THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2018/0254

BETWEEN:

LEON NATTA-NELSON

Claimant

and

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Defendant

Appearances:

Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Claimant
Mr. Douglas Mendes S.C., with him Ms. Gabrielle Gellineau and Ms. Simone Bullen Thompson, Solicitor General, for the Defendant

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2019: February 8
March 25

JUDGMENT

[1] **VENTOSE, J**.: The Claimant has been employed since 22 August 2011 as an accountant in the Customs Department in the Ministry of Finance.. He has political aspirations and wishes to compete as a candidate for the St. Kitts-Nevis Labour Party (the "**Labour Party**") against the Prime Minister, who is the incumbent representative for the Constituency of Saint Christopher 7. However, the Claimant

claims that the provisions of Rules 36 and 38 of Public Service (Conduct and Ethics of Officers) Code, SRO No. 9 of 2014 (the "**Code**") stand in his way.

[2] The Claimant avers that the effect of Rules 36 and 38 of the Code is to prohibit public officers from attending public meetings or engaging in political activities, in particular, running for political office, unless they first resign from the public service. The Claimant further avers that unless Rules 36 and 38 of the Code are impugned, they will cause him serious hardship, especially since he does not have a sufficient number of years of service in the public service to resign and receive pension benefits. Additionally, the Claimant states that if he resigns to compete in the next Federal Elections, which are constitutionally due in January 2020 and loses, he will not be able to return to his job as an accountant in the public service. The Claimant avers that it is this predicament, inconvenience and hardship that made him file his application by way of originating motion seeking declarations against the force and validity of the subsidiary legislation in question, namely, Rules 36 and 38 of the Code.

[3] The Claimant on 15 October 2018, therefore, filed an application by way of originating motion seeking the following reliefs:

(a) A Declaration that the restrictions imposed on the freedom of expression and assembly and association by statutory rules 36 and 38 of the Public Service (Conduct and Ethics of Officers) SRO 9 of 2014 violate the provisions of sections 3(b), 12 (c), and 13(c) of the Constitution and are not reasonably required for the proper performance of the public officer's functions, and in any event are not reasonably justifiable in a democratic society;

(b) A Declaration that the restrictions imposed by statutory rules 36 and 38 of the Public Service (Conduct and Ethics of Officers) SRO 9 of 2014 without qualification or exception, are wholly arbitrary and disproportionate and are therefore not reasonably required for the proper performance of a public officer's functions and in particular the Claimant's functions as Accountant of Customs in the Ministry of Finance;

(c) A Declaration that statutory rules 36 and 38 of the Public Service (Conduct and Ethics of Officers) SRO 9 of 2014 contravene sections 3(b), 12 (c), and 13(c) of the Constitution, and therefore

statutory rules 36 and 38 are unconstitutional, null and void and of no effect;

(d) A Declaration that the Claimant is entitled to take part in active part in a political organization and more importantly run for elected office or public office in the Federal Elections of the Federation of Saint Christopher and Nevis;

(e) Damages;

(f) Costs;

(g) Such further orders as this Honourable Court deems fit.

[4] The first issue for determination is whether Rules 36 and 38 of the Code contravene sections 3(b), 12 (2)(c), and 13(2)(c) of the Constitution.

The Public Service (Conduct and Ethics of Officers)

[5] The Code was made by the Minister in the exercise of the powers conferred upon him by section 53 of the Public Service Act, No. 19 of 2011 (the "**Public Service Act**"). Section 53(3)(b) of the Public Service Act provides that the Minister may make provision for *inter alia* codes of conduct and ethics for public officers.

[6] Rules 4, 36 and 38 of the Code provide as follows:

Public Meetings.

(1) A public officer shall not call a public meeting to consider any action of the Government or speak or otherwise actively take part in such meeting.

(2) Subsection (1) applies to a public officer appearing on the platform at a public meeting which is convened with the object of considering or discussing a matter which involves the Government or the actions of the Government.

(3) Subsection (1) shall not apply to public meetings of a religious nature.

Engaging in political activities.

A public officer shall not engage in party political activity at any time, including,

(a) holding office or taking active part in any political organization;

(b) engaging in political controversy or publicly criticizing the policy of the Government or department of Government;

(c) writing letters to the press, publishing books or articles, circulating leaflets or pamphlets or participating in radio or television broadcast on political matters;

(d) canvassing in support of political parties or in any way publicly supporting or indicating support for any political party or candidate.

4. Application of Code.

The Code shall apply to all public officers except in cases where, by virtue of the Constitution or any other law in force in Saint Christopher and Nevis, specific provision is made with respect to a particular public office or category of public offices.

[7] Rule 36 applies to all public officers and prohibits them from taking part in public meetings. Rule 38 prohibits all public officers from engaging in any form of political activity at any time.

The Constitutional Provisions

[8] Sections 3(b), 12(2)(c), and 13(2)(c) of the Constitution of Saint Christopher and Nevis are as follows:

3. Fundamental rights and freedoms.

Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, birth, political opinions, colors, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

…

(b) freedom of conscience, of expression and of assembly and association; and

…

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest.

12. Protection of freedom of expression.

(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including

freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision

…

(c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

13. Protection of freedom of assembly and association.

(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assembly freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests or to form or belong to political parties or other political associations.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision

…

(c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

[9] The Claimant essentially submits that Rules 36 and 38 are not reasonably required for the proper performance of the Claimant's role as an accountant in the Customs Department and are, in any event, not reasonably justifiable in a democratic society such as Saint Christopher and Nevis in which the public service makes up the largest portion of the employment sector.

[10] The courts in the Commonwealth Caribbean have had the opportunity on various occasions to consider whether statutory provisions, rules or public service orders

that purport to limit the rights of public officers to participate in political activity, broadly interpreted, infringe the fundamental rights and freedoms of public officers, namely, the protection of freedom of expression and the protection of freedom of assembly and association. The leading authority in the Commonwealth Caribbean is, of course, **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing** [1999] 1 A.C. 69. In that decision, the Privy Council had to consider whether section 10(2)(a) of the Civil Service Act of Antigua and Barbuda which prohibited the communication by civil servants to any other person of any information or expressions of opinion on matters of national or international political controversy contravened the fundamental rights and freedoms provisions of the Constitution of Antigua and Barbuda relating to the protection of freedom of expression and the protection of freedom of assembly and association.

[11] The starting point in **de Freitas** is the recognition of the important role that public officers play in society and why the Constitution expressly recognizes limitations on their rights to free expression and to peaceful assembly and association. The Privy Council stated (at 75-76) that:

> Their Lordships also recognise the special position which is enjoyed by civil servants in a democratic society. As Floissac C.J. pointed out in the Court of Appeal, in every truly democratic society a civil servant holds a unique status in many respects. As the servant or agent of the state he enjoys special advantages and protections and correspondingly must submit to certain restrictions. Their special position is recognised in the existence of a special chapter, chapter VII, in the Constitution containing provisions relating to them and to the express provisions in sections 12 and 13 authorising restrictions on the freedoms contained therein. The preservation of the impartiality and neutrality of civil servants has long been recognised in democratic societies as of importance in the preservation of public confidence in the conduct of public affairs. The point can be found in the quotation which Redhead J. took from Hood Phillips, Constitutional and Administrative Law, 5th ed. (1973), p. 299: "the public interest demands the maintenance of political impartiality in the Civil Service and confidence in that impartiality as an essential part of the structure of government in this country." Along with these elements of neutrality and impartiality their Lordships would associate an element of loyalty, in particular to the minister whom the civil servant has been appointed to serve. The importance of these characteristics lies in the

> necessity of preserving public confidence in the conduct of public affairs. That is at least one justification for some restraint on the freedom of civil servants to participate in political matters and is properly to be regarded as an important element in the proper performance of their functions.

[12] The important elements from this passage are as follows: (1) the special position of public officers is recognized in the Constitution because a chapter of the Constitution is devoted solely to them and the express provisions in section 12 and 13 provide specific restrictions on public officers of the freedoms contained therein; (2) the need to preserve the impartiality and neutrality of public officers is to preserve public confidence in the conduct of public affairs; (3) the element of loyalty of public officers is important, particularly to the minister whom the public servant has been appointed to serve; (4) the preservation of public confidence in the conduct of public affairs is one justification for some restraint on the freedom of public officers to participate in political affairs; and (5) the latter point is an important element in the proper performance of the functions of public officers.

[13] The Privy Council also opined (at p. 76) that:

> The general proposition that civil servants hold a unique status in a democratic society does not necessarily justify a substantial invasion of their basic rights and freedoms. The proper balance to be struck between the freedom of expression and the duty of a civil servant properly to fulfil his or her functions was discussed by Dickson C.J.C. in In re Fraser and Public Service Staff Relations Board (1985) 23 D.L.R. (4th) 122 …

[14] There cannot, therefore, be any substantial invasion of the fundamental rights and freedoms of public officers, and a proper balance must be struck between the freedom of expression and the duty of a public officer to fulfill his or her functions. The Privy Council also explained (at 77-78) that:

> The restrictions which may consistently with the Constitution be imposed upon the freedom of expression in section 12 and the freedom of assembly in section 13 of the Constitution in the case of civil servants must be restrictions which are reasonably required for the proper performance of their functions. Furthermore they must be reasonably justifiable in a democratic society. The considerations which are relevant to these two requirements may to an extent overlap, but their Lordships turn first to the former.
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> …

> But their Lordships are not persuaded that the restrictions set out in section 10 without qualification would meet the condition that they be reasonably required for the proper performance of the civil servant's functions. A blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy would in the view of their Lordships be excessive. It would not satisfy the qualification in the Constitution that the restriction be reasonably required for the proper performance of their functions. …

[15] Some observations are necessary here. First, the restrictions that may consistently with the Constitution be imposed upon the freedom of expression and the freedom of assembly and association of public officers must be those restrictions that are: (1) reasonably required for the proper performance of their functions; and (2) reasonably justifiable in a democratic society. Secondly, any blanket restraint, without qualification, on the ability of public officers to express any view on political matters is excessive and would not be reasonably required for the proper performance of their functions.

[16] The test accepted by the Privy Council to be applied was whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. The Privy Council was prepared to accept in principle that the first two of these criteria could be met in the case of civil servants once it is noticed that their special status, with its advantages and restraints, is recognized as proper in the administration of a free society. In relation to the third, the Board clarified (at 81-82) that:

> … But the third criterion raises a question of proportionality which was developed in argument by junior counsel for the applicant and gives rise to real difficulty for the respondents. The blanket approach taken in section 10 imposes the same restraints upon the most junior of the civil servants as are imposed upon the most senior. The point was made by Redhead J. that in the United Kingdom there are classes of civil servants related to the seniority of the posts which they fill and a distinction is made between the classes as to the extent of any restraints imposed upon them in regard to their freedom of political expression. In the Civil Service Act of Antigua and Barbuda a considerable analysis of the grades of civil servants is set out in Schedule 1 and it would plainly be practical to devise a comparable

> system of classification as has been adopted in the United Kingdom. Without some such refinement their Lordships are not persuaded that the validity of the provision can be affirmed. The distinction between the different grades of civil servant and the application of the provision in particular circumstances to particular individuals cannot in their Lordships' view sufficiently be made by the implied condition proposed by the Court of Appeal for the reasons which have already been set out. It was for the applicant to show that the restraint, with its qualification, was not reasonably justifiable in a democratic society and their Lordships are persuaded that that has been shown to be the case.

[17] The Privy Council held that the blanket approach in section 10 of Civil Service Act of Antigua and Barbuda whereby the same restraints upon the freedom of expression of the most junior of civil servants are also imposed on the most senior was simply not proportionate. Consequently, it held that section 10(2)(a) of Civil Service Act which prohibited the communication by civil servants to any other person of any information or expressions of opinion on matters of national or international political controversy could not survive as it stood and was, therefore, unconstitutional.

[18] In **Osborne v Canada (Treasury Board)** [1991] 2 S.C.R. 69, the Canadian Supreme Court had to consider the constitutionality of section 33 of the Public Service Employment Act that prohibited public servants from engaging in work for or against a political party or candidate. The Supreme Court then applied the two central criteria that must be satisfied to establish a reasonable limit as set out in **R v Oakes** [1986] 1 S.C.R. 103, namely, first, the government objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; and second, the means chosen must be reasonable and demonstrably justifiable in a free and democratic society. It also stated that the proportionality requirement has three aspects, namely: (1) the existence of a rational link between the measures under review and the objective; (2) a minimal impairment of the right or freedom; and (3) a proper balance between the effects of the limiting measures and the legislative objective.

[19] The Supreme Court then held that: first, the importance of the governmental objective was not at issue because it was for the preservation of the neutrality of

the civil service to the extent necessary to ensure their loyalty to the government of Canada and, therefore, their usefulness in the public service. Second, it was beyond dispute that restricting partisan political activity was rationally connected to the objective of maintaining the neutrality of the public service. The Supreme Court, however, noted that the question of whether the government had chosen a means that was carefully designed to meet its objective was open to serious question. In relation to this, the Supreme Court opined as follows:

> 56 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.C. in Fraser: "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 [[1985] 2 S.C.R., p. 243 C.C.E.L.]). 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.

[20] The Supreme Court continued that:

> 59 To summarize, the impugned legislation bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the hierarchy of the public servant. …

[21] Consequently, the Supreme Court concluded that, since section 33 of the Public Service Employment Act failed the minimum impairment test, it was unnecessary to consider the third aspect of the proportionality test. Although noting that **Fraser v Public Service Staff Relations Board** [1985] 2 S.C.R. 455 was decided without consideration of the Canadian Charter of Rights and Freedoms, the Supreme Court, after outlining the principles stated therein, noted that:

> 41 Applying the criteria expounded above, I cannot see how it may be said that the oppugned section in the present case does not constitute a violation of the right to freedom of expression. By prohibiting public servants from speaking out in favour of a political party or candidate, it expressly has for its purpose the restriction of expressive activity.

[22] The legislation was, therefore, held by the Supreme Court to be unconstitutional.

Application of Principles to Rules 36 and 38 of the Code

[23] Section 10(2)(a) of the Civil Service Act 1984 of Antigua and Barbuda is in similar terms to Rule 38 of the Code. It will be remembered that section 10(2)(a) prohibited the communication by all public officers to any other person of any information or expressions of opinion on matters of national or international political controversy. Rule 38 of the Code prohibits all public officers from engaging in party political activity at any time, including: (b) engaging in political controversy or publicly criticizing the policy of the Government or department of Government; and (c) writing letters to the press, publishing books or articles, circulating leaflets or pamphlets or participating in radio or television broadcast on political matters.

[24] The Claimant submits that Rules 36 and 38 of the Code are perfectly clear and unambiguous – they expressly and specifically preclude all public servants, irrespective of their rank or function from political expression and from assembly and association with political parties and candidates. The Claimant further submits that since Rules 36 and 38 of the Code seek to limit the most junior to the most senior of the members of the public service, the limitation was far more than what is necessary constitutionally to limit the fundamental rights and freedoms of public officers. In the Claimant's view, these rules contravene the Constitution and are, therefore, null and void.

[25] The Defendant submits that Rules 36 and 38 of the Code apply to the full gamut of public officers employed in the civil service of Saint Christopher and Nevis and cover a wide range of activities encompassed in the right to freedom of expression and freedom of assembly and association. The Defendant continues that these fundamental rights and freedoms may be impaired by a law which "imposed restrictions upon public officers that are reasonably required for the proper performance of their functions", but not if the law is shown "not to be reasonably justifiable in a democratic society" – sections 12(2)(c) and 13(2)(c) of the Constitution. The Defendant further submits that it is for the court to determine

whether the Rules are so excessive in their coverage as not to be reasonable required in a democratic society, and if the court comes to this conclusion a declaration of invalidity would be appropriate. It must be noted that the Defendant did not defend the constitutionality of Rules 36 and 38 of the Code.

[26] The Supreme Court of Canada in **Osborne** held that legislation that "bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the hierarchy of the public service" is unconstitutional. The Privy Council in **de Freitas** held that a "blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy" was excessive, and it would not satisfy the qualification in the Constitution that the restriction be reasonably required for the proper performance of their functions. Rules 36 and 38 of the Code are similarly widely worded and cover all public servants and cover a considerable range of activities that would ordinarily fall within the scope of the right to freedom of expression guaranteed under section 12(2)(c) and the right to freedom of assembly of association guaranteed under section 13(2)(c) of the Constitution. Consequently, Rules 36 and 38 of the Code contravene sections 3(b), 12(2)(c), and 13(2)(c) of the Constitution and null and void and of no effect, because they are not reasonably required for the proper performance of the functions of public officers in Saint Christopher and Nevis.

The Claimant's Personal Declaration

[27] The Claimant also seeks a declaration that he is entitled to take an active part in a political organization and more importantly run for elected office or public office in the Federal Elections of the Federation of Saint Christopher and Nevis. I agree with both parties that the Constitution of Saint Christopher and Nevis does not disqualify public servants from membership in the National Assembly. Since being public servant is not a disqualification for participating in Parliamentary Elections in Saint Christopher and Nevis, it is not necessary for me to consider in detail the facts and reasoning of **Daniel et al v Public Service Commission and the Attorney General of St. Vincent and the Grenadines** (SVGHCVAP2016/0007

dated 19 January 2019). Section 28(5)(a) of the Constitution merely empowers Parliament to disqualify a person from being elected or appointed as a member of the National Assembly "if he holds or is acting in any office or appointment", but Parliament has not so provided.

The Legal Authorities

[28] The Defendant submits that, as a public servant, the Claimant is under a duty of loyalty to his employer, the Government, and this duty places limitations on his activities, which if exceeded, may expose him to disciplinary action, citing the decision of the Supreme Court of Canada in **Fraser v Public Service Staff Relations Board** [1985] 2 S.C.R. 455. The Privy Council in **De Freitas** expressly approved of some of the reasoning in **Fraser**. In that decision, the Supreme Court had to consider the question of whether the Adjudicator erred in deciding that the appellant, a federal public servant, was properly discharged from his job as a unit supervisor in the Department of Revenue Canada after having expressed views highly critical of the Government. Before commencing its decision, the Supreme Court clarified that its decision did not arise under either the Canadian Charter of Rights and Freedoms (which had not been proclaimed when the events in the case arose) or the Canadian Bill of Rights, R.S.C. 1970, App. III (because no federal law was challenged). Accordingly, the "freedom of expression" and "freedom of speech" provisions of these watershed documents were not in issue. It however noted (at [24]) that:

> That is not to say, however, that this is not, at least in part, a 'freedom of speech' case. It is. As Mr. Fraser correctly points out, 'freedom of speech' is a deep-rooted value in our democratic system of government. It is a principle of our common law Constitution, inherited from the United Kingdom by virtue of the preamble to the Constitution Act, 1867.

[29] The Supreme Court explained its reasons as follows:

> 35 The Adjudicator recognized that a balance had to be struck between the employee's freedom of expression and the Government's desire to maintain an impartial and effective public service. He said:
>
> > [It is] incumbent upon the public servant to exercise some restraint in the expression of his views in opposition to

> Government policy. Underlying this notion is the legitimate concern that the Public Service and its servants should be seen to serve the public in the administration and implementation of Government policies and programs in an impartial and effective manner. Any individual upon assuming employment with the Public Service knows or ought to be deemed to know that in becoming a public servant he or she has undertaken an obligation to exercise restraint in what he or she says or does in opposition to Government policy. Moreover, it is recognized that the exercise of such restraint may very well not be a requirement of employees who work in less visible sectors of Canadian society.

In other words, a public servant is required to exercise a degree of restraint in his or her actions relating to criticism of Government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties. 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.

36 In my opinion, the Adjudicator was correct in identifying the applicable principles and in applying them to the circumstances of the case. The act of balancing must start with the proposition that some speech by public servants concerning public issues is permitted. Public servants cannot be, to use Mr. Fraser's apt phrase, "silent members of society". I say this for three reasons.

37 First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

38 Secondly, account must be taken of the growth in recent decades of the public sector — federal, provincial, municipal — as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.

39 Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. Can anyone seriously contend that a municipal bus driver should not be able to attend a town council meeting to protest against a zoning decision having an impact on her residential street? Should not a provincial clerk be able to stand in a crowd on a Sunday afternoon and protest a provincial government decision cutting off funding for a daycare centre or a shelter for single mothers? And surely a federal commissionaire could speak out at a Legion meeting to protest against a perceived lack of federal support for war veterans. These examples, and many others could be advanced, demonstrate that an absolute prohibition

> against public servants criticizing government policies would not be sensible.

[30] The overriding consideration the Supreme Court had in mind in **Fraser** was the need for a balance to be struck between the public officer's freedom of expression and the Government's desire to maintain an impartial and effective public service. Additionally, the Supreme Court emphasized that an absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities that no sensible person in a democratic society would want to prohibit. The Supreme Court continued that:

> 40 On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.
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> 41 A similar type of balancing is required in the present appeal. Public servants have some freedom to criticize the government. But it is not an absolute freedom. To take but one example, whereas it is obvious that it would not be 'just cause' for a provincial Government to dismiss a provincial clerk who stood in a crowd on a Sunday afternoon to protest provincial day-care policies, it is equally obvious that the same Government would have 'just cause' to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.

[31] Although some speech by public servants concerning public issues is permitted, and public servants have some freedom to criticize the government, this is not an absolute freedom. The Supreme Court accepted that a public servant is required to exercise a degree of restraint in his or her actions relating to criticism of Government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties. Indeed, the Supreme Court noted that the provincial Government would not be justified in dismissing a provincial clerk who protested against provincial policies at a rally but that it would have just cause

to dismiss a Deputy Minister who spoke vigorously against the same policies at the same rally.

[32] The Supreme Court in explained that:

> 43. … A job in the public service has two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public.

[33] The Supreme Court also approved as correct in law the following analysis and conclusion found in the decision of the Adjudicator:

> … A public servant simply cannot be allowed under the rubric of free speech to cultivate distrust of the employer amongst members of the constituency whom he is obliged to serve. I am satisfied that Mr. Fraser cast doubt on his effectiveness as a Government employee once he escalated his criticism of Government policy to a point and in a form that far exceeded the issues of general public interest that he espoused before February 1, 1982. Or, more succinctly, his incipient and persistent campaign in opposition to the incumbent Government conflicted with the continuation of his employment relationship. Once that situation arose he either had to cease his activities or resign from the position he occupied.

[34] The Supreme Court explained that the federal public service in Canada is part of the executive branch of government and its fundamental task is to administer and implement policy. To enable the executive branch effectively to do this, the public service must employ people with certain important characteristics, namely, first, knowledge; second, fairness; and, third, integrity. It continued that:

> 46 As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In

> conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.

[35] The Supreme Court stated that there is a powerful reason for this general requirement of loyalty, namely, the public interest in both the actual, and apparent, impartiality of the public service. It continued that the benefits that flow from this impartiality have been well-described by the MacDonnell Commission, and that although the description relates to the political activities of public servants in the United Kingdom, it touches on values shared with the public service in Canada as follows:

> Speaking generally, we think that if restrictions on the political activities of public servants were withdrawn two results would probably follow. The public might cease to believe, as we think they do now with reason believe, in the impartiality of the permanent Civil Service; and Ministers might cease to feel the well-merited confidence which they possess at present in the loyal and faithful support of their official subordinates; indeed they might be led to scrutinise the utterances or writings of such subordinates, and to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own.
>
> If this were so, the system of recruitment by open competition would provide but a frail barrier against Ministerial patronage in all but the earlier years of service; the Civil Service would cease to be in fact an impartial, non-political body, capable of loyal service to all Ministers and parties alike; the change would soon affect the public estimation of the Service, and the result would be destructive of what undoubtedly is at present one of the greatest advantages of our administrative system, and one of the most honourable traditions of our public life.

[36] In concluding that the Adjudicator did not err, the Supreme Court held that:

> There is in Canada, in my opinion, a similar tradition surrounding our public service. The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the Government.

[37] The appellant in **Fraser** also argued that the Adjudicator erred in law by finding that his public statements, without any evidence, impaired his effectiveness as a public servant. The Supreme Court stated that:

> 53 It is true the Adjudicator found Mr. Fraser's effectiveness as a public servant was impaired. It is also true there was no direct evidence to this effect before the Adjudicator. There was not, for example, testimony from so-called 'clients' of the Department of Revenue Canada (i.e. persons subject to a tax audit) establishing that in their eyes Mr. Fraser's conduct placed his impartiality and judiciousness in doubt. In spite of this, the Adjudicator concluded that Mr. Fraser's activities were job-related in that they led to 'impairment' of his ability to do his job properly. Indeed he found impairment in two senses: first, impairment to perform effectively the specific job because of the inferred effect on clients; secondly, and in a wider sense, impairment to be a public servant because of the special and important characteristics of that occupation.

[38] In response, the Supreme Court explained that:

> 54 I do not think the Adjudicator erred on either count. As to impairment to perform the specific job, I think the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. In this case the inference drawn by the Adjudicator, namely that Mr. Fraser's conduct could or would give rise to public concern, unease and distrust of his ability to perform his employment duties, was not an unreasonable one for him to make.

[39] At this juncture, it must be pointed out that the Privy Council in **de Freitas** also held that the approach of the Court of Appeal whereby it sought to secure the validity of section 10(2)(a) of the Civil Service Act of Antigua and Barbuda by applying the presumption of constitutionality such that there should be implied therein words as "when his forbearance from such publication is reasonably required for the proper performance of his official functions" was not permissible. It continued (at 78-79) that:

> But that does not end the matter. Even if the solution proposed by the Court of Appeal were to be adopted their Lordships are not persuaded that the validity of the provision can thereby be secured. What the solution seeks to do is to remove the excessive scope of the express terms of the subsection. But in the view of their Lordships it fails effectively to achieve that. One principle which has to be observed here is that of legal certainty. This was succinctly expressed by the European Commission on Human Rights in G. v. Federal Republic of Germany, 6 March 1989, Application No. 13079/87, 60 D. & R. 256, 261, where it was stated that "legal provisions which interfere with individual rights must be . . . formulated

> with sufficient precision to enable the citizen to regulate his conduct." The critical question then is whether the prohibition in section 10(2) as qualified by the Court of Appeal produces a rule sufficiently precise to enable any given civil servant to regulate his conduct.
>
> The rule applies to all civil servants without distinction so that it is left to the individual in any given circumstances to decide whether he is or is not complying with the rule. Their Lordships are not persuaded that the guidance given is sufficiently precise to secure the validity of the provision. It is to be noticed that the provision is fenced with a possible criminal sanction in section 32 of the Act and it is necessary that in that context a degree of precision is required so that the individual will be able to know with some confidence where the boundaries of legality may lie. It cannot be that all expressions critical of the conduct of a politician are to be forbidden. It is a fundamental principle of a democratic society that citizens should be entitled to express their views about politicians, and while there may be legitimate restraints upon that freedom in the case of some civil servants, that restraint cannot be made absolute and universal. But where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual decision. Even under the formulation suggested by the Court of Appeal the civil servant is left with no clear guidance as to the exercise of his constitutional rights

[40] The Privy Council also suggested that the *State* should devise a comparable system of classification which has been adopted in the United Kingdom whereby there are classes of civil servants related to the seniority of the posts which they fill and a distinction is made between the classes as to the extent of any restraints imposed upon them in regard to their freedom of political expression.

[41] The Defendant submits that more recent authorities have considered the constitutionality of provisions that required public servants desirous of running for political office to resign or proceed on leave, with the possibility of reinstatement if unsuccessful in the election. In **Ahmed v United Kingdom** (2000) 29 E.H.R.R. 1, the European Court of Human Rights (the "**ECHR**") had to consider whether regulations made in 1990 by the Secretary of State of the Environment to restrict the political activities of local government officers in "politically restricted posts" breached the appellants rights to freedom of expression and assembly under Articles 10 and 11 respectively of the European Convention on Human Rights. In determining whether the regulations pursued a legitimate aim, the ECHR stated that:

> 53. The Court observes that the local government system of the respondent State has long resided on a bond of trust between elected members and a permanent corps of local government officers who both advise them on policy and assume responsibility for the implementation of policies adopted. That relationship of trust stems from the right of council members to expect that they are being assisted in their functions by officers who are politically neutral and whose loyalty is to the council as a whole. Members of the public also have a right to expect that the members whom they voted into office will discharge their mandate in accordance with the commitments they made during an electoral campaign and that the pursuit of that mandate will not founder on the political opposition of their members' own advisers; it is also to be noted that members of the public are equally entitled to expect that in their own dealings with local government departments they will be advised by politically neutral officers who are detached from the political fray.
>
> The aim pursued by the Regulations was to underpin that tradition and to ensure that the effectiveness of the system of local political democracy was not diminished through the corrosion of the political neutrality of certain categories of officers.

[42] In relation to whether the regulations were necessary in a democratic society, the ECHR stated that:

> 62. …
>
> In the Court's view, the Widdicombe Committee had identified a pressing social need for action in this area. The adoption of the Regulations restricting the participation of certain categories of local government officers, distinguished by the sensitivity of their duties, in forms of political activity can be considered a valid response by the legislature to addressing that need and one which was within the respondent State's margin of appreciation. It is to be observed in this regard that the organisation of local democracy and the arrangements for securing the functioning, funding and accountability of local authorities are matters which can vary from State to State having regard to national traditions. Such is no doubt also the case with respect to the regulation of the political activities of local government officers where these are perceived to present a risk to the effective operation of local democracy, especially so where, as in the respondent State, the system is historically based on the role of a permanent corps of politically neutral advisers, managers and arbitrators above factional politics and loyal to the council as a whole.

[43] In answering the question of whether the aim of regulations was pursued with minimum impairment, the ECHR stated that:

> 63. As to whether the aim of the legislature in enacting the Regulations was pursued with minimum impairment of the applicants' rights under Article 10 the Court notes that the measures were directed at the need to preserve the impartiality of carefully defined categories of officers whose duties involve the provision of advice to a local authority council or to its operational committees or who represent the council in dealings with the media. In the Court's view, the parent legislation has attempted to define the officers affected by the restrictions in as focused a manner as possible and to allow through the exemption procedure optimum opportunity for an officer in either the second or third categories to seek exemption from the restrictions which, by the nature of the duties performed, are presumed to attach to the post-holder. It is to be observed also that the functions-based approach retained in the Regulations resulted in fewer officers being subject to restrictions than would have been the case had the measures been modelled on the Widdicombe Committee's proposal to apply them to principal officers and above as a general class and irrespective of the duties performed.

[44] The ECHR, therefore, concluded that there was no violation of Article 10 of the Convention by reason of the existence of the legislation and its impact on the appellants' rights under Article 10 (at [65]). The ECHR also concluded that its reasoning in respect of the Article 10 violation applied equally to Article 11 because the freedom to hold opinions and to receive and impart information and ideas is one of the objectives of freedom of assembly and association as enshrined in Article 11 (at [70]).

[45] In **The Matter of an Application by Ryan McKinney for Judicial Review** [2004] NIQB 73, the applicant was employed with the Northern Ireland Civil Service as an Administrative Officer in the Child Support Agency. The applicant was also a member of the Socialist Environmental Alliance and was selected by the party as their candidate for West Belfast in the Northern Ireland Assembly elections. However, by notice dated 21 October 2003 the applicant was informed of the restrictions that applied to candidature in the Assembly elections and he did not stand for election to the Northern Ireland Assembly. Members of the Civil Service were disqualified from membership of the Assembly: section 1(1)(b) of the Northern Ireland Assembly Disqualification Act 1975 provides that a person is disqualified for membership of the Northern Ireland Assembly who for the time being is employed in the Civil Service of the Crown. There was also a statutory

prohibition that applied to certain members of the Civil Service on candidature for election to the Assembly; namely, Article 3 of the Civil Service (Parliamentary and Assembly Candidature) Order (Northern Ireland) 1990 and the Northern Ireland Pay and Conditions of Service Code made under the Civil Service (Northern Ireland) Order 1999 (the "**NI Code**"). The NI Code divided the Civil Service into three (3) groups as follows:

(1) The politically free group – industrial and non-office grades who were completely free to engage in political activities.

(2) The intermediate group – divided into politically sensitive and non sensitive. Non-sensitive employees had standing permission, while politically sensitive employees were required to apply for permission, which was not usually granted. Politically sensitive employees were defined as including persons engaged in policy assistance to Ministers, staff who regularly spoke for the Government in dealings with various groups and staff who represented the Government internationally or whose duties involved significant interface with the public; and

(3) The politically restricted group – persons who were barred from political activity but free to seek permission.

[46] All groups were required to resign before seeking election, but the politically free group had the right to re-instatement if unsuccessful, while the intermediate and politically restricted groups would have to satisfy certain criteria to be re-instated.

[47] The court summarized the case as follows: the applicant occupies a post in the intermediate group that is not in a politically sensitive area. Accordingly under paragraph 967(c) of the Code he is eligible for freedom to engage in any or all of the national or local political activities, other than candidature, by permission of the Department, for which he has standing permission. However he is excluded from candidature for the Westminster parliament or the European Assembly or any Northern Ireland Assembly. He must resign on adoption as a candidate, and if

unsuccessful apply for reinstatement, which is a matter of discretion. Were he in the politically free group he would have a right to reinstatement.

[48] The two issues the court had to consider were: (1) whether the distinction between the intermediate grades, who were excluded from candidature and have no right to reinstatement, and industrial grades and non-office grades, who are permitted candidates and have a right to reinstatement, was arbitrary and irrational; and (2) whether the approach to candidature represented a breach of the applicant's right to freedom of expression under Article 10 of the European Convention and of the applicant's right to freedom of peaceful assembly and freedom of association under Article 11 of the European Convention and of the right to free elections under Article 3 of the First Protocol to the European Convention.

[49] The court stated that:

> [15] In the present case the restrictions on the intermediate group involve exclusion from candidature by virtue of the 1990 Order and no right to reinstatement after an unsuccessful candidature by virtue of the Code. It is not in issue that the restrictions interfere with the applicant's right to freedom of expression under Article 10. Accordingly the interference requires justification under Article 10(2). Such justification requires that the restrictions are prescribed by law, pursue one or more of the legitimate aim or aims specified in Article 10(2) and are necessary in a democratic society as corresponding to a pressing social need and as being proportionate to the legitimate aim.

[50] The court explained that it was not contested that law prescribed the scheme. It continued that:

> [24] I am satisfied that the objective which is sought to be achieved, the pressing social need, is sufficiently important to justify restrictions on the right to candidature. The objective is to maintain the principle of political impartiality and also the traditional relationship between the legislature and the Executive, as set out in the Defendant's affidavit. I am satisfied that the means chosen to limit that right are rational, fair and not arbitrary. The restrictions on candidature have been carefully considered and are a relevant response to the pressing social need. The distinction between industrial and non office grades and those in the intermediate group is not an arbitrary distinction but represents a description of those whose employment is of a nature that engages the concerns that are being addressed by the restrictions.

> [25] The issue is whether the response to the need impairs the right as minimally as is reasonably possible. The contest in the present case occupies narrow ground. In effect the resignation of all Civil Servants is required during candidature. While a Civil Servant in the politically free group is not obliged to resign on adoption as a prospective candidate he or she is disqualified from election to the Northern Ireland Assembly. To prevent the election being held to be void he or she should resign before consenting to nomination. If unsuccessful the Civil Servant in the politically free group will be re-instated in his previous capacity. This is the position for which the applicant contends in respect of non-politically sensitive posts in the intermediate category. On the other hand the system that applies to those in the non-politically sensitive area of the intermediate group involves a discretion as to re-instatement when postings to non-sensitive areas of work are possible. The difference lies in a right to re-instatement to those in, or certified to be in, industrial grades and non-office grades, and in relation to all other civil servants a discretion as to re-instatement in non-politically sensitive posts.
>
> [26] The Defendant contends that there is, and should be, a discretion as to re-instatement in order that consideration might be given to the impact of the Civil Servants actual candidature on the need for political impartiality and the maintenance of the traditional relationship between the legislature and the Executive. The basis of the justification for particular measures in relation to candidature also provides the basis for giving consideration to the impact of the particular candidature before making a determination as to reinstatement. I am satisfied that the approach to candidature warrants consideration of the impact of a particular candidature before reaching a decision on reinstatement. In those circumstances the measures impair the right as minimally as reasonably possible. I am also satisfied that the measures have proportionate effect. There is a fact sensitive approach to reinstatement based on the particular circumstances of each case. Accordingly I am satisfied that the restrictions are proportionate and there is no breach of Article 10.

[51] The court also stated that under Article 11 the right to freedom of peaceful assembly and to freedom of association with others includes the freedom to hold opinions and receive and impart information and ideas. It concluded that for the reasons set out in the discussion of Article 10(2) it was satisfied that such interference as arises in relation to the right to freedom of peaceful assembly and to freedom of association with others is justified under Article 11(2) (at [28]).

The Claimant's Submissions

[52] Counsel for the Claimant submits that the Claimant is not in a senior, managerial or administrative position at the Customs Department and that his duties all relate to implementing the policies and customs laws as an accountant. Counsel further submits that the Claimant is an accountant who is employed and paid at Grade K33 of the Saint Christopher and Nevis Approved Salary Scales and Grades (1 January 2018) and that the Claimant falls within the role of public officers who implement policy, programmes and decisions of the Government. Counsel also states that the Claimant sits at the subordinate level of the Customs' Department Organizational Chart 2015 and for all intents and purposes the Claimant is not part of senior management. Counsel submits that the Acting Comptroller of Customs, Mr. Kennedy De Silva, changed from referring to the Claimant as "a senior officer" in his first affidavit to "part of senior management or management" in his second affidavit.

[53] Counsel further submits that the Defendant has not provided any evidence or cogent evidence to prove the allegation that the Claimant is in a policy-making role at the Customs Department. Counsel submits that the organizational chart and the ranking of public officers in the Approved Salary Scales and Grades both confirm that the Claimant at all material times is ranked at K33, adding that an article published in the newspaper does not promote or change the true nature of the Claimant's role or rank. Counsel further submits that the central issue is whether or not the Claimant is part of senior or top management at the Customs Department charged with creating the policies for the State and is by some law (that is constitutional) prohibited from engaging in, *inter alia*, public meetings or political activities.

[54] Counsel submits that in order to prohibit the Claimant from taking part in public meetings or political activities or to curb his fundamental rights and freedoms as guaranteed by sections 3, 12 and 13 of the Constitution, there must be legislation (primary or delegated) that restricts those rights within the confines of the Constitution. Counsel further submits that section 28(5) of the Constitution only

provides an invitation for Parliament to pass legislation imposing such restrictions. Counsel submits that the Defendant in submissions filed accepts that *ex facie* the Claimant is entitled pursuant to section 27 of the Constitution to take an active part in a political organization. However, Counsel continues, the Defendant seems to suggest that the Claimant should be restrained from participating in active politics because of the duty of loyalty owed to the Government as his employer.

[55] Counsel submits that in order for the Claimant to obtain the declaration or relief sought at relief (d) of his application by way of originating motion, he must prove that there is no legislation (which is constitutional) that prevents the making of such a declaration. Counsel further submits that the Claimant has identified Rules 36 and 38 of the Code as the only legislation that prevents the Claimant from taking an active part in politics. Counsel continues that if the court accepts that these rules are *ultra vires* and, therefore, null and void, then there would be no lawful restraint on the Claimant and that consequently he would be entitled to a declaration to that effect. Counsel contends that the court cannot of its own violation make such a restraint, as invited to by the Defendant, because to do so would be to trespass into Parliament's realm in breach of the separation of powers doctrine.

[56] Counsel submits that the burden then shifts to the Defendant to show that there is a constitutional restriction on the Claimant receiving such a declaration. Counsel further submits that while the Claimant has discharged the burden of proving that there is no law (that is also constitutional), preventing him from obtaining relief (d) prayed for in his application by way of originating motion, the Defendant has failed to provide any lawful reason to deny the Claimant the relief that he seeks. Counsel submits that, first, section 9 of the Customs Act deals expressly with confidentiality and the consequences of a breach so there is no lacuna that requires the court to make an order (or refrain from making an order) to protect such confidentiality. Secondly, it is highly speculative of the Defendant to presume that the Claimant will breach his duty confidentiality or loyalty to the Government if he ran for political office, and that it is even more speculative and unsupported by evidence for the

Defendant to suggest that the Claimant will behave in such a manner that will bring his loyalty to the Government into question. Counsel further submits that, in any event, these are arguments that can only be properly advanced if there was a constitutional provision restraining such political activities or where the presumption of constitutionality allowed the court to modify any rules to bring them into conformity with the Constitution.

[57] Counsel submits that the need for a positive declaration that the Claimant is entitled to take an active part in political activities is not just a relief to which he is entitled, but one that will protect him from the political discrimination that he currently faces as a result of his desire to run for political office. Counsel further submits that the Claimant has provided evidence to show that there are a number of public servants of varying ranks who have engaged in political activities in support of the ruling party but they have not been subject to any disciplinary action or political restraint, and that the Claimant's evidence in respect of this was not challenged by the Defendant. Counsel contends that the Claimant, who wishes to challenge the Prime Minister at the next General Elections for the majority vote in Constituency 7, was charged by the Chief Personnel Officer via letter dated 10 October 2018 for allegedly engaging in political activities contrary to Rules 38 and 49 of the Code. Counsel further contends that the Claimant's disproportionate treatment is not only possible but real, and that explains why it is critical that the Claimant obtains a positive declaration so that there can be no doubt that any attempt by the Government expressly or implicitly to restrain the Claimant, outside of a constitutional provision providing for such restraint, will have legal consequences.

[58] Counsel submits that the Claimant has provided evidence, which has not been disputed by the Defendant, that the public sector is the majority employer in Saint Christopher and Nevis. Counsel also submits that there is also a real risk that the Claimant will be treated differently or disadvantageously because his intended political activities include challenging the Prime Minister in the next General Elections for the majority vote as representative of Constituency 7. Counsel

contends that a positive declaration in terms of relief (d) in the Claimant's application by way of originating motion is, therefore, needed to protect the Claimant from continued political victimization, disciplinary action and/or discrimination.

[59] The Claimant submits that **Fraser** is distinguishable based on the specific legislation in Canada that provided for restraint on certain classes of public servants. In fact, the decision in **Fraser** was not based on any specific legislation but merely considered the question of whether the provincial Government can lawfully dismiss an employee for criticizing the government in the way in which the appellant in **Fraser** did. The Claimant further submits that the Privy Council in **de Freitas**, which binds this court, after highlighting the case of **Fraser**, made it clear that the general proposition that civil servants hold a unique status in a democratic society or owe a duty of loyalty does not justify a substantial invasion of their basic rights and freedoms.

[60] The Claimant submits that **Ahmed** and **Re McKinney** can also be distinguished on the specific provisions under consideration in each case. In both cases, the legislation under review related to specific categories of public servants who were restrained from political activities. The Claimant further submits that Rules 36 and 38 of the Code are not on all fours with legislation considered in these decisions. The Claimant contends that these rules are on all fours with the legislation considered by the Privy Council in **de Freitas** that failed to satisfy all three limbs of the test for any constitutional restraint on the rights and freedoms of public officers. The Claimant, therefore, concludes that Rules 36 and 38 of the Code are unconstitutional and cannot be saved by modification or amendment without this amounting to judicial legislating.

The Defendant's Submissions

[61] The Defendant submits that the evidence of Mr. Kennedy De Silva, the Acting Comptroller of Customs, shows that the Claimant is responsible for: (1) enforcing Government's customs policies in relation to businesses that import goods; (2) post clearance audits which entail the auditing of external companies to determine

compliance with customs laws and the accuracy of their declarations to the Customs Department; and that during such audits companies share sensitive financial information with the Customs Department to which the Claimant has access as part of his audit duties; (3) the First Time Home Owners Programme by which home owners are allowed concessions on imported materials where the Claimant verifies the amounts for which local companies can claim refunds; and (4) representing the Government from time to time in international fora at which he is authorised to speak on behalf of the Government.

[62] The Defendant also states that the Claimant is an accountant in the Customs Department of the Government of Saint Christopher and Nevis and that he holds a fairly senior supervisory position over other public servants in his department. The Defendant also states that the Claimant: (1) is privy to sensitive customs information; (2) exercises a discretion in carrying out decisions on behalf of the Government in matters directly affecting the public, namely, audits and the First Time Home Owners Programme; and (3) represents the Government of Saint Christopher and Nevis on a regional and international level. The Defendant submits that, as a senior public servant, the Claimant's neutrality and impartiality would be called into question were he to run for elected office, irrespective of whether he ran for the governing party or a party in opposition. The Defendant further submit that if the Claimant ran for the Government, the public would be entitled to be concerned that the advice he gives the Government as a public servant would not be impartial, but that he in fact tows the party line. Likewise, if the Claimant ran for an opposition party, the public may perceive that his ability to give independent advice would be impacted by his allegiance to the opposition. The Defendant submits that merely running for office would put the Claimant in breach of his contract of employment and expose him to disciplinary action.

[63] The Defendant contends that even if the Claimant's candidature by itself is insufficient to preclude him from running for elected office, the way he conducts himself in the cut and thrust of a bruising political campaign may bring his loyalty to his employer, the Government, into question. The Defendant further contends

that this might occur even if the Claimant is not himself the mouthpiece of criticisms of Government policy, but by mere association with a vitriolic opposition campaign. The Defendant submits that while there is no law which disqualifies the Claimant from running for office, the issue of the blanket declaration which he seeks has the potential to: (1) contradict his duty of loyalty to his employer, the Government; (2) negate his duty to uphold the impartiality and neutrality of the public service; and (3) immunize him from any disciplinary action consequent upon the expected incidents of participation in a hotly contested political campaign. The Defendant further submits that the declaration the Claimant seeks is contrary to the law governing his employment as a public servant and, therefore, ought to be rejected.

[64] The Defendant contends that not only do the authorities cited indicate clearly that a particular public servant may be restricted in his or her political activities by his implied duty of loyalty to the Government that he or she serves, depending on the position he or she holds in the public service, but both sections 12(2)(c) and 13(2)(c) of the Constitution expressly permit the imposition of "restrictions upon public officers that are reasonably required for the proper performance of their functions." The Defendant submits that the Claimant's contention that he is not in a senior, managerial or administrative position at the Customs Department is contradicted in the Claimant's own affidavits where the Claimant: (1) states that his daily roles and responsibilities include administrative roles and that he oversees all financial transactions at the Customs Department; and (2) admits that he is part of the Management Team and is the Supervisor or Manager of the Post Clearance Audit (PCA) Unit. Consequently, the Defendant further submits that the Claimant by way of his own evidence contradicts the statement of facts in his submissions and agrees that he is a manager and does in fact carry out administrative duties.

[65] The Defendant submits that the clear and unequivocal affidavits of the Acting Comptroller of Customs set out in detail the rank, role and responsibility of the Claimant as an accountant in the Customs Department. The Defendant further submits by reference to the Claimant's duties in the PCA Unit and in the First Time

Home Owners Programme as well as by reference to the uniform which he wears, and the management meetings which he attends, the Acting Comptroller has identified the Claimant as a manager within the Customs Department who performs a sensitive role and exercises managerial discretion in carrying out his functions. The Defendant contends that in light of the uncontroverted evidence of the Acting Comptroller of Customs the Claimant is a manager within the Customs Department who is responsible for staff and who, by his own admission, oversees all financial transactions, carries out administrative roles, makes recommendations and consults on a wide variety of financial matters, it is incorrect for the Claimant to state that prohibiting him from political activity is not reasonably required for the proper performance of the Claimant's role as an accountant in the Customs Department and is not reasonably justifiable in a democratic society.

[66] The Defendant contends that the fundamental issue in this case is whether the Defendant's rank as an accountant in the Customs Department and the nature of his duties place him in a sensitive strata of the civil service whereby running for office and the activities required to execute a political campaign would bring the civil service into disrepute and impugn the public's perception of an impartial civil service. The Defendant submits it is for this reason that the affidavits of the Defendant have focused on explaining the Claimant's important role as an accountant in the Customs Department and detailing his duties and rank. Senior Counsel for the Defendant submits that while the Defendant agrees that the fundamental rights to protection of freedom of speech and freedom of assembly and association are important fundamental rights and freedoms to be closely guarded, these rights and freedoms are not absolute. Senior Counsel continues that the law recognizes that a civil servant owes a duty of loyalty to his employer, and depending on his or her rank, role and responsibilities, he or she may properly be subject to restrictions on his or her freedom of speech and freedom of assembly and association, and that these restrictions are necessary to safeguard the impartiality of the civil service.

[67] The Defendant submits that, similar to the applicant in **Re McKinney**, the Claimant might not be a member of the top echelon of management but he is a member of the Management Team at the Customs Department who regularly attends management meetings and who by his own admission carries out administrative functions, oversees all financial transactions, consults on a wide variety of financial matters and supervises staff. The Defendant continues that the Acting Comptroller has given uncontroverted evidence that the Claimant provides recommendations and implements policy, as did the applicants in the **Ahmed** and **Re McKinney** cases. The Defendant submits that so significant is the position that the Claimant is considered to hold in the Customs Department, that he is included as a member of a small cadre of senior staff, set apart and distinguished from the vast majority of staff by the uniforms they wear and the rank they hold. The Defendant further submits that the Claimant wears that different uniform and is considered senior to scores of officers in the Customs Department. The Defendant contends that restricting the Claimant's candidature in general elections is justified considering his rank, roles and responsibilities within the Customs Department and that, in so doing, the public's trust in an impartial civil service will be maintained. The Defendant, therefore, concludes that the Claimant is not entitled to the in personam declaration that he is "entitled to take active part in a political organisation and more particularly run for elected or political office in the Federal Elections of the Federation of Saint Christopher and Nevis."

The Court's Considerations

[68] At the hearing of the application by way of originating motion, the court inquired of counsel for the parties if the court were to find that Rules 36 and 38 of the Code are unconstitutional, why should the court also grant the in personam declaration since there would be no existing law which would prohibit the Claimant from participating in elective politics in Saint Christopher and Nevis. Senior Counsel for the Defendant pointed out that the duty of loyalty that the Claimant owes to the Government as his employer may properly limit his ability to run for political office. In relation to this aspect, various questions arise for consideration. First, whether

the Government can lawfully prevent a public officer from running for public office in the absence of legislation enacted pursuant to section 28(5)(a) of the Constitution. Second, whether the Government can lawfully rely on the implied duty of loyalty to prevent a public officer from running for political office on the basis that the associated political activities in which that public officer will of necessity engage would result in a breach of that duty by the public officer, in the absence of any specific rule in a code made by the Minister pursuant to section 53(3)(b) of the Public Service Act. Third, whether the court can, or should, consistently with the separation of powers doctrine make a determination of whether the Claimant, as a public officer, can run for political office in light of the first and second questions and what criteria should the court use?

Public Officers and the National Assembly

[69] There is no doubt that the Constitution is the supreme law because section 2 of the Constitution of Saint Christopher and Nevis expressly states that this Constitution is the supreme law of Saint Christopher and Nevis and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Senior Counsel for the Defendant helpfully drew to the court's attention that the word "law" when used in sections 12(2)(c) and 13(2)(c) of the Constitution includes "unwritten" law or the common law. This is because section 119 of the Constitution provides that:

> "law" means any law in force in Saint Christopher and Nevis or any part thereof, including any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly;

[70] The case at bar involves not only the right to protection of freedom of expression, the right to protection of freedom of assembly and association of public officers and the limitations therein found in sections 12(2)(c), and 13(2)(c) of the Constitution respectively but also, importantly, involves the rights of persons qualified to be elected or appointed as a member of the National Assembly pursuant to section 27 of the Constitution who are not otherwise disqualified under section 28 of the Constitution. Section 28 of the Constitution sets out the grounds

on which a person shall not be qualified to be elected or appointed as a member of the National Assembly. This signals convincingly there can be no other disqualification to be elected or appointment as a member of the National Assembly other than those expressly recognized by section 28 of the Constitution. Section 28(5) of the Constitution provides that:

> (5) If it is so provided by Parliament, and subject to such exceptions and limitations (if any) as Parliament may prescribe, a person shall not be qualified to be elected or appointed as a member if
>
> (a) he or she holds or is acting in any office or appointment (whether specified individually or by reference to a class of office or appointment) other than the office of elected member or nominated member of the Nevis Island Assembly or member of the Nevis Island Administration;
>
> (b) he or she belongs to any defence force or to any class of person that is comprised in any such force;
>
> (c) he or she belongs to any police force or to any class of person that is comprised in any such force; or
>
> (d) subject to any exceptions or limitations prescribed by Parliament, he or she has any such interest in any such government contract as may be so prescribed.

[71] The Claimant submits that sections 27 and 28 of the Constitution do not make being employed as a public servant a disqualifying factor to stand for parliamentary or elected office. The Claimant alleges that he is qualified to run for political office under section 27 and is not disqualified under section 28 of the Constitution. The Claimant contends that since the Defendant in his affidavits in response does not dispute this, it must, therefore, be accepted as common ground that the Claimant is qualified under section 27 and not disqualified under section 28 of the Constitution. The Defendant accepts that, on the face of it, the Claimant is entitled to take an active part in a political organization and to run for elections or political office, adding that the Constitution does not disqualify public servants from membership in the National Assembly. The Defendant submits that section 28(5)(a) empowers Parliament to disqualify a person from being elected or appointed as a member of the National Assembly "if he holds or is acting in any office or appointment", but Parliament has not so provided.

[72] Section 28(5)(a) of the Constitution has expressly stated that it is for Parliament to make laws in respect of cases where a person shall not be qualified to be elected or appointed as a member **if he or she holds or is acting in any office or appointment** (whether specified individually or by reference to a class of office or appointment). Since the power expressly to exclude persons who holds or who are acting in any office or appointment is vested in Parliament, no common law rule can operate to disqualify a public officer, being a person who is holding an office, from being elected or appointment as a member of the National Assembly. In other words, unless Parliament expressly so provides there is nothing that can prevent a public officer qualified to be elected or appointed as a member of the National Assembly under section 27 of the Constitution and not otherwise disqualified under section 28 of the Constitution from running for elected office. For reasons explained more fully below, the Executive and the Judiciary, as co-equal branches of Government, cannot usurp this function of Parliament under the guise of an implied contractual duty of loyalty or through judicial activism.

[73] The decision of the Court of Appeal in **Daniel** lends support to this approach. In that decision, the Court of Appeal had to consider the question of whether Article 16 of a collective agreement which provided for a no pay leave of absence of up to six months for certain teachers to contest General Elections infringed section 26(1)(d) of the Saint Vincent and the Grenadines Constitution which provides that no person shall be qualified to be elected as a representative if he holds or is acting in any public office. The Court of Appeal held that Article 16 of the collective agreement does not and cannot qualify a public servant, in this case a teacher, to be elected as a representative, given the provisions of section 26(1)(d) of the Constitution because that Article only addresses leave to contest an election. The Court of Appeal stated that:

> [24] In conclusion, to successfully challenge article 16 of the collective agreement on the ground that it is violates section 26(1)(d) of the Constitution, it has to be shown that there is something in its provisions that qualifies the appellants to be so elected. There is nothing in the provisions of article 16 qualifying the appellants to be elected to Parliament. Article 16 deals with leave to contest. A provision granting

> leave to teachers, upon application, to contest a general election, does not qualify them to be elected to Parliament. It was open to the Government to initiate the requisite steps for Parliament to prescribe exceptions and limitations to the disqualification imposed by section 26(1)(d) of the Constitution. The fact that this was not done does not transform a provision granting leave to contest a general election into one that violates the Constitution. Further, the provision of article 16 speaking to the return to teaching posts or posts of equivalence in the public service, without loss of benefits, cannot be said to violate the Constitution.

[74] In other words, since Parliament had not prescribed any exceptions and limitation to the disqualification of public officers from being elected to Parliament in accordance with section 26(1)(d) of the Constitution of Saint Vincent and the Grenadines, to contravene the Constitution any provision had to purport to otherwise qualify teachers to be elected to Parliament. Since Article 16 related solely to granting of leave to teachers to contest a General Election and it did not qualify them to be elected to Parliament, Article 16 did not infringe the Constitution. Only Parliament had the power to create any exceptions or limitations for public officers who would otherwise be disqualified from being elected to Parliament pursuant to section 26(1)(d) of the Constitution of Saint Vincent and the Grenadines. Therefore, any exception or limitations created otherwise than by Parliament would infringe section 26(1)(d) of the Constitution.

Public Officers and the Duty of Loyalty

[75] Notwithstanding his acceptance that Parliament has not expressly prohibited public officers from being elected as members of the National Assembly, and has not done so for over 35 years since independence in 1983, the Defendant anchors his position with the argument that, nevertheless, as a public servant the Claimant is under an implied duty of loyalty to his employer, the Government, and this duty places limitations on his political activities, which, if exceeded, may expose him to disciplinary action. The Defendant then cites the decisions of **Fraser**, **de Freitas**, **Ahmed** and **Re McKinney**. The decisions in **de Freitas**, **Ahmed** and **Re McKinney** were all concerned with challenges to legislation that prohibited all or a class of public officers from engaging in political activities. They were not concerned with the question of whether absent legislation the Government can

lawfully prohibit a particular public officer from running for political office based on the duty of loyalty owed to the Government as his or her employer. **De Freitas** in particular concerned freedom of speech and did not relate to or concern any limitation on the appellant's ability to run for political office based on the duty of loyalty owed to his employer.

[76] In **Ahmed**, the ECHR had to consider whether regulations which restricted the political activities of local government officers in politically restricted posts breached the appellants rights to freedom of expression, and freedom of association and assembly under Articles 10 and 11 of the European Convention of Human Rights respectively. This decision did not relate to whether these officers could run for political office or whether they would be disqualified for so doing because they were employees of the local government. **Re McKinney** concerned whether the Code which divided the Civil Service into three groups whereby there were varying levels of restrictions depending on the group to which the civil servant belonged infringed Articles 10 and 11 of the European Convention of Human Rights. This decision bears the closest similarity to the case at bar but the restriction held to be lawful by the ECHR was based on a carefully crafted Code that set out clearly what restrictions applied to specific groups of public officers, not a common law rule that would of necessity have to be applied on a case by case basis.

[77] The Defendant submits that the import of these authorities is that, depending on the rank of the public servant and/or the sensitive nature of the work performed by him or her, merely running for office or participating in a political campaign which is most likely to involve criticism of the policies of the government the public officer serves, may constitute a breach of his or her contract of employment justifying the taking of disciplinary action.

[78] As previously explained, it is for Parliament alone to disqualify a public officer from running for political office or being elected as a member of the National Assembly. There must exist legislation restraining the political activities of public officers or those activities associated with running for political office. As mentioned above,

section 53(3)(b) of the Public Service Act provides that the Minister may make provision for *inter alia* codes of conduct and ethics for public officers. If the Government wishes to regulate any aspect of the conduct of public officers, including the participation by public officers in political activities, it has the power to do so, and can only do so, by creating a new code pursuant to section 53(3)(b) of the Public Service Act or by amending existing codes, including the Code. Similarly, Parliament may pursuant to section 28(5)(a) of the Constitution disqualify a person from being elected or appointed as a member of the National Assembly "if he holds or is acting in any office or appointment".

[79] A common law rule or a clause in an employment contract cannot be interpreted in a way that usurps the constitutional power of Parliament to create such an exception and unless Parliament so provides, none can be created by the common law or contract both of which must yield to the constitutional mandate. In addition, any restriction on the political activities of any public officer must be achieved by legislation or codes as permitted by section 53(3)(b) of the Public Service Act, not otherwise. It is therefore impermissible for the Government to prevent the Claimant from running for political office by relying solely on the duty of loyalty that may be breached if the Claimant as a public officer runs for political office. The Government is also not permitted to give a liberal interpretation to other provisions of the Code to achieve the objective it sought impermissibly to achieve: (1) previously in the impugned Rules 36 and 38 of the Code; and (2) currently with the arguments marshaled in the case at bar in respect of the duty of loyalty owed by public officers to their employer, the Government.

Public Officers and Criticisms of Government

[80] Some of the decisions discussed above involved public officers criticizing the government, principal among them is the decision of the Privy Council in **de Freitas**. It will be remembered that the Privy Council mentioned the necessity of preserving public confidence in the conduct of public affairs. This, the Privy Council noted, was one justification for some restraint on the freedom of civil servants to participate in political matters and was properly regarded as an

important element in the proper performance of their functions. However, the Privy Council cautioned that the general proposition that civil servants hold a unique status in a democratic society does not necessarily justify a substantial invasion of their basic rights and freedoms, adding that a proper balance needs to be struck between the freedom of expression and the duty of a civil servant properly to fulfill his or her functions. The Privy Council held that a blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy would be excessive and it would not satisfy the qualification in the Constitution that the restriction be reasonably required for the proper performance of their functions.

[81] The Defendant cites **Fraser** for the view that while some speech by public servants on public issues are permitted this must be balanced by the fact that public servants owe a duty of loyalty to the Government they serve. However, in **Fraser**, the Supreme Court also stated that, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. **Fraser** was concerned with whether the dismissal of the appellant, a federal public servant, for expressing views highly critical of the Government was lawful. The decision of the Supreme Court of Canada must be confined to the facts of the case where the court found as a fact that the appellant had engaged in an "incipient and persistent campaign in opposition to the incumbent Government conflicted with the continuation of his employment relationship". I agree with the Counsel for the Claimant that one should not in advance speculate that the Claimant would engage in any such activity.

[82] In addition, the decision of the Supreme Court in **Fraser** was not concerned with the impact of the Federal Government's dismissal of the appellant on his right to freedom of expression and freedom of assembly and association. It is not for this court to speculate as to what the outcome would have been if the Supreme Court of Canada had to determine to extent to which that dismissal would have affected

these fundamental rights and freedoms like those enshrined in sections 12(2)(c) and 13(2)(c) of the Constitution of Saint Christopher and Nevis. Even if **Fraser** is an authority for the principle that the Defendant espouses it must be read in light of the existing public service scheme in Saint Christopher and Nevis. There exists: provisions in the Constitution relating to public officers, namely, Chapter VII entitled the Public Service, the Public Service Act, the Code, Public Service Standing Orders, No. 11 of 2014, the Public Service Code of Discipline, No. 10 of 2014, and the Public Service (Recruitment and Appointment of Public Officers) Code, No. 8 of 2014. These suggest a clear attempt by Parliament and the Executive to create a complete statutory framework for the activities and in respect of public officers in Saint Christopher and Nevis. The Defendant cannot surely argue that there must be some residual power under the duty of loyalty to restrict the political activities of public officers when this was expressly considered and included in the Code and which provisions have been held to be unconstitutional for reasons already explained above.

[83] There is also the specific obligation on the Minister under section 53(3)(b) of the Public Service Act to make provision for inter alia codes of conduct and ethics for public officers. The Government cannot bypass the mandate of Parliament to make provision in a code for a matter such as the one at issue here and rely on a duty of loyalty under the public officer's contract of employment to achieve the same objective. Also, the provisions of sections 12(2)(c) and 13(2)(c) of the Constitution expressly permits the imposition of "restrictions upon **public officers** that are reasonably required for the proper performance of their functions." The restrictions to which the Constitution refers are restrictions on public officers generally not a restriction of those fundamental rights and freedoms of **one** public officer, in this case the Claimant. The wording of sections 12(2)(c) and 13(2)(c) of the Constitution prohibit the argument proffered by the Defendant in the case at bar.

[84] Having found that Rules 36 and 38 of the Code are unconstitutional there is now no law, common law or otherwise, that specifically prevents a public officer like the

Claimant from engaging in any political activity, in particular, running for political office. I now return to three submissions made earlier by the Defendant. The first one is that the Claimant is under a duty of loyalty to his employer, the Government, and this duty places limitations on his activities, which if exceeded, may expose him to disciplinary action. The second is that the blanket declaration that the Claimant seeks has the potential to: (1) contradict his duty of loyalty to his employer, the Government, and his duty to uphold the impartiality and neutrality of the public service; and (2) immunize him from any disciplinary action consequent upon the expected incidents of participation in a hotly contested political campaign. The third is that the declaration the Claimant seeks, in other words, contradicts the law governing his employment as a public servant and therefore ought to be rejected.

[85] For two principal reasons I do not accept these submissions of the Defendant. First, it leaves the decision of whether a particular public servant can participate in active politics or in any political activity to the Government. In **de Freitas**, the Privy Council, in rejecting the approach adopted by the Court of Appeal to secure the constitutionality of the impugned sections, stated that one principle which has to be observed is that of legal certainty, accepting that legal provisions which interfere with individual rights must be formulated with sufficient precision to enable the citizen to regulate his conduct. Apart from the obvious point that the Defendant's approach is not based on any legal provision, the principle of legal certainty also applies here because if such an approach, as contended for by the Defendant, is adopted public officers will not be able to regulate their conduct and they will not know beforehand whether their conduct will offend any principle of which they might not be aware. The Privy Council emphasized that: (1) any rule must sufficiently precise to enable any given civil servant to regulate his conduct; and (2) a degree of precision is required so that the individual will be able to know with some confidence where the boundaries of legality may lie. This point was emphasized by the Privy Council in **de Freitas** when it stated (at p. 79) that:

> It is a fundamental principle of a democratic society that citizens should be entitled to express their views about politicians, and while there may be

> legitimate restraints upon that freedom in the case of some civil servants, that restraint cannot be made absolute and universal. **But where the line is to be drawn is a matter which cannot in fairness be left to the hazard of individual decision**. (Emphasis added)

[86] Without any specific restraint as permitted by law, public officers must be able to express their views about politicians and their policies and to participate in and run for political office. The decision on whether a particular public officer can express such views or run for political office cannot in fairness be left to the hazard of individual decision. The use of the duty of loyalty in this context is not sufficiently precise to enable the Claimant or any other public officer to regulate his conduct and eviscerates the boundaries of legality so much so that the Claimant, or any other public officer, cannot know in advance whether the political activities in which he or she might wish to engage are permitted. The duty of loyalty that public officers owe to the Government as their employer or any other general rule found in the Code cannot lawfully be used by the Government to justify preventing any or all public officers from engaging in any political activity or prevent those public officers who qualify under section 27 of the Constitution to be elected or appointed as a member of the National Assembly from running for political office.

[87] The second reason why I do not accept the submissions of the Defendant is that the court can only strike a proper balance between the freedom of expression and of association and assembly, and the duty of a civil servant properly to fulfill his or her functions if and when there is a specific restriction in the manner described above on the ability of public officers to participate in any form of political activity. In deciding whether any such restriction is constitutional the court must of necessity consider where to strike that balance paying close attention to the need to preserve the impartiality and neutrality of public officers in order to preserve public confidence in the conduct of public affairs. However, for reasons explored more fully below, there is now no lawful restriction on the ability of public officers to participate in political activity and the court cannot pronounce on a restriction that does not exist. Similarly, is not for the court to devise a scheme by which to gauge the future actions of the Claimant. It is for Parliament and those to whom Parliament has delegated such powers to enact or devise such a scheme.

Separation of Powers and the In Personam Declaration

[88] In light of the discussion above and manner in which this specific issue arises, it is not necessary and indeed it is inappropriate for this court to determine whether the Claimant can participate in elective politics in Saint Christopher and Nevis based on the affidavit evidence adduced by the parties. For reasons explained above, any common law rule the effect of which is to prevent some or all public officers from participating in political activities must yield to the provisions of the Constitution. The Constitution empowers Parliament in section 28(5)(a) to make provision for further disqualification in respect of persons who hold or are acting in any office or appointment. If the court were to decide whether the Claimant is entitled to the in personam declaration on the basis of the criteria used by the courts in **Osborne**, **Fraser**, **de Freitas**, **Ahmed** and **Re McKinney** to determine whether decisions made in relation to, or legislation in respect of, the participation by public officers in political activities, the court would, in effect, be deciding whether the Claimant is thereby disqualified from running for political office.

[89] The Constitution expressly reserves this power to Parliament and not the Judiciary. In **Hinds v The Queen** [1977] AC 195 (at p. 212):

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.

[90] The Defendant submits that its evidence focused on explaining the Claimant's important role as an accountant in the Customs Department and detailing his duties and rank because these place him in a sensitive strata of the civil service

whereby running for office and the activities required to execute a political campaign would bring the civil service into disrepute and impugn the public's perception of an impartial civil service. However, it is manifestly inconsistent with the separation of powers doctrine for this court to use the criteria in the above-mentioned cases, as suggested by Senior Counsel for the Defendant at the hearing of the application by way of originating motion, to devise a scheme to enable it to decide based on the evidence presented by the parties whether the Claimant is entitled to the in personam declaration. I agree with the submission of Counsel for the Claimant that the court cannot of its own violation make such a restraint, as invited by the Defendant, because to do so would be to trespass into Parliament's realm in breach of the separation of powers doctrine.

[91] It is for Parliament pursuant to the mandate provided in section 28(5)(a) of the Constitution to determine whether any class of or all public officers may be disqualified from being elected or appointed as a member of the National Assembly. It is also for the Executive pursuant to the mandate provided in section 53(3)(b) of the Public Service Act to determine whether to enact any code, or amend existing codes, restricting the participation of certain categories of public officers, distinguished by the sensitivity of their duties, in forms of political activity. Any such categories need to be in as focused a manner as possible and should allow through an exemption procedure optimum opportunity for a public officer in any of those categories to seek exemption from the restrictions that, by the nature of the duties performed, are presumed to attach to the public officer. It will be remembered that the Privy Council in **de Freitas** stated that it would plainly be practical to devise a comparable system of classification as has been adopted in the United Kingdom whereby there are classes of civil servants related to the seniority of the posts which they fill and a distinction is made between the classes as to the extent of any restraints imposed upon them in regard to their freedom of political expression. It would be sensible for the Government of Saint Christopher and Nevis to pay attention to those words.

[92] This court, as the judicial branch of government, cannot consistently with the separation of powers doctrine use any criteria that it may devise (which power is reserved to the Executive pursuant to section 53(3)(b) of the Public Service Act) that may have the result of disqualifying a public servant qualified under section 27 of the Constitution from being elected as a member of the National Assembly (which power is reserved to Parliament pursuant to section 28(5)(a) of the Constitution). If the court were to accede to the request of the Defendant, it would be usurping the functions of both the Executive and the Legislature. The doctrine of the separation of powers forbids this and I decline the invitation.

[93] Since there are no lawful restrictions on the ability of public officers to engage in any form of political activity and there is no legislation that prohibits public officers from putting themselves as candidates in any General Election in the Federation of Saint Christopher and Nevis, the Claimant is entitled to the declaration that he seeks.

[94] To be sure, nothing in this judgment must be taken to suggest that: (1) Parliament cannot prevent public officers from being elected to Parliament pursuant to section 28(5)(a) of the Constitution; or (2) the Executive cannot limit the political activities of public officers either by amending the Code or making a new code pursuant to section 53(3)(b) of the Public Service Act. Both of these actions if pursued must be consistent with sections 3(b), 12(2)(c), and 13(2)(c) of the Constitution of Saint Christopher and Nevis and must take into account the learning in the decisions discussed in this judgment and summarized at [91] above.

Disposition

[95] For the reasons explained above, I make the following orders:

(1) A Declaration is granted that Rules 36 and 38 of the Public Service (Conduct and Ethics of Officers) contravene sections 3(b), 12(2)(c), and 13(2)(c) of the Constitution of Saint Christopher and Nevis and are therefore null and void and of no effect.

(2) A Declaration is granted that the Claimant is entitled to take an active part

in a political organization and run for elected office or public office in the Federal Elections of the Federation of Saint Christopher and Nevis.

(3) The Defendant shall pay the Claimant's costs to be assessed if not agreed within 14 days of todays date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar