

Ta'an Kwäch'än Judicial Council
Record of Decision

Case Numbers: TKJC06-02, TKJC06-07 and TKJC06-08

Applicant: Bonnie Harpe



The applicant, Ms. Bonnie Harpe, is a Ta'an Kwach'an citizen. She has filed three complaints with the Judicial Council under section 12.2 of the Ta'an Kwach'an Council Constitution charging Acting Chief Ruth Massie with compromising the dignity and effectiveness of her office and requesting that Acting Chief Massie be removed from office. These complaints are dated April 13, 2006 (TKJC06-02), May 10, 2006 (TKJC06-07) and May 31, 2006 (TKJC06-08).

The complaint dated May 31 is also made against the "Ta'an Kwach'an Board of Directors" and asks for the "current Board of Directors" to be removed from office. This aspect of the May 31 complaint will be addressed below under "Preliminary Matters".

Preliminary matters

The parties have agreed that the Judicial Council will consider these three complaints concurrently, based on written submissions and evidence, and without an oral hearing.

The Judicial Council established September 8, 2006, as the final date for the parties to file written material. Two written submissions were made after that date: the first filed on behalf of Acting Chief Massie and the second filed by Ms. Bonnie Harpe.

In a request dated and filed September 11, 2006, counsel for Acting Chief Massie asked for leave to file the affidavit of Mr. James Miller, Sr., stating that Mr. Miller "was not available on the date of the filing of the Submissions". This request included Mr. Miller's affidavit. In her request for leave, counsel also stated, quite reasonably, in our view, "Should this Affidavit be admitted, there would be no opposition to Ms. Harpe having additional time to respond to it if she felt it necessary."

In a submission dated September 16, 2006, and received by the Judicial Council on September 20, 2006, Ms. Bonnie Harpe asks that the Miller affidavit not be accepted. However, in her submission Ms. Bonnie Harpe responds substantively to the matters set out in the Miller affidavit. In the circumstances, we have decided to grant leave as requested and accept the affidavit of Mr. James Miller, Sr. We have also decided to accept the submission of Ms. Bonnie Harpe dated September 16, 2006.

As noted above, in the complaint dated May 31 the applicant asks that the "current Board of Directors" be removed from office. We are dismissing this aspect of the complaint because Section 12.2 of the Constitution requires that such complaints be

made with respect to individual board members setting out the specific allegations, which then allows an opportunity for the named individuals to respond.

The applicant filed supplementary materials dated August 27, 2006. In these materials the applicant states, "I strongly suspect that Ms. Williams has a criminal record for an indictable offence." A similar allegation is made against Harold Chambers. The Judicial Council will not consider these allegations for two reasons. First, these are new allegations, not contained in the original complaints that are the subject of the current proceeding. It is inappropriate for supplementary submissions respecting an existing complaint to be used as the basis to commence a new complaint. Second, a charge brought under section 12.2 of the Constitution is a very serious matter and should not be made based on a "suspicion", rumour or innuendo.

The Complaints

We have consolidated the allegations made against Acting Chief Massie into the three following complaints:

It is alleged that:

1. Ms. Lori Graham sat on the Board as a Family Director on two occasions. Ms. Lori Graham is ineligible to be a Family Director as she has a criminal record that disqualifies her from holding that office. Acting Chief Massie has a legal duty as Acting Chief to ensure that Board members produce a criminal record check. Acting Chief Ruth Massie did not require Ms. Graham to produce her criminal record, and Ms. Massie allowed Ms. Graham to sit as a Family Director. In failing to require Ms. Graham to produce a criminal record check, Acting Chief Massie has compromised the dignity and effectiveness of her position and should be removed from office.
2. Mr. James Miller, Sr., was selected to sit on the Board as a Family Director of the Maggie Broeren Family. Mr. James Miller is not a member of the Maggie Broeren Family. Acting Chief Massie has a legal responsibility ensure that persons selected by Traditional Families to be Family Directors are eligible to be selected for that office. Acting Chief Massie did not disallow Mr. Miller from sitting as a Family Director when it was known to her that he was not a member of the Maggie Broeren Family. In allowing Mr. Miller to sit as a Family Director, Acting Chief Massie has compromised the dignity and effectiveness of her position and should be removed from office.
3. Acting Chief Massie held or participated in meetings with members of the Board in circumstances where there was a lack of quorum for a formal Board meeting. In doing so, Acting Chief Massie compromised the dignity and effectiveness of her position and should be removed from office.

We will address each of these complaints in turn.

Complaint No. 1

The allegations made in this complaint raise the following matters for determination:

1. Was Ms. Graham eligible to be a Family Director?
2. Did Ms. Graham sit on the Board as a Family Director?
3. Did the alleged failure of Acting Chief Massie to meet her supposed legal duty to require Ms. Graham to produce a criminal record check compromise the dignity and effectiveness of her office?

Ms. Graham's Eligibility to be a Family Director

Section 8.4 of the Constitution provides that "Each family line shall select a Citizen of its Traditional Family ... as its Family Director according to its own procedures to be a member of the Board for a four year term."

Section 8.5 states, "Upon providing written notice to the Board, a Traditional Family may recall its representative to the Board and replace him or her."

Section 8.14 of the Constitution provides, "Citizens are not eligible to be a Family Director...if they have been convicted of an indictable offence...."

It is admitted that Ms. Graham was convicted of indictable offence in 2001. In our view, it is clear that under section 8.14 of the Constitution Ms. Graham was not eligible to be selected as a Family Director. The prohibition in 8.14 applies equally to a selection being made by a Traditional Family under 8.4 or to a replacement named pursuant to 8.5. In either case, it is not open to a Traditional Family to select or otherwise appoint a Citizen who has a disqualifying criminal record – in this case, a conviction for an indictable offence. In summary, Ms. Graham was not eligible to be a Family Director.

Did Ms. Graham sit as a Family Director?

It is alleged by the applicant that Ms. Graham participated in two Board meetings as a Family Director in place of Mrs. Sophie Miller. The meetings in question were held on June 16, 2004, and June 1, 2005. On behalf of Acting Chief Massie, it is acknowledged that Ms. Graham attended meetings of the Board on those dates; however, it is argued that Ms. Graham did not consider that she was attending as a Family Director, and that she attended "more in the form of an agent" on behalf of her grandmother, Mrs. Sophie May Miller.

Regrettably, the record is less than clear on whether Ms. Graham attended in these meetings as a Family Director or in some other capacity. What is clear, based on the conclusion stated above respecting eligibility, is that Ms. Graham was not eligible to sit as a Family Director.

Three related questions arise from Ms. Graham's attendance at the Board meetings in question:

Did Ms. Graham vote as a Board member?

Based on the minutes for the two meetings in question, the affidavit of Ms. Graham sworn August 30, 2006, as well as the submissions of counsel for Acting Chief Massie, we are satisfied that Ms. Graham did not vote at either meeting as a member of the Board. We accept that at the meeting held June 16, 2004, the members present determined there was not a quorum and as a result no decisions or resolutions of the Board were voted upon. We also accept the evidence in Ms. Graham's affidavit, repeated in Ms. Fendrick's submission, that Ms. Graham did not vote on any resolutions considered by the Board at its meeting held June 1, 2005.

Was Ms. Graham counted for the purposes of establishing quorum?

This question is not readily answered from the materials filed with the Judicial Council. Neither the submission from counsel for Acting Chief Massie nor the affidavit of Ms. Graham directly address the matter, although both documents state that she did not vote. The minutes for the meeting held June 1, 2005, list Ms. Lori Graham as being in attendance as an "Acting Director", suggesting that Ms. Graham was considered a Family Director for the purposes of establishing quorum.

Section 8.6 of the Constitution provides that quorum for the Board to conduct business requires the Chief or Deputy Chief and any six Family Directors. The minutes for the Board meeting held June 1, 2005, lists six Directors, including Ms. Graham. We understand from the record that the Board conducted business at this meeting and, although Ms. Graham did not vote, the minutes suggest that she was counted as a Family Director for the purposes of establishing quorum. If Ms. Graham was counted as a Family Director, this was an error — Ms. Graham was not eligible to be a Family Director and should not have been counted in establishing quorum for the June 1, 2005 Board meeting. We note that Ms. Graham states in her affidavit (at para. 12) that she did not consider herself to be attending as family director, reinforcing that she should not have been counted for the purpose of establishing quorum.

Did Ms. Graham receive payment as a Board Member for attending the meetings?

We have no direct evidence on this question. However, in light of our conclusion that Ms. Graham was not eligible to be a Family Director and the statement in her own affidavit that she did not consider herself to be a Family Director when she attended the meeting (at para. 12), it is apparent that Ms. Graham was not entitled to be paid as a Family Director for the meetings attended on June 16, 2004, and June 1, 2005.

Compliance with Criminal Record Check

The Constitution sets out eligibility criteria to hold the office of Family Director and allocates the legal authority for making the selection to the respective Traditional Families. These constitutional provisions carry with them responsibilities and obligations at several levels.

Each Traditional Family, as the authority responsible for selecting Family Directors and for establishing its own selection procedures, has an implied constitutional obligation to take reasonable steps to ensure that the individual it selects is eligible for office. It is not reasonable for a Traditional Family to make selections without regard to eligibility requirements in the Constitution and leave compliance with those requirements up to the Chief or others.

An integral part of the selection process is verifying that an individual being considered for selection as Family Director is not disqualified from holding that office: at a minimum the selection process should include reasonable measures to confirm the individual is a Citizen of its Traditional Family, is at least 16 years of age, and that he or she has not been convicted of a disqualifying criminal offence.

In this case, there is uncertainty whether Ms. Graham was sitting as a Family Director or merely attending on behalf of her grandmother. It appears Ms. Graham was not aware that she was ineligible to attend as a Family Director.

While there may be a procedural obligation on the part of the Chair of a Board meeting, the Chair usually being the Chief, to confirm that paperwork for appointment as Family Director has been provided for any new appointments, as a legal obligation, it is the Board members collectively that share responsibility to ensure the Board operates in accordance with its constitutional requirements, including its proper composition. Given the shared nature of the responsibilities of primarily the Traditional Family and collectively the Board for the noted irregularities in selection of Family Directors, these procedural errors or oversights do not establish to our satisfaction that Acting Chief Massie, as an individual, has compromised the dignity and effectiveness of her office.

Complaint No. 2

The allegations made in this complaint raise the following matters for determination:

1. Is Mr. James Miller, Sr., eligible to sit on the Board as a Family Director of the Maggie Broeren Family?
2. Does Acting Chief Massie have a legal responsibility to ensure that persons selected by Traditional Families to be Family Directors are eligible to be selected for that office?
3. By not disallowing Mr. Miller from sitting as a Family Director has Acting Chief Massie compromised the dignity and effectiveness of her position, and therefore should she be removed from office?

Mr. Miller's Eligibility to be a Family Director

The Maggie Broeren family is one of the Traditional Families of the Ta'an Kwach'an. On several occasions the Maggie Broeren Family has appointed Mr. Miller as a "replacement" Family Director. Section 8.5 of the Constitution allows for a Traditional Family to recall its representative to the Board and replace him or her. It is clear from the record that this provision has been relied on to appoint replacements when the

"standing" Family Director was not able to attend a meeting of the Board. Providing the eligibility and written notice requirements in the Constitution are complied with, we see no difficulty with using the authority under 8.5 to appoint temporary replacements.

It is admitted that Mr. Miller is not a member of the Maggie Broeren family line. Section 8.4 of the Constitution provides that "Each family line shall select a Citizen of its Traditional Family... as its Family Director according to its own procedures...." In our view, 8.4 sets out a clear eligibility criterion that applies to the selection of a Family Director under 8.4 as well as a replacement made under 8.5, namely: a Citizen selected to be a Family Director must be a member of the Traditional Family that is making the selection. It follows that Mr. Miller was not eligible to sit as a replacement Family Director for the Maggie Broeren Family.

Counsel for Acting Chief Massie argues that the recall and replacement provisions under 8.5 should be read "disjunctively" and that there "is no requirement that a replacement of a Family Director be a person from that particular traditional family". We do not accept this view. It is not supported by the clear wording in 8.4 and if accepted would substantially undermine the purpose of having an eligibility requirement in 8.4 of the Constitution. The authority in 8.5 to replace a Family Director, temporarily or otherwise, is subject to the eligibility criteria in 8.4.

Given the clear requirements of Section 8.4 of the Constitution for the selection of its Family Director and by extension any replacement for their original choice, each Family Line bears a first responsibility in ensuring that their chosen citizen meets the basic eligibility requirements. It is not the specific or primary responsibility of the Chief or Acting Chief to see that condition is met. While the Chief or Acting Chief may have a procedural responsibility to see that this Traditional Family duty has been fulfilled, it is a shared responsibility with the rest of the Board. On this complaint, we do not find that Acting Chief Massie has compromised the dignity and effectiveness of her office.

Complaint No. 3

It is admitted that Acting Chief Massie held or participated in meetings with members of the Board in circumstances where there was a lack of quorum for a formal Board meeting. The applicant submits that in doing so, Acting Chief Massie compromised the dignity and effectiveness of her position and should be removed from office. We do not agree and dismiss this complaint.

The applicant's position is, effectively, if there is a lack of quorum at a duly called Board meeting, the members in attendance are required to terminate any discussions until a duly called meeting with quorum is convened. On behalf of Acting Chief Massie, it is submitted the members in attendance can continue outside of the context of an "official or formal" meeting of the Board to discuss matters informally, as a "working" or informational meeting amongst those in attendance. It is acknowledged that the Board has no legal authority to pass resolutions or transact official business without a quorum of members being present.

The Board has the legal authority to establish its procedures and guidelines (8.7.7). It is too narrow and legalistic to say that the only option for the Board members attending duly called meeting that lacks quorum is to have no further discussion or interaction on matters respecting the Ta'an Kwach'an Council. On this complaint, we do not find that Acting Chief Massie has compromised the dignity and effectiveness of her office.

Refusal to appoint Family Director

This matter was not brought forward as a part of a complaint in these proceedings; however, it is raised by the applicant in her materials and is addressed in the submissions of counsel for Acting Chief Massie. In our view, it is an important matter warranting comment from the Judicial Council.

The materials filed by the applicant indicate the Susie Jim Family has decided not to appoint its Family Director. The applicant suggests that other Traditional Families have taken or may take the same position. The authority given to Traditional Families under the Constitution to select Family Directors carries with it an implied legal obligation on each Traditional Family to exercise that authority, in good faith and in a timely manner. Good governance and the operation of Ta'an Kwäch'än Council government require a functioning Board. The deliberate refusal of a Traditional Family to select its Family Director can severely impair the ability of the Board to operate. To argue that the Board without a quorum cannot unofficially carry on any discussions of business related to the governance of the First Nation while at the same time not seeking to assure that all vacancies are filled fundamentally weakens this challenge. Refusing to make timely Family Director appointments undermines the very constitutional fabric of the Ta'an Kwäch'än First Nation.

Decision

The Ta'an Kwäch'än Judicial Council has determined that no grounds have been substantiated that would lead us to order Acting Chief Ruth Massie's removal from office for allegedly compromising the dignity and effectiveness of the office in accordance with section 12.2 of the Constitution of the Ta'an Kwäch'än Council 2004. We, therefore, dismiss the complaints found in TKJC06-02, TKJC06-07 and TKJC06-08.

Dated this 12 day of October 2006 in Whitehorse, Yukon.



Michael Dougherty
Judge



John Bailey
per: Judge



per: Chuck Hume
Judge