

# Ta'an Kwäch'än Judicial Council

## Disposition

**Date:** January 22, 2015

**Case Number:** TKJC 14-02

**Applicant:** Alice McGuire and Brenda Sam

**Respondent:** Kristina Kane

**Oral Hearing:** November 27 and 28, 2014

### COMPLAINT(S)

The Ta'an Kwäch'än Judicial Council (TKJC) received two complaints — one from Brenda Sam, and a subsequent one jointly from Alice McGuire and Brenda Sam (Joint Complaint). Both called for the removal of Kristina Kane from her position as Chief of the Ta'an Kwäch'än Council (TKC) because of her violation of section 8.14 of the Ta'an Kwäch'än *Constitution*. Further, the Complaint requested Ms. Kane's reimbursement of all remuneration received while sitting under false pretenses as a Director and Chief from December 2009 to present.

Specifically, the first complaint delivered to the TKJC on April 29, 2014, alleged that Ms. Kane had "represented her family on the Ta'an Kwäch'än Council from December 2009 until October 2012 as a Director, and then as Chief from October 2012 to present, knowing she had two (2) criminal convictions against her."

Ms. Sam stated that this was in violation of section 8.14 of the *Constitution*, which states, "Citizens are not eligible to be a Family Director, Chief or Deputy Chief if they have been convicted of an indictable offense or of theft, fraud or false pretenses."

In the Joint Complaint, Ms. Sam and Ms. McGuire stated that Ms. Kane has "not been granted a pardon or record suspension by the Pardons Board of Canada" for two theft convictions to be the heart of this matter. They also called for the TKJC to order Ms. Kane's removal as Chief and require her to "repay all monetary value that she acquired" as a result of her serving as Director and Chief from December 2009 to present under false pretenses.

## ISSUES

1. Does the fact that a person has a criminal conviction (“convicted of an indictable offense or the offense of theft, fraud or false pretenses” — Section 8.14) automatically mean:
  - a. they have compromised the dignity of the office?
  - b. they have compromised the effectiveness of the office?
2. Should the remuneration received be required to be repaid?
3. Upon realization that a pardon had not been granted, did Ms. Kane’s failure to disclose immediately the status of her criminal convictions compromise the dignity or effectiveness of the office?

While considering the issues raised in this Joint Complaint, the TKJC also recognizes the impacts of several sub-issues and mitigating factors:

1. Frailty of the *Elections Act*, which:
  - requires a current Royal Canadian Mounted Police clearance as the singular proof that a citizen is eligible pursuant to Section 8.14 of the *Constitution* to run for office; and
  - does not require a citizen to declare they have had criminal convictions for which a pardon has or has not been granted.
2. Presuming that Ms. Kane knew she had criminal convictions, did Ms. Kane fraudulently seek election, or:
  - Was she required to declare those convictions in spite of the clear criminal record checks?
  - Did the clear criminal record checks stand as reasonable evidence that a pardon for her criminal convictions had been granted and thus would allow her to hold office?
3. Once Ms. Kane knew that she did not have a pardon and that, in spite of the clear criminal record, she was not eligible to hold office, did she properly disclose her criminal convictions? What are the proper procedures for such discovery and upon whose shoulders does the burden fall to ensure such proper action is taken — the official affected, Elders Council or the TKC Board?
4. While the Parties did not wish the TKJC to rule on the relationship between the *Constitution* and *Elections Act* pursuant to Section 12.1.4 of the *Constitution*, which states TKJC has the authority to “determine the validity of a law or regulation enacted by the TKC”, the shortfall of the *Elections Act* in relation to the *Constitution* requires recognition.

## JURISDICTION

The TKJC is a branch of the government of the Ta'an Kwäch'än First Nation created under Section 5 of the *Constitution*.

While the first complaint maintains that because of a violation of Section 8.14 of the *Constitution*, the TKJC “needs to remove Chief Kristina Kane from her position as Chief”, the TKJC’s power to remove a TKC official from office flows from section 12.2 of the *Constitution*, which states it may “remove a member of the Board if he or she is found to be compromising the dignity or effectiveness of that office.”

This jurisdiction is reinforced by Yukon Supreme Court interpretations of the TKJC’s role. “The Judicial Council has enormous powers ranging from adjudicating violations of the laws of the Ta'an Kwäch'än Council to removing members of the Board.” (Harpe vs. Massie and Ta'an Kwäch'än Council, 2006 YKSC 01) These powers, such as outlined in Section 12.1.1, allow the TKJC to also “impose such sentences as are provided by law to ensure compliance”.

Of note, the TKJC further recognizes that it “has the unique power to examine the validity of any existing law or regulation to determine if it is consistent with the customs and traditions of the Ta'an Kwäch'än.” (Harpe vs. Massie and Ta'an Kwäch'än Council, 2006 YKSC 01) However, the parties to the Joint Complaint before the TKJC did not challenge the validity of any other Ta'an Kwäch'än law or regulation.

## ARGUMENT OF THE COMPLAINANTS

Ms. McGuire and Ms. Sam stated in their opening and closing submissions that the failure of Ms. Kane to divulge her criminal record relating to theft under \$5,000 in 1997 constituted fraud and false pretenses. They argued that even though the charges were well prior to her 2009 election as Family Director and October 2012 election as Chief of the Ta'an Kwäch'än, the fact that she had a criminal record meant that she was in breach of the *Constitution*, and any constitutional breach automatically, by its very nature, compromises the dignity of the office of Chief of the Ta'an Kwäch'än.

They further stated that the *Constitution* was silent on the question of pardons for previous offenses and that any attempt to use the *Elections Act* to argue that the point of a possible pardon exonerates her from obligation to strictly adhere to Section 8.14 of the *Constitution* was irrelevant. This, they submitted, is particularly so given that Ms. Kane, although she believed she was the recipient of a pardon, had in fact not received the pardon that she reputedly applied for.

They referred to their sole witness, Barbara Hare, a TKC Councillor for the Maggie Broeren family who, in her testimony, remarked that following receipt of documents on April 15, 2014 which revealed Ms. Kane’s criminal offenses, she, as a director, had not attended TKC Board meetings. She has done so on the instruction of her family and because she believes the presence of Ms. Kane has rendered the TKC Board illegitimate.

Ms. Sam argued in her closing submission that “theft is theft” and, referring to the decision in TKJC 06-01, a TKC Board member is obliged to bring a matter such as this to the attention of the TKC Board immediately. Ms. McGuire restated that to break the law, most particularly a requirement set out in the *Constitution*, is a serious attack on the repute of the office, in and of itself. She contended that the Elders Council has been negatively impacted by this dispute as has the Ta’an Kwäch’än First Nation as a whole.

### **Summary of Complainants’ Arguments:**

1. Because Ms. Kane has been convicted of theft on two occasions (shoes/pack of cigarettes) she has compromised the dignity of the office of Chief.
2. Even if the conviction(s) in and of itself is insufficient, the fact that Ms. Kane did not declare her criminal convictions once she became aware that she had not been granted a pardon demonstrates that she holds office on false pretenses.
3. Allowance in the Elections Act of a pardon, effectively eliminating criminal convictions, is not relevant as a pardon has not been granted.
4. Because Ms. Kane is not eligible to hold the office of Chief, she is subject to the reclamation of all remuneration provided to her while sitting as Chief.

### **ARGUMENT OF THE RESPONDENT**

Jocelyn Barrett, acting as counsel for Ms. Kane, maintained that at no time did Ms. Kane deny her criminal past. She maintained that her 2010, 2012 and 2014 criminal record checks showed that she did not have a criminal record. (Exhibits 5 and 6) Relying on her clean RCMP criminal record checks, Ms. Kane believed she had adequately satisfied the eligibility requirements to run for office, pursuant to the *Elections Act*. Ms. Kane testified that she was never asked if she had been indicted as part of the eligibility process, and did not feel compelled to reveal her past convictions, based on the stipulation in the *Elections Act* that a person with a pardon is eligible to run in an election.

Ms. Kane submitted that she had applied for a pardon in 2003, and while she did not have a copy of her pardon or application for it, the clear criminal record checks sustained Ms. Kane’s belief, albeit erroneously, that she had received a pardon.

Ms. Kane stated that while she never received confirmation of the pardon, based on her clear criminal record checks, she believed that because of her several changes of addresses following her application, the paperwork had simply been lost in the mail.

While she did not provide a copy of her pardon application or any correspondence dealing with it, no one challenged her attestation of her pardon application.

Ms. Kane relied on the RCMP criminal record checks as proof that she had no criminal record, effectively because of a believed pardon. This allowed her to stand for office in good faith. Her evidence was:

- In February 2014, Ms. Kane was informed by an elder that her criminal record still existed. This sparked a further, more extensive criminal record check in March 2014 which required her being fingerprinted. This subsequent check again showed that she had no criminal record.
- As a result of this further criminal record check, Ms. Kane attended an Elders Council meeting and declared that the results of this more extensive criminal record check proved she had a pardon, and was properly eligible to run for office and, subsequent to the election, hold office as Chief. Ms. Kane did not share the criminal record check, citing confidentiality. Ms. Kane relied on her continued belief that she had a pardon to relieve her from the obligation for full disclosure.
- Following the May 2014 filing of the Joint Complaints to the TKJC, Ms. Kane, through persistent questioning to the RCMP and the Canadian Parole Board offices, discovered in early May 2014 (actual date not submitted in evidence) that the Parole Board had not granted her a pardon. There was no information provided to the TKJC as to why the pardon was not granted.
- Ms. Kane informed the TKC Board in her September 23, 2014 memo (Exhibit 7) of the facts of her convictions and the subsequent actions she took which resulted in her discovery that indeed she did not have a pardon for her theft offenses in 1997.
- Ms. Kane stated that at no time was she asked to step down by the TKC Board or the Elders Council, and the work of the Ta'an Kwäch'än First Nation continued.
- Ms. Kane stated she has not in any way compromised the dignity or effectiveness of her office. Exhibits such as correspondence from the Yukon Chamber of Commerce (Exhibit 10) or the administrative assistant for the Yukon Premier (Exhibit 13) were entered to bolster this argument.

Section 32 of the *Elections Act* states, "Paragraph 31 (e) does not apply to a citizen who has been granted a pardon removing any penalties or punishments and preventing any new prosecution of the citizen for which the pardon was given."

Up until early May 2014, Ms. Kane held the erroneous belief that she had a pardon.

Based on her discovery that a pardon does not exist, Ms. Kane again applied to the Parole Board in October 2014 in expectation of bringing her eligibility to hold office back into compliance with the *Elections Act*.

Ms. Barrett, in her closing submissions, stated that Ms. Kane was under no positive obligation to declare her criminal record but only to produce evidence of a lack of a criminal record by way of a current RCMP criminal record check in order to satisfy the eligibility conditions of the *Elections Act*. Counsel argued that Ms. Kane's erroneous belief in her receipt of a pardon meant that she did not knowingly or fraudulently present herself as a candidate for the position of Chief in the 2012 Ta'an Kwäch'än election.

## EVIDENCE AND WITNESS TESTIMONY

Witnesses called to testify for the Respondent were Gail Anderson, Georgina Leslie, Michelle Telep, James MacDonald and Shawn O'Dell.

Ms. Anderson, an elder of the Jennie Dawson family, testified as a witness for the Respondent that she became aware of Ms. Kane's criminal record at an Elders Council meeting in the spring of 2014. At that meeting, Ms. Kane indicated that she had a pardon. Ms. Anderson stated that she did not believe this compromised the dignity or effectiveness of the office of Chief. Ms. Anderson believes that this Joint Complaint is rooted in the discord around the very nature of the family line composition of the Ta'an Kwäch'än First Nation.

The Chief Returning Officer for the 2012 Ta'an Kwäch'än election, Georgina Leslie, also testified for the Respondent. She noted that Ms. Kane produced her criminal record check as other candidates had. Both believed that this satisfied the *Elections Act* and Section 8.14 obligations. Ms. Kane was permitted to run for the position of Chief and won the election. Ms. Leslie, in her testimony, acknowledged the now-obvious inadequacy of an RCMP criminal record check to fully assure the conditions for Ta'an Kwäch'än eligibility to hold office have been met, as the documentary evidence that Ms. Kane had been convicted of theft on two occasions did not show in the RCMP criminal record checks.

Michelle Telep, the Deputy Chief, testified that she first heard of Ms. Kane's criminal record in March or April of 2014. She couldn't recall if the Joint Complaint had been discussed at the TKC Board. Ms. Telep believes that Ms. Kane is a good leader doing what is required of her and that she has not compromised the dignity of her office. She saw no problem with a pardoned individual sitting as a Ta'an Kwäch'än official.

As a witness, James MacDonald, a TKC Councillor from the Jenny Lebarge family, stated that the TKC Board did not ask Ms. Kane to resign following her disclosure of a criminal record. He did not believe that this was called for. He testified that a by-election would be costly and disruptive, particularly since the next Ta'an Kwäch'än election is to be held in October 2015. Further, the removal of Ms. Kane from office, he believed, would not address longstanding community divisions.

Shawn O'Dell, the Executive Director of the Ta'an Kwäch'än First Nation, saw it as everyone's job to uphold the *Constitution*. He did not see the work of the TKC Board being disrupted by this Joint Complaint nor did he see the effectiveness of the administration compromised. If called upon, he believed the Deputy Chief would be able to assume the Chief's administrative role.

The Respondent's witnesses all spoke to the key concern from Section 12.2 of the *Constitution* which states that the TKJC may "remove a member of the Board if he or she is found to be compromising the dignity or effectiveness of that office." All of these witnesses supported the position that regardless of the revelation of Ms. Kane's past criminal record, there had been no impact on her effectiveness as Chief, nor did those acts of theft in 1997 bring disrepute on the office of Chief.

Counsel for Ms. Kane also attempted in her questioning of witnesses to establish that the Joint Complaint was actually a result of longstanding familial divisions that exist within the Ta'an Kwäch'än First Nation, which are deeply rooted and existed prior to Ms. Kane's tenure as Chief or Director.

## **CONSTITUTIONAL AND STATUTORY REFERENCES**

### **Ta'an Kwäch'än *Constitution* (2012)**

8.14 "Citizens are not eligible to be a Family Councillor, Chief or Deputy Chief if they have been convicted of an indictable offence or the offence of theft, fraud or false pretenses."

8.15 "Where a Family Councillor, Chief or Deputy Chief is convicted during his or her term, he or she shall be removed from office."

8.16 "Where a Family Councillor, Chief or Deputy Chief is charged with a criminal offence, he or she shall be suspended immediately and will not receive remuneration."

8.16.1 "if the Family Councillor, Chief or Deputy Chief is found innocent or the charges are withdrawn, he or she shall be reinstated immediately."

### ***Elections Act* (2007, as amended 2009)**

31. Eligibility for candidacy as Chief or Deputy Chief

"An individual is eligible to be a candidate pursuant to section 39 for the office of either Chief or Deputy Chief if he or she:

(e) has evidence by way of a current Royal Canadian Mounted Policy clearance of no criminal record for an indictable offense or an offense related to theft, fraud or false pretenses

32. Exemption: "Paragraph 31 (e) does not apply to a citizen who has been granted a pardon removing any penalties or punishments and preventing any new prosecution of the citizen for which the pardon was given."

## **SUB-ISSUES AND MITIGATING FACTORS**

### **(a) *The Constitution and the Elections Act***

The Respondent did not dispute the facts presented that she had been convicted of theft. This fact alone puts her in violation of the *Constitution's* injunction against holding office when convicted of theft.

The TKJC, however, is challenged by the Respondent's referral to the *Elections Act*, which sets out in legislation the requirements for candidacy as Chief or Deputy Chief — particularly Section 31(e), which states that it flows from Section 8.14 of the *Constitution*, and Section 32, which is a specific exemption from the candidacy requirements related to criminal convictions.

Section 31(e) of the *Elections Act* requires nothing more than “a current Royal Canadian Mounted Police clearance” as evidence of no criminal record. Further, the *Elections Act* states that where a person is granted a pardon, they are eligible for candidacy as Chief or Deputy Chief.

Ms. Kane, based on the results of her RCMP criminal record checks in 2010, 2012 and 2014, believed that she had received the pardon she had applied for in 2003. Although Ms. Kane had never received confirmation of a pardon, she persisted in her belief that she had been pardoned, thereby relieving her of any burden under Section 8.14 of the *Constitution*.

Ms. Sam held that because there is no mention of pardons or their impact on previous convictions in the *Constitution*, this negates Ms. Kane’s argument that she was in compliance with the letter of the law. Ms. Kane saw a pardon, as noted under Section 32 of the *Elections Act*, as removing the onus from a previous criminal holder of a criminal record found under Section 31(e) of the same Act, and by extension, her *Constitutional* obligation.

Based on the RCMP clearances, the decision of the Chief Electoral Officer was that Ms. Kane was eligible to run and serve in office as Chief. Unfortunately, further investigation has proven the inadequacy of the RCMP clearance, as Ms. Kane has not been granted a pardon, effectively eliminating her reliance on the exemption clause (32. of the *Elections Act*) and remains in violation of Section 8.14 of the *Constitution*.

The Parties have not requested that the TKJC rule on the interplay between the *Constitution* and the *Elections Act*, but it is clear that the requirements for candidacy in the *Elections Act* do not provide effective assurance of *Constitutional* compliance.

## **(b) Mitigating Factors**

### **Reasonable assumption**

In her defense, Ms. Kane maintained that she had the “reasonable assumption” that the pardon she applied for in 2003 had been granted. With no substantiating documentation, she erroneously assumed that clear RCMP criminal record checks offered proof of a pardon. She declared as much to attendees at an Elders Council meeting in the spring of 2014.

This argument assumes Ms. Kane’s knowledge that if she hadn’t received the pardon she would have been ineligible to run under the strictures of the *Elections Act*, and if elected, she would have been unable to serve in light of Section 8.14 of the *Constitution*.

### **Knowledge of *Constitutional* breach**

When Ms. Kane received confirmation from the Parole Board in early May, 2014 that she had not received a pardon, she did not immediately inform the TKC Board or Elders Council, nor did she resign her position. She waited until September 23, 2014 to inform



the TKC Board that she had not received a pardon for her offenses. It was this supposed pardon that she believed had made her eligible to run for office in 2012 while not divulging her criminal record.

The memo of September 23, 2014 refers to Ms. Kane's conduct in relation to the *Elections Act* but does not address the standards established and required under the *Constitution*. However, her discovery that she lacked a pardon removed her last possible defense against full disclosure of her criminal convictions.

The TKJC refers to Section 8.14 which establishes that a seated official found to have committed a proscribed act under section 8.14 is subject to removal. Even if the TKJC accepted, in light of her reasonable assumption and the declaration by the Chief Returning Officer, that she was eligible to stand for election as Chief, once it was known that the pardon did not exist, Ms. Kane had a responsibility to act as if the convictions reflected on her current status as Chief.

### **Responsibility to act**

As Chief, Ms. Kane has the *Constitutional* obligation to bring "into force all laws and regulations" (Section 9.5.9). The *Government Administration Interpretation Act*, Section 9, obligates every member "whose conduct or behavior may call into question the dignity or integrity of the member, the Board, the General Assembly, or the Ta'an Kwäch'än Council shall disclose the nature and extent of their interest, conduct or behavior to the Board, General Assembly or the Ta'an Kwäch'än Council at the earliest opportunity after becoming aware of the conflict or situation."

Ms. Kane took four months before publicly revealing that she was in breach of the *Constitution*. At no time did she offer to resign her position, nor did she offer other actions to redress the *Constitutional* breach, other than reapplying for a pardon, which has not reversed the injunction of Section 8.14 against her.

Section 8.14 of the *Constitution* provides an ongoing responsibility by establishing the circumstances under which an office holder is no longer eligible retain their office. Any office holder found in breach of its injunction at any time during their tenure may be removed from office.

### **c) Judicial Council's authority and responsibility under Section 12.2**

The TKJC has the power to remove a sitting elected official from power when they have been "found to be compromising the dignity or effectiveness of that office." (Section 12.2)

"Read in the context of the *Constitution* as a whole, it is clear that the authority bestowed on the Judicial Council to remove a Board member from office is extraordinary. This authority, in the Judicial Council's view, should only be exercised when there is clear and convincing evidence established on a balance of probabilities that a Board member has compromised the dignity or effectiveness of their office. The burden of proof lies on the party making the charge." (TKJC 04-05 para. 4)

## **Dignity**

Section 12.2 gives the TKJC the power to “remove a member of the Board if he or she is found to be compromising the dignity or effectiveness of that office.” The TKJC has applied the modern-day usage of the word “dignity” to denote “respect” and “status” in its determination of the impact of Section 12.2.

The offices of the Ta’an Kwäch’än demand dignity. If they are not accorded their deserved dignity, the entire governance structure is weakened and possibly called into disrespect.

The test of whether the dignity of an office has been compromised does not rely on the effectiveness of an office holder in fulfilling their assigned duties but rather in the diminishing of the status of the said office.

The obligations on the Chief to uphold the *Constitution* and laws that flow from it are central to her or his role. If a law has been violated, it is incumbent on the Chief to act. Failure to do so could undermine the dignity of the office by that fact alone.

Ms. Kane had grounds to believe she had adhered to the letter, if not the spirit, of the law until early May of 2014. After confirmation that she was not the recipient of a pardon, she did not.

In her failure to address the full implications of Section 8.14 of the *Constitution*, Ms. Kane has not fully met her elected duty to uphold the *Constitution* and laws of the Ta’an Kwäch’än which, in the eyes of some of her constituents, has affronted the dignity of her office.

## **Effectiveness**

Effectiveness relates to not only the capability of producing desired results but also the realization of this capacity. In the context of Section 12.2 of the *Constitution*, this relates to the expectations placed on any office holder of a given post.

The Complainants did not provide any evidence of Ms. Kane having compromised the effectiveness of her position as Chief. Rather, the testimony of the witnesses for the Respondent declared under oath that Ms. Kane in fact has served in the position of Chief effectively.

While there is no compelling evidence that Ms. Kane has compromised the effectiveness of her office, there is sufficient evidence that the dignity of the office has been compromised to a degree that warrants action by the TKJC.

## **Validity of 2012 Election for Chief**

There was no challenge of the validity of the 2012 election for Chief and Council. However, the deficiency in the *Elections Act* which allowed the *Constitutional* breach to occur must be addressed.

The *Elections Act* sets out the procedures to be followed in determining the eligibility of an individual to run for office. Section 31(e) restricts the person who has committed a proscribed offense from running for office, which complies with the *Constitution*. However, the *Elections Act* further states that where a person has been granted a pardon, Section 31(e) does not apply, insinuating that a pardon expunges the convictions, thereby bringing that person into compliance with the *Constitution*.

The facts in this case clearly demonstrate that the singular requirement to satisfy eligibility pursuant to Section 31(e) is a current RCMP criminal record check (clearance), which Ms. Kane produced.

Ms. Kane was properly declared eligible as a candidate for the office of Chief and subsequently won the election. The election was not challenged. The inadequacy of this process, later uncovered, brought Ms. Kane into non-compliance with Section 8.14 of the *Constitution* more than a year after her election.

### **Repayment of remuneration**

Ms. Sam and Ms. McGuire asked that Ms. Kane pay back her wages from 2010 to present. Section 12.1.1 allows the TKJC to “impose such sentences as are provided by law to ensure compliance”. The TKJC accepts that it has the power to order the remedy requested.

However, there is no evidence that Ms. Kane did not serve the Ta’an Kwäch’än First Nation ably and effectively in her role as Director or Chief while under the illusion that she had been elected legally under the *Elections Act* and similarly believed that she served in accordance with Section 8.14 of the *Constitution*. The TKJC, therefore, sees no compelling reason to order the repayment of past wages.

## **DECISION**

### **1. Does the fact that a person has a theft conviction automatically mean they have compromised the dignity or the effectiveness of the office?**

The TKJC finds that the short answer to this question is “no” insofar as the constitutional injunction (8.14) that “Citizens are not eligible to be a Family Director, Chief or Deputy Chief if they have been convicted of an indictable offense or of theft, fraud or false pretenses” can be read in conjunction with the *Elections Act*, which initially mirrors the standards established by 8.14 of the *Constitution* in Section 31 (e), followed immediately by Section 32 — an exemption which clarifies that a pardon expunges a criminal record, expanding our interpretation of the injunction in Section 8.14 of the *Constitution*.

While the TKJC believes that the Ta’an Kwäch’än legislators intended to follow the generally accepted “hierarchy” of law which includes common law (judge-made law) and statute law (written law), written law hierarchy is what is being dealt with in this matter. The generally accepted hierarchal order of laws is constitutional laws, statutes or acts properly passed by the government, and the regulations that flow from them. It also understands that the “living tree doctrine” should be applied to the *Constitution*. “This

means that, as with other constitutions, a First Nation constitution should be given a large and liberal, or progressive interpretation to ensure its continued relevance.” (2006 YKSC 1, 94.1)

Section 32 of the *Elections Act* (2006) fills in a gap in the *Constitution* and should be read in conjunction with Section 8.14 of that document. In this case, the TKJC believes that the *Constitution* read with this statute establishes when a “theft charge” or relevant criminal offense may be excluded in determining eligibility for the Ta’an Kwäch’än Council, Chief or Deputy Chief through the granting of a pardon.

In the absence of a pardon, Ms. Kane should have been ineligible to run for elected office. However, the *Elections Act* only stipulates that eligibility rests on presentation of a clear RCMP check, which Ms. Kane produced repeatedly. These RCMP clearances were erroneously interpreted as evidence of a pardon of Ms. Kane.

**2. Upon realization that a pardon had not been granted, did Ms. Kane’s failure to disclose immediately the status of her criminal convictions compromise the dignity or effectiveness of the office?**

Section 8.14 has been breached by Ms. Kane from the perspective that she continued as Chief following her discovery that she did not have a pardon. A mitigating factor, however, is that this breach was made possible by shortcomings in the information available from RCMP criminal record checks, a procedural gap in the *Elections Act* which failed to recognize such frailty, an unknowing lack of due diligence on the part of the Chief Electoral Officer in not understanding the limitations of a criminal record check system and failing to obtain confirmation of a pardon.

Once it was established conclusively that Ms. Kane was in breach of both the constitutional mandate and the exception rule of the *Elections Act*, Ms. Kane had an obligation to disclose. She delayed acting for four months. On September 23, 2014, she did inform the TKC Board of her criminal record and the lack of a pardon. The Chief’s oath of office states that she will “exercise the powers and perform the duties and responsibilities of my office in observance of the *Constitution*, laws, rules, procedures and policies of the Ta’an Kwäch’än Council.” **The TKJC finds that it is Ms. Kane’s inaction in assuming her constitutional and statutory obligations to bring “into force all laws and regulations” triggered by her lack of a pardon that constitutes a serious breach of Section 8.14 of the *Constitution*.**

While it is the opinion of the TKJC that TKC Board members collectively share responsibility to ensure the Board operates in accordance with its constitutional requirements, the primary burden of disclosure rests with Ms. Kane, who knowingly withheld salient information once she had been made aware that she did not possess a pardon. The cumulative effect of this is that while Ms. Kane has been in active breach of Section 8.14 for more than four years — in effect violating Section 31(e) of the *Elections Act* in 2010 and 2012 — once she discovered that the pardon did not exist, she was no longer eligible to retain her position as Chief and did so under false pretenses.

The TKJC recognizes that it has the power under Section 12.2 of the *Constitution* to “remove a member of the Board if he or she is found to be compromising the dignity or effectiveness of that office.” By extension, under the “living tree doctrine” interpretation of its constitutional responsibilities, the TKJC assumes the ability to exercise the lesser power of removing temporarily (suspending) a Ta’an Kwäch’än First Nation office holder whose actions warrant a lesser censure than permanent removal from office, but censure nonetheless. Because of the challenging mitigating factors involved in this case, TKJC chooses this lesser course.

Ms. Kane’s erroneous belief that she obtained a pardon for her offenses in 1997 must be considered as a mitigating factor in the ultimate judgment of the TKJC in this matter. The TKJC has found that Ms. Kane has not impacted negatively the effectiveness of the TKC Board, only the dignity arising from continued service as Chief under false pretenses.

### **3. Should the remuneration received be required to be repaid?**

The TKJC, under Section 12.1.1 of the *Constitution*, has the power to “impose such sentences as are provided by law to ensure compliance”. The Complainants in this case, Ms. Sam and Ms. McGuire, asked for the repayment of the monetary benefits that accrued to Ms. Kane during her service as a Ta’an Kwäch’än office holder. The TKJC believes it has the power to make such an order. The documentary evidence and witness testimony that Ms. Kane has represented and led their First Nation effectively is sufficient a factor to allow moderation by the TKJC to not require repayment of remuneration received.

The TKJC finds that Ms. Kane served as Chief without impacting the effectiveness of the First Nation and was financially compensated for such services. Therefore, the remuneration received is not required to be repaid.

## **ORDER**

**[NOTE:** On January 19, 2015, the TKJC Registrar notified Parties as follows: “*Please be advised that the Judicial Council is in the final stage of preparing the decision with respect to the recent hearing into the McGuire/Sam complaint against Chief Kane. Although Chief Kane has recently provided a copy of her pardon and she has indicated that she has resigned office effective January 31, 2015, the Judicial Council confirms that it had already made its decision in this matter based on the evidence brought before it during the hearing. The pardon and the resignation do not have a bearing on the Judicial Council’s decision, which has already been made. The written decision will be sent out as soon as it has been finalized. It is expected that this will be within the next few days.*”]

The TKJC immediately suspends Ms. Kane without pay from her duties as Chief of the Ta’an Kwäch’än First Nation until such time as she is able to present to the Ta’an Kwäch’än Council evidence of her pardon for the crimes of theft that she was convicted of in 1998 and the necessary documentation to confirm that this document conforms with Section 32 of the *Elections Act*.

Upon satisfying this requirement and after she retakes her oath of office, she is to reassume her role as Chief with all its incumbent duties, obligations, and remuneration if this occurs within the time limit of her current term of office.

Until that time, Michelle Telep, Deputy Chief of the Ta'an Kwäch'än First Nation, will assume her constitutional role and act in Ms. Kane's stead, assuring the effective administration of the Ta'an Kwäch'än First Nation.

This decision does not order recovery of past wages.

**Issued by the Ta'an Kwäch'än Judicial Council this 22<sup>nd</sup> day of January 2015.**



Michael Dougherty  
Judge

Barbara Evans  
Judge