

TA'AN KWÄCH'ÄN JUDICIAL COUNCIL
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To: Ta'an Kwäch'än Council Board
117 Industrial Road
Whitehorse, Yukon Y1A 2T8

And: Chief Jim Boss Family
c/o: Harold Chambers

And: Maggie Broeren Family
c/o: Glenda Jones

And: Jenny Laberge Family
c/o: Alice McGuire

And: Jenny Laberge Family
c/o: Jackie Bazett

And: Maggie Broeren Family
c/o: Pamela Adamson

And: Jenny Dawson Family
c/o: William Jones

And: Maggie Broeren Family
c/o: Doreen Grady

And: Susie Jim Family
c/o: Bonnie Harpe

And: Chief Jim Boss Family
c/o: Edythe Maloney

And: Gail Anderson

And: Glen Grady

And: Barbara Hare

Ta'an Kwäch'än Judicial Council

Decisions

Case Numbers: TKJC06-19, TKJC06-20, TKJC06-21 and TKJC06-22

The Ta'an Kwäch'än Judicial Council (Judicial Council) conducted a hearing to consider the following:

- TKJC06-19, a November 28, 2006 application from Barbara Hare, respecting eligibility of a Board Director.

- That part of TKJC06-20, a December 1, 2006 application from Barbara Hare, that relates to the appointment of a Family Director and the status of business conducted by the Board with the participation of an alleged ineligible member.

- The part of TKJC06-21, a December 6, 2006 application from Bonnie Harpe, that relates to the status of Board business conducted with the alleged participation of an ineligible member.

- TKJC06-22, a December 6, 2006 application from members of the Board respecting the obligations for Traditional Families to make their Director appointments to the Board.

These matters were considered in a single hearing conducted on March 13, 2007 as provided for in the Directions on Procedure issued by the Judicial Council on January 26, 2007 and February 5, 2007. The decisions for all of these matters are provided in this document, and these decisions included consideration of written submissions previously filed by the parties.

The Issues

For the purpose of the hearing, the issues raised in these four cases were consolidated as follows:

1. The responsibilities of a Traditional Family to name directors to the Ta'an Kwäch'än Board (the Board) and the remedy, if any, to be granted by the Judicial Council should a Traditional Family not do so.

This issue focuses on the responsibilities of Traditional Families (with specific reference to the Susie Jim, Chief Jim Boss and Maggie Broeren Families) to name Directors to the Board. This arose in TKJC06-22 and was also referred to in TKJC06-19, wherein it was the position of the applicant that a Maggie Broeren Family Director position be left vacant for a year as a show of respect following the March, 2006 death of Sophie Miller.

The parties to the hearing for the purpose of this issue include the Board and representatives of the three Traditional Families named in the application. The Board and Doreen Grady were represented at the hearing by legal counsel. The Susie Jim Family was represented by Bonnie Harpe, the Maggie Broeren Family by Pamela Adamson, and there was no representative for the Chief Jim Boss Family. Barbara Hare was not present at the hearing, but had advised the Judicial Council by e-mail that Bonnie Harpe was authorized to speak on her behalf and present evidence.

2. The validity of the Board Directorship of Doreen Grady

This issue relates to TKJC06-19 and a portion of TKJC06-20 and the parties to the hearing for the purpose of this issue included Barbara Hare, represented by Bonnie Harpe and Doreen Grady and the TKC Board, represented by legal counsel.

3. **The status of business conducted by the Board with the participation of Harold Chambers in the three years prior to the submission of TKJC06-21 (December 6, 2006) and with the participation of Doreen Grady at a Board meeting held November 30, 2006.**

This issue relates to TKJC06-20 and TKJC06-21. The parties to the hearing for the purpose of this issue include Barbara Hare, Bonnie Harpe, Doreen Grady, Harold Chambers and the Board. Legal counsel represented the Board; Bonnie Harpe provided her own representation and was also authorized to speak on behalf of and present evidence for Barbara Hare.

Other Parties and Witnesses

During the course of the hearing, Hazel Bunbury and David Bunbury were recognized by the Judicial Council and spoke as additional representatives of the Maggie Broeren Family. Alice McGuire and Chief Ruth Massie appeared as witnesses for the Board for the consideration of Issue 1. The Judicial Council would like to express its appreciation for the input from two Ta'an Kwäch'än elders, Hazel Bunbury and Alice McGuire.

Issue 1 - The responsibilities of a Traditional Family to name directors to the Ta'an Kwäch'än Board (the Board) and the remedy, if any, to be granted by the Judicial Council should a Traditional Family not do so.

Counsel for the Board argues that the Judicial Council has jurisdiction to consider the responsibilities of Traditional Families to name Board Directors by virtue of the constitutional authority of the Judicial Council under 12.0, including the responsibility under 12.1.1 to "adjudicate any cases of alleged violations of the laws of the Ta'an Kwäch'än...." and that the Constitution itself is such a law, and the naming of Directors is a duty provided for under that law. Counsel further

argues that the Judicial Council has the jurisdiction to provide declaratory relief respecting this issue and may have more limited jurisdiction to provide further relief.

Ms. Adamson, Ms. Harpe and Mr. Bunbury argue that the naming of a Director is the sole responsibility of a Traditional Family under (8.4) of the Constitution and consequently not within the jurisdiction of the Judicial Council.

The Judicial Council concludes that it has jurisdiction to consider and adjudicate and provide relief respecting alleged violations of the appointment requirements outlined in 8.4 of the Constitution by virtue of its responsibility to do so under 12.1.1.

Submissions

Counsel for the Board and applicants in TKJC06-22 argues that there is a duty under 8.4 of the Constitution for all family lines of each Traditional Family to select a Family Director to the Board. Counsel further argues that these appointments must be made in a timely manner in order that the functioning of the Ta'an Kwäch'än government is not compromised as there can be difficulties achieving the Board quorum required to conduct business. While expressing support for the sentiment underlying the proposal to leave a Family Director position vacant for a year or more out of a traditional show of respect following a family death, counsel notes that this practice could effectively shut down the operation of the Board and government.

The representatives of the respondents in TKJC06-22 brought forward a number of points respecting their not naming Family Directors as well as to the TKJC06-19 proposal to leave a Director position vacant for a year. They argue that under the traditions of the Ta'an Kwäch'än, when a family member dies, there is a one-year period or more during which nothing resembling business or governance is to be conducted as a show of respect and to allow for grieving for the deceased. The end of this period is marked by a potlatch being held – usually about a year after death, but possibly up to eighteen months later depending on the time of year and state of preparations. They more specifically argue that this

was the situation in the case of Sophie Miller, who passed away in March of 2006, but should more generally apply with the operation of the government accommodating this traditional practice. Mr. Bunbury and Ms. Adamson both argue that, while 8.4 of the Constitution requires Family Directors to be named, there is no time limit provided, so they are free to take as much time as they want.

The respondents also argue that the existing leadership and unspecified others in the government have neither the knowledge of nor respect for the history and traditions of the Ta'an Kwäch'än needed to properly govern the Citizens. They argue that without a solid traditional background, the Ta'an Kwäch'än government would not be able to preserve the culture and traditions of the people. Mr. Bunbury and Ms. Adamson both state that they are under order from their Family Elder, Hazel Bunbury, not to name a Family Director, and Ms. Bunbury confirms this.

Both Ms. Adamson and Ms. Harpe submit that they did not feel that the Board of Director meetings presented a safe environment for them. They both allege that other Board members did not show them respect, voted down their ideas regularly rather than operating by consensus, used abusive language at times and exhibited negative body language. Further, Ms. Adamson alleges that one or more Directors smelled of alcohol during Board meetings. In Ms. Adamson's case, her experiences with the Board pre-date the current leadership, as she left the Board in 2004. Ms. Harpe's experience, which led to her resigning from the Board, was over the period of April 2004 until January 2005.

Finally, Ms. Harpe stated clearly that she and her Family were unwilling under any circumstance to name a Director until there is a change in the leadership acceptable to Ms. Harpe and the Susie Jim Family.

Analysis

Like many first nations in the Yukon and elsewhere in Canada, the Ta'an Kwäch'än face the challenge of implementing their responsibilities and obligations under their final and self-government agreements while maintaining their underlying culture and traditions. There are many complexities and exigencies when a first nation is operating a public government, providing a wide variety of government services, and interacting on a government-to-government basis with federal, territorial and municipal government agencies. As noted by Ms. Adamson among others at the hearing, some changes to the day-to-day function of government have been made by many first nations to accommodate traditional practices, such as marking the death of a member through a one-day government office closure.

The Constitution adopted by the Ta'an Kwäch'än in 2004 establishes the structures for their government and sets out the basic rules and duties in order for these to function. The main governing body established for the Ta'an Kwäch'än is the Board, with its requirements set out in section 8 of the Constitution. Five Traditional Families select one to three Citizens each to sit as Family Directors on the Board (a total of nine Family Directors), with the elected Chief and Deputy Chief completing the membership. To meet its constitutional quorum requirement under 8.6, the Board requires at least six of the nine Family Directors and the Chief or Deputy Chief to be present at a meeting. Without a quorum, the Board cannot carry out its responsibilities under 8.7 of the Constitution, which can disrupt the day-to-day function of the Ta'an Kwäch'än government and place into jeopardy the effective operation of the government and its programs serving Ta'an Kwäch'än Citizens.

It is clear that the respondents to TKJC06-22 are fully aware of the impact their withholding naming Family Directors has on the functioning of the Board and its ability to achieve quorum on a regular basis. While a number of reasons were given for withholding Directors, none would allow for superseding the obligations of the Constitution. Regularly holding a position vacant for a year or more as a sign of respect following a death could easily bring the Board's

operation to a halt, and this is obviously not intended by the Constitution. There are other means available - the current practice of closing the government office for a day following the death of a Citizen, for example - where respect can be shown without compromising the operation of the government or other constitutional duties.

Having other governing body members disagree with points brought forward and occasionally doing so through vigorous debate is common to many governing structures. While consensus is noted as the preferred decision-making approach for the Board under 8.8 of the Constitution, the same provision provides for a three-quarter-majority vote to resolve issues when consensus cannot be reached. Again, losing votes is a regular occurrence in many government structures, and it is not reasonable to withhold participation merely because one cannot get their way. No evidence was presented that would support an allegation that a Board meeting is an unsafe environment for any participant.

Finally, dissatisfaction with the lawfully elected leadership, as submitted by Ms. Harpe as her reason for withholding the naming of a Susie Jim Family Director, is clearly not consistent with and effectively flaunts the Constitution of the Ta'an Kwäch'än. If these respondents and the Families they represent have issues to raise with the leadership or other Board Directors, they should do so by carrying out their constitutional duties to name Family Directors and ensuring those Directors participate at Board meetings and address concerns in a manner consistent with the Constitution. There is clear intent by these respondents not to do so; rather, they are trying to make it as difficult as possible for the government to operate as a means of bringing forward their concerns.

The Constitution clearly contemplates the establishment and operation of a functioning Board as the main governing body for the Ta'an Kwäch'än. It follows that it is intended that the obligation of the Traditional Families to name Family Directors is a clear constitutional duty that a Traditional Family cannot fail to carry out. Further, while there is no specific timeline for the exercise of this

duty, it must be carried out without delay in order to meet the full scope and intent of this constitutional obligation.

Decision:

The Ta'an Kwäch'än Judicial Council declares that each family line of a Traditional Family has a constitutional obligation to name a Family Director under 8.4 of the Constitution of the Ta'an Kwäch'än, without delay. Further, Family Directors have an obligation to attend and participate at Board meetings consistent with rules developed under 8.7.7 of the Constitution.

Issue 2 - The validity of the Board Directorship of Doreen Grady

Counsel for the Board argues that the Ta'an Kwäch'än Judicial Council does not have jurisdiction to consider the validity of a Family Director appointment in this case, as the selection of a Director is an internal Traditional Family matter.

The Judicial Council concludes that it does have jurisdiction to consider and adjudicate this matter. Under 12.1.1 of the Constitution, the Judicial Council is given the responsibility to "adjudicate any cases of alleged violations of the laws of the Ta'an Kwäch'än Council..." The Constitution of the Ta'an Kwäch'än is a law of the Ta'an Kwäch'än Council and 8.4 imposes a duty on each family line to select Directors for the Board. Failure to carry out this duty as prescribed by 8.4 can be considered a "violation" of this law, and consequently it would qualify as a matter within the Judicial Council's jurisdiction to consider and adjudicate.

Submissions

The applicant, Ms. Barbara Hare, argues that Ms. Doreen Grady was not properly appointed as a Director of the Board, alleging that this selection was made with the involvement of only two members of the Sophie Miller family line – Doreen Grady and Glen Grady.

Ms. Grady submitted that there were many more members of the Sophie Miller family supporting her selection as Director. She also alleges that Ms. Hare was estranged from Sophie Miller for about sixteen years and not involved with the majority of members of the family line. Ms. Grady summarizes her submission by asking that the Judicial Council dismiss Ms. Hare's application as frivolous and vexatious.

Analysis

In 8.4, the Constitution of the Ta'an Kwäch'än refers to the procedure to be used for the selection of Family Directors, with a family line making this selection "according to its own procedures". The submissions received indicate that several members of the Sophie Miller family line were involved in and/or supported the selection of Ms. Doreen Grady for their family line Director. When in ailing health and unable to attend meetings as a Director, Sophie Miller authorized Doreen Grady to attend in her stead on a number of occasions.

Neither the Constitution nor the submissions received indicate what procedure is supposed to be used by the Sophie Miller family line to select a Director. With this absence of clarity, it is difficult for the Judicial Council to determine if there was a violation of 8.4 of the Constitution. If there is concern with the process used to select a Director, this is more appropriately dealt with in the first instance by the family itself rather than the Judicial Council. Further, as provided in 8.5 of the Constitution, the Traditional Family can recall its Board representative; and again, this is a more appropriate avenue to explore for replacing Ms. Grady as a Director should the Family consider that to be an appropriate course of action.

Decision

The Judicial Council dismisses Barbara Hare's application in TKJC06-19 and does not find Doreen Grady's appointment to the Board invalid.

Issue 3 - The status of business conducted by the Board with the with the participation of Harold Chambers in the three years prior to the submission of TKJC06-21 (December 6, 2006) and with the participation of Doreen Grady at a Board meeting held November 30, 2006

Counsel for the Board argues that, while the Judicial Council has the jurisdiction to determine if the quorum requirements under 8.6 of the Constitution were met, it does not have jurisdiction to rule on the validity of laws, motions and resolutions made when the Board may have been inquorate. Counsel cites *Harpe v. Massie and the Ta'an Kwäch'än Council*, 2005 YKSC 54, in which Mr. Justice Veale concluded that the Judicial Council did not have the jurisdiction to review a resolution of the Elders Council.

The applicant in TKJC06-21, Ms. Bonnie Harpe, argues that the Judicial Council has jurisdiction, as it is responsible under 12.1.1 of the Constitution to adjudicate alleged violations of Ta'an Kwäch'än Council laws, that the Constitution itself is such a law, and that 8.6 and 8.8 of the Constitution impose constitutional duties on the Board that must be complied with. She further argues that if the Judicial Council has jurisdiction to determine whether the Board had a proper quorum when conducting its business, it follows logically that it must also have jurisdiction to grant some form of relief if it finds the Board acted without quorum.

The Judicial Council concludes that it does have jurisdiction to consider whether or not the Board was operating with a proper quorum and to provide an appropriate remedy if it finds business was conducted while the Board was inquorate. The Constitution gives the Judicial Council the responsibility to "adjudicate any cases of alleged violations of the laws of the Ta'an Kwäch'än Council ..." (12.1.1). As noted previously, the Constitution is a law of the Ta'an Kwäch'än and 8.6 establishes quorum requirements in order for the Board to operate. Section 8.8 of the Constitution provides that approval of all laws, motions and resolutions requires consensus or a three-quarter-majority vote of the Board. These constitutional provisions impose mandatory requirements on

the Board. Under the Constitution the responsibility to adjudicate an alleged failure to adhere to these legal requirements is a matter assigned to the Judicial Council. In our view, it follows that the Judicial Council can also rule on the validity of business conducted by the Board if it has done so contrary to the Constitution. It would be a hollow authority and would render ineffective the responsibilities of the Judicial Council under 12.1.1 of the Constitution to limit its jurisdiction to a determination of whether the Board conducted business with a proper quorum and not rule on the validity of business conducted if the Judicial Council determines there was no quorum.

Submissions

In her application, Ms. Bonnie Harpe submits that Mr. Harold Chambers participated on the Board as a Family Director when ineligible to do so under 8.14 of the Constitution of the Ta'an Kwäch'än, that precludes a Citizen from being a Family Director if they have been convicted of an indictable offence or the offence of theft, fraud, or false pretenses. Ms. Harpe further argues that, because he is ineligible, Mr. Chambers should not have been considered in establishing quorum for the Board from the time 8.14 came into effect in 2004 until he ceased participating as a Director. Finally, Ms. Harpe argues that any laws, motions and resolutions approved by the Board where it was necessary to include Mr. Chambers in order to meet the quorum requirements should be declared to be invalid and of no force or effect. She asks that all such Board business over the past three years be reviewed.

Counsel for Mr. Chambers and the Board concedes that Mr. Chambers sat as a Director when ineligible to do so from the effective date of the 2004 Constitution until resigning as a Director in December 2006. Counsel submits that, with the criminal record dating back almost thirty years, Mr. Chambers had forgotten about the event and its significance for him sitting as a Director during the tenures of Ms. Harpe as Acting Chair of the Board and Ms. Ruth Massie as Acting Chief and Chief. Counsel submits that, to invalidate all laws, motions and resolutions passed by the Board during an approximate three-year period when

Mr. Chambers was needed to meet the Board quorum requirements would create a legal vacuum that would not be in the interest of the Ta'an Kwäch'än or the general public interest. Counsel cited *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, where the Supreme Court of Canada determined that Manitoba laws passed since 1890 were invalid as they had not been passed in accordance with the requirements of the *Constitution Act* (1867) and the *Manitoba Act* (1870). To avoid creating a legal vacuum and ensuing legal chaos, the Court deemed the laws to be temporarily valid and provided the Manitoba Legislature a period of time to re-enact the laws in a manner that complied with constitutional requirements. Counsel submits it would be appropriate for the Judicial Council to adopt a similar approach if it determines that Board business conducted with Mr. Chamber's participation is invalid. Finally, counsel submits that the Judicial Council should deny the relief sought by the applicant on the grounds that, by withholding participation of a Susie Jim Family Director and thereby contributing to difficulties for the Board achieving quorum, Ms. Harpe was not bringing the matter forward to the Judicial Council "with clean hands", and as a matter of equity she should not be granted the relief she is seeking.

Analysis

The Judicial Council has a constitutional responsibility to adjudicate alleged violations of Ta'an Kwäch'än laws and a general responsibility to uphold the Ta'an Kwäch'än Constitution and respect the principle of the rule of law. The Judicial Council considers it would be inappropriate to dismiss Ms. Harpe's application on the grounds the applicant is "without clean hands" because this would diminish the importance of the constitutional issue that has been raised, and would effectively ignore the substantive matter of the Board conducting business with an ineligible member — a point that all parties acknowledge.

Based on evidence provided and acknowledged by the Board, Mr. Chambers sat as a Director of the Board while ineligible to do so under 8.14 of the 2004 Constitution. His ineligibility means that he should not have been considered as a Director for the purpose of establishing quorum under 8.6.

Between the time that the Constitution was adopted and Mr. Chambers resigned as a Director in December of 2006, it appears certain that the Board approved some laws, motions or resolutions under 8.8 of the Constitution while inquorate when counting on Mr. Chamber's participation to make up the minimum quorum. Since these laws, motions or resolutions were approved in violation of 8.6 and 8.8 of the Constitution, it follows that such laws, motions or resolutions are legally defective and invalid.

While it is not clear what volume of Board business was transacted in the absence of a proper quorum due to the participation of Mr. Chambers as an ineligible Director, it could be considerable. As noted in *Re Manitoba Language Rights*, simply issuing a declaration that many of the laws, motions or resolutions approved over a three-year period are invalid and of no legal force or effect would create a legal vacuum, deprive the citizens and government of Ta'an Kwäch'än of legal order and certainty and constitute a transgression of the rule of law. For the Judicial Council to allow this situation to occur would be inconsistent with its overarching responsibility to the Ta'an Kwäch'än as one of their governing bodies.

To avoid creating a legal vacuum and to maintain the rule of law, and based on the principles and rationale relied on by the Court in *Re Manitoba Language Rights*, the Judicial Council temporarily deems valid those laws, motions or resolutions that were approved by the Board at any time the participation of Mr. Chambers was essential to the Board for establishing quorum. This period of temporary validity will allow the Board time to review all laws, motions and resolutions dealt with from the effective date of the 2004 Constitution until the date of Mr. Chambers' resignation as a Director and to take remedial action as necessary. In the case of invalid motions and resolutions, it may be appropriate to consolidate and re-approve them as a block. In the case of laws, it is obvious the Board will be required to follow the legislative process under 13.0 of the Constitution. Recognizing that this review and undertaking remedial measures will take some time to complete, the Judicial Council orders that the period of temporary validity be one year from the date of this decision. In

the event exigent circumstances prevent the Board from completing its review or undertaking remedial actions within the one-year period, the Judicial Council will consider applications to extend this timeline and may amend it.

Decision

In the matter of TKJC06-21, the Judicial Council finds that any laws, motions or resolutions approved while Harold Chambers was participating as a Board Director and required to meet quorum after the effective date of the Constitution are invalid, but deems them to be valid for a period of one year to allow the Board to re-approve them as it decides is appropriate.

In the matter of TKJC06-20, as the Judicial Council has ruled that Doreen Grady's participation as a Board member on November 30, 2006 was not invalid, the application to declare invalid business of the Board conducted at that meeting is dismissed.

Issued by the Ta'an Kwäch'än Judicial Council this 28th day of March 2007.

per:

Chuck Hume
Judge

Michael Dougherty
Judge

John Bailey
Judge