (the “Application”).
2. In support of her Application, the Applicant alleges breaches of s. 42 of the *Election Act*, and breaches of the *Code of Conduct and Conflict of Interest Act* (“COCCIA”), ss. 10.1, 10.2, 11.1.2, 12.1, 15, 16, 17 and 18.
3. The Applicant names four Respondents to the Application:
 - a) John Jack, who was elected Chief Councillor in the June 17, 2023 election,
 - b) Kit Spence, the Election Commissioner for the June 17, 2023 election,
 - c) Brad Johnson, who was elected Councillor in the June 17, 2023 election, and
 - d) Kimberley MacDonald, HFN staff member, who collected signatures on behalf of John Jack.
4. The Application alleges:
 - a) Campaigning within 50 meters of [HFN government] office,
 - b) [HFN government] staff received [election] materials to work email,
 - c) Ballots were sent out before [the election] materials,
 - d) Nomination material was [circulated] by an employee on work time,
 - e) Carvings were purchased while campaigning.
5. The Application was filed Thursday, June 22, 2023, five days after the election.

6. Pursuant to s. 70(6)(a) of the *Election Act*, the Tribunal directed that the Application would be determined at an oral hearing, and set a hearing date for Tuesday, June 27, 2023 by videoconference.
7. A pre-hearing conference attended by all parties and the Tribunal Chair was held Monday, June 26, 2023.
8. The hearing of the matter was conducted by the Tribunal Chair, Tuesday, June 27, 2023. The hearing was attended by the Applicant and all Respondents and was open to viewing on Zoom by the public.

The Legislation

9. The *Election Act* provides at s. 70(1) that “an application to have an election declared invalid may only be made under this section”.
10. Section 70 further provides:

“70(4) An application may only be made
 - (a) within 7 days of voting day,
 - (b) on the ground that a contravention of this Act, whether or not an offence is or was the subject of a prosecution, affected or may have affected the outcome of an election, and (emphasis added)
...”
11. The Application complies with s. 70(4)(a), having been made within 7 days of voting day.
12. However, the allegations in the Application relating to alleged breaches of the *COCCIA* do not meet the mandatory requirement of s. 70(4)(b), which provides that an application may only be made on the ground of a contravention of the *Election Act*. Consequently, allegations that the *COCCIA* has been breached have been disregarded in considering the Application.

13. The *Election Act* further provides:

“71(1) Within 7 days of receiving an application under section 70, the tribunal must declare one of the following:

- (a) The election is valid;
- (b) The election is invalid and another election must be held as soon as practicable to fill the elected offices;
- (c) The election of a candidate is invalid and the office is vacant;
- (d) The election of a candidate is invalid and another candidate is duly elected.
...”

Decision

14. For the reasons that follow, I have decided, pursuant to s. 71 of the *Election Act*, that the election held June 17, 2023 was valid.

Evidence at the Hearing

Applicant’s Evidence

15. The Applicant presented evidence from three witnesses:

- a) Sandra Young, an HFN employee who testified respecting the Respondent, Kimberley MacDonald, soliciting signatures for a nomination on or about May 3, 2023,
- b) Bruce Nookemus, an HFN citizen who testified that he sold a carving to John Jack during the campaign period, and
- c) The Applicant herself, who testified that when she had heard about Kimberley MacDonald collecting signatures at the HFN offices, she contacted the Election Commissioner to complain.

16. The Applicant also relied on an email sent by John Jack to HFN electors, including to electors whose email addresses were HFN government email addresses.

Respondents' Evidence

17. The Respondent, John Jack, elected Chief Councillor on June 17, 2023, was represented by counsel. Mr. Jack presented two witnesses:
 - a) Stephen Rayner, a successful candidate for Council in the June 17, 2023 election, who testified that Bruce Nookemus “always offers” to sell carvings. He stated that in his interaction with Mr. Nookemus there was no suggestion that Mr. Nookemus was trying to influence the election.
 - b) Mr. Jack, himself, whose testimony included:
 - i) A denial that he attended any government office during the election campaign, with the exception of an all-candidates meeting, held at a government office,
 - ii) That on June 15, 2023, he sent a broadcast email to all persons on the voters list, provided by the Election Commissioner, who had email addresses, and that of 11 of the electors on the list had listed their HFN government email addresses, and
 - iii) That on or about June 1, 2023, he purchased two carvings from Bruce Nookemus at Anacla, but did not talk about the election.
18. Mr. Jack also submitted a brief of documents which were admitted into evidence, including the electors lists, which had been provided by the Election Commissioner and from which Mr. Jack used email addresses to distribute his campaign materials under his email of June 15, 2023. These documents corroborated Mr. Jack’s explanation of his June 15 broadcast email.
19. Election Commissioner, Kit Spence, explained that election ballots were sent out several days prior to the descriptive material respecting the election, explaining that this was done on the basis of practicality. He also noted that he counted 15 persons who use HFN

government email addresses on the list of electors, which had been provided to him by the HFN Law Clerk.

20. Brad Johnson, who was elected Councillor in the June 17, 2023 election, submitted two documents as evidence:
- a) A notice of call for nominations, which identified the nomination period to be open from Monday, May 1 to Thursday, May 11, 2023, and
 - b) His nomination form, dated May 2, 2023.

Mr. Johnson testified that these documents established the date of his nomination, and that campaigning for the election had not yet begun.

21. Kimberley MacDonald testified that she did solicit signatures on behalf of John Jack and another person, on or about May 2 or 3, but it was done during her break at work.

The Issues

Did any Respondent campaign within 50 meters of the government offices, contrary to s. 42(a) of the Election Act?

22. The Applicant alleges that Chief-Elect, John Jack, having sent an email to a number of HFN government email addresses has contravened s. 42(1) which provides:

“42(1) A candidate, and any person campaigning for a candidate, must not do any of the following:

- (a) campaign at or within 50 meters of an office of a Huu-ay-aht body;
 - (b) require a public officer to provide services or resources to a candidate either directly or indirectly;
 - (c) use a Huu-ay-aht body’s resources for their campaign.
- ...”

23. There is no evidence that any of the Respondents physically campaigned within 50 meters of an HFN office. The only evidence in this regard is to the contrary, with John Jack expressly denying that he had been within 50 meters of an HFN office during the campaign, with the exception of attending an all-candidates meeting.
24. The Applicant argued that s. 42(1)(a) should be interpreted to include emails to persons using HFN government email addresses.
25. The Tribunal rejects the Applicant's interpretation. "Campaigning at or within 50 meters" necessarily implies an activity and a physical distance. While an email may qualify as a campaigning activity, it has no relationship whatsoever to a physical distance of 50 meters or otherwise.
26. Thus, the Tribunal finds there has been no breach of s. 42(1)(a).
27. In argument, the Applicant further asserted a breach of s. 42(1)(c), "use of a Huu-ay-aht body's resources for their campaign", being the June 15 email to persons with an HFN government email address. It is questionable whether an email address is a "resources of a Huu-ay-aht body", but regardless, it is not the candidates who are using that resource, but rather the recipients of the email.
28. Accordingly, the Tribunal finds there has been no breach of s. 42(1)(c).

Ballots sent out before materials

29. The Applicant submitted that the fact that ballots were sent out to HFN members before the election materials were sent out was improper procedure, but failed to identify any alleged contravention of the *Election Act*, as required by s. 70.
30. Election Commissioner Spence explained the permissive nature of the *Election Act* sections 43 and 48, with respect to the distribution of materials and ballots, and explained that the delay between the mailing of the ballots and the mailing of the materials was a matter of practicality.

31. The Tribunal accepts the evidence of Election Commissioner Spence and finds that although it is correct that the ballots were mailed before the materials, that does not constitute a breach of the *Election Act*.

Soliciting nomination signatures at government office

32. The Applicant alleges that an HFN employee, Ms. MacDonald, solicited nomination signatures at a government office, on work time.
33. Ms. MacDonald testified that she was on her break when she was soliciting signatures for Mr. Jack, on or about May 2, 2023, during the nomination period. She also testified that the signatures she collected were never used, as Mr. Jack's nomination papers were filed using other signatures.
34. The Applicant argued that being on a break was no excuse, nor that the signatures collected were not actually used, but rather, this was election activity on government property.
35. The Tribunal finds that there are two problems with the Applicant's argument. First, this activity, even if inappropriate, was in relation to a nomination, and not the election itself. Second, the Applicant failed to avail herself of the appeal procedure in the *Election Act* which allows for the challenge to nominations.
36. Further, in the event that the Tribunal is wrong in this observation, the Tribunal finds that this irregularity, if confirmed, did not materially affect the outcome of the election, as required by the *Election Act*, s. 71(2)(b).

Carvings

37. The Applicant contended that Chief-Elect, John Jack, purchased carvings from HFN citizen, Bruce Nookemus, on or about June 1, 2023, within the campaign period.
38. The Applicant failed to identify a section of the *Election Act* which was allegedly breached by this purchase, but rather contended that it was "improper".

39. The evidence of John Jack was that he did purchase two carvings from Mr. Nookemus on or about June 1, 2023, but did not discuss the election with Mr. Nookemus. This evidence was confirmed by Mr. Nookemus who testified that Mr. Jack just came in and bought a carving, but did not discuss the election.
40. Thus, the Tribunal finds no merit in this claim.

Order

41. The Tribunal has found that the Applicant has failed to establish any contraventions of the *Election Act*, as required by s. 70(4)(b), "...that a contravention of this Act...affected or may have affected the outcome of an election".
42. Further, the Tribunal notes the requirement of the *Election Act*, s. 71(2):
- "71(2) The tribunal must not declare an election invalid only because of an irregularity or failure to comply with this Act or regulations if the tribunal is satisfied that:
- (a) the election was conducted in good faith and in accordance with the purposes of this Act, and
 - (b) the irregularity or failure did not materially affect the outcome of the election.
- ..."
43. Thus, even if there was some irregularity in respect of compliance with the Act or regulations, s. 71(2) must be applied.
44. Having heard all of the evidence, the Tribunal is satisfied that:
- a) The election was conducted good faith and in accordance with the purposes of the Election Act, and
 - b) Any irregularity or failure did not materially affect the outcome of the election.
45. Pursuant to s. 71(1), the Tribunal declares that the June 17, 2023 Huu-ay-aht First Nations election for Chief Councillor and Councillors is valid.

46. No parties sought costs in this proceeding and the Tribunal makes no order respecting costs.

Dated: June 28, 2023

A handwritten signature in black ink, appearing to read "J. Rich", is written above a horizontal line.

John Rich
Tribunal Chair