

Ta'an Kwäch'än Judicial Council

Date: April 19, 2017
Case Number: TKJC 16-09
Complainant: Bonnie Harpe
Respondent: Kristina Kane

This is the Decision in the matter of **TKJC 16-09** Harpe v. Kane regarding the responsibility of Chief Kristina Kane for the cancellation of the Ta'an Kwäch'än Special General Assembly scheduled for February 20 & 21, 2016.

COMPLAINT

In correspondence from Ms. Bonnie Harpe of the Susie Jim Family, originally dated March 1, 2016, the allegation was brought before the Ta'an Kwäch'än Judicial Council on September 8, 2016, that "By ignoring the resolution of the General Assembly, Chief Kane has breached section 9.5.2 of the Ta'an Kwäch'än Constitution."

TIMELINE

November 8, 2015: The Ta'an Kwäch'än General Assembly resolution called for a "Special" General Assembly to be held by February 28, 2016.

January 3, 2016: Notice was given for a Special General Assembly to be held on February 21 & 22, 2016.

February 15, 2016: A complaint was received by the Ta'an Kwäch'än Judicial Council (TKJC) from Ms. Bonnie Harpe alleging that Chief Kane and Vice-Chief Telep had compromised the dignity and effectiveness of their positions under sections 12.2 and 12.2.1 of the Ta'an Kwäch'än *Constitution* by "using the Ta'an Kwäch'än Council's (TKC) VISA to take personal cash advances" and by accessing the Ta'an Kwäch'än (TK) Emergency Accounts. The TKJC designated these complaints TKJC 16-01 and 16-02.

February 17, 2016: Ta'an Kwäch'än Council passed a resolution postponing the February 21 & 22 Special General Assembly.

June 23 and 24, 2016: Ta'an Kwäch'än Judicial Council held hearings on TKJC 16-01 and TKJC 16-02.

Post June 24, 2016: The Ta'an Kwäch'än Council recalled the Special General

Assembly for August 26 & 27.

August 24, 2016: Decisions were rendered on TKJC 16-01 and TKJC 16-02.

August 26, 2016: The Special General Assembly convened.

September 8, 2016: The complaint from Ms. Harpe officially received by the registrar.

September 26, 2016: The TKJC wrote Ms. Harpe seeking clarification on her complaint and its scope. A case number TKJC 16-09 assigned to this complaint.

November 14, 2016: Ta'an Kwäch'än Judicial Council sent a request to all engaged parties for additional information.

BACKGROUND

A letter of complaint from Ms. Bonnie Harpe addressed to the Ta'an Kwäch'än Judicial Council was dated March 1, 2016; however the Judicial Council did not receive it until September 8, 2016. It alleged that Kristina Kane as Chief of the Ta'an Kwäch'än Council had breached Section 9.5.2 of the Ta'an Kwäch'än *Constitution* (the "*Constitution*") which directs the Chief to "implement the directions of the Elders Council and the General Assembly".

Ms. Harpe's complaint referred to a November 8, 2015 Ta'an Kwäch'än General Assembly resolution calling for a "Special" General Assembly to be held by February 28, 2016. According to the document provided by Ms. Harpe the Resolution #2105-00 stated: "THEREFORE BE IT RESOLVED THAT the Council call a General Assembly to specifically address the proposed constitutional amendments specific to those subject matter outlines in this resolution on or before February 28, 2016." Of note, "June 30, 2016" was deleted in the original text and replaced with February 28, 2016.

Ms. Harpe stated in her complaint that Chief Kane, together with the Ta'an Kwäch'än Council, scheduled a Special General Assembly to be held at the KDFN Cultural Centre on February 20 and 21, 2016, but prior to this Special General Assembly being held, a resolution from the Ta'an Kwäch'än Council was passed on February 17, 2016 cancelling the Assembly.

The draft minutes from Wednesday, February, 17, 2016 provided to the TKJC offers the wording of Resolution #2016-07 which concludes; "Therefore Be It Resolved that the TKC Council agrees to postpone the special General Assembly scheduled for February 21, 2016 until the matters implicating the Chief and Deputy Chief are resolved, or otherwise directed by Council."

The motion on Resolution #2016-07 passed by a TKC majority with 5 in favour, 1 opposed and 1 abstention.

In her complaint, Ms. Harpe argued that "neither the Board or the Chief have the

authority to override a directive given by the ultimate authority, which is “The General Assembly”.

Ms. Harpe alleged that by ignoring the resolution of the General Assembly, Chief Kane has breached section 9.5.2 of the *Constitution*.

Ms. Harpe did not include the Ta’an Kwäch’an Council in her complaint, even though she was provided the opportunity by the Ta’an Kwäch’an Judicial Council to clarify the scope of her complaint in this regard. As a result, the Judicial Council will adjudicate the complaint on the stated basis of an allegation of a breach of section 9.5.2 of the *Constitution* singularly by Chief Kane.

AUTHORITY

The Ta’an Kwäch’an Judicial Council accepts its responsibility to “adjudicate any cases of alleged violations of the laws of the Ta’an Kwäch’an Council and impose such sentences as are provided by law to ensure compliance” (Ta’an Kwäch’an *Constitution* 12.1.1). This implies the continuing duty of the TKJC to interpret the Ta’an Kwäch’an *Constitution* as needed.

Under section 12.1 of the *Constitution*, the Ta’an Kwäch’an Judicial Council has the authority “to impose such sentences as are provided by law to ensure compliance” when laws of the Ta’an Kwäch’an have been violated. The Ta’an Kwäch’an *Constitution* is not clear on how the Ta’an Kwäch’an Judicial Council may act and impose a sentence upon violation of a given law when no sentence has been legislated.

The Ta’an Kwäch’an Judicial Council in the past has taken upon itself the duty to address this legislative void when called upon. As noted in TKJC 16-01: “Since 2004 when the TKJC was first established, the TKJC has ordered a broad range of remedies when specific laws or regulations have been violated. These have included ordering the TKC to review all legislation passed during the tenure of a member later determined not to be eligible to have served, to obligating a suspended official to retake their oath of office prior to reinstatement when certain conditions had been met.”

While these remedies were not specifically legislated, the TKJC understands that the “living tree doctrine” should be applied to the *Constitution*. 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” and believes “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)”

CONSTITUTIONAL PROVISIONS

The Complaint is that Chief Kane breached the *Constitution* 9.5.2 which calls on the Chief to “Implement the directions of the Elders Council and the General Assembly”.

The duties of the General Assembly are outlined in Sections 6 and 16 of the *Constitution* which include: calling meetings, discussing issues, nullifying laws, removing Council members and amending the *Constitution*.

The duties of the Board of the Ta'an Kwäch'än Council are outlined in Section 8.7 of the Ta'an Kwäch'än *Constitution*, particular to this instance, Section 8.7.5 which states "fulfill the mandates and directions provided by the General Assembly."

The duties of the Chief are outlined under section 9.5 of the *Constitution*. Of particular concern is Section 9.5.2 of the Ta'an Kwäch'än *Constitution* directs the Chief to "implement the directions of the Elders Council and the General Assembly." This is at the heart of this complaint.

Section 6(2) of the Ta'an Kwäch'än *Constitution* clearly requires that "The General Assembly shall meet at least once each calendar year and at such other times as the General Assembly or Board may direct". Section 6.2 of the *Constitution* clearly empowers the Board of the Ta'an Kwäch'än Council to call a General Assembly.

The "Board" is defined under the *Constitution* as meaning the main governing body of the Ta'an Kwäch'än Council, which is composed of one Chief, one Deputy Chief and nine Family Directors.

Section 6.4 states "the Council shall be responsible for arranging the meetings of the General Assembly."

The *Constitution* is completely silent on the question of who may cancel a duly called General Assembly or under what circumstances a General Assembly may be cancelled.

The General Assembly has the right, under Section 6.9.1 to "nullify any law or regulation enacted by the Ta'an Kwäch'än Council", and under Section 6.9.2 remove "any member of the council". The rights of the General Assembly under section 6 imply an authoritative supremacy of the General Assembly over the Board of the Ta'an Kwäch'än Council. However, the Ta'an Kwäch'än *Constitution* appears to treat these governing bodies as collaborative. It is not clear what course must be taken if the Ta'an Kwäch'än Council and the General Assembly do not agree.

Section 8.7.5 of the *Constitution* also states, "The Council shall have the responsibility to ... fulfill the mandates and directions provided by the General Assembly."

QUESTIONS ARISING

Several questions of constitutional interpretation arose from the complaint as filed. As a result, the TKJC solicited written responses to a series of questions from the several parties that it felt had a stake in this proceeding. Responses to the following questions were received from Chief Kane, Ms. Harpe, and various persons on the Ta'an Kwäch'än Council.

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- 1) Does a resolution from the General Assembly obligate the Ta'an Kwäch'än Council to call a General Assembly?
 - 2) Once the Ta'an Kwäch'än Council calls a General Assembly, does Section 6.2 imply that the Ta'an Kwäch'än Council also has the authority to cancel a General Assembly?
 - 3) If the Ta'an Kwäch'än Council calls a General Assembly, and subsequently cancels that General Assembly, does that constitute failure to fulfill their obligations under Section 8.7.5?
 - 4) If the Ta'an Kwäch'än Council cancels a General Assembly, what is the obligation of the Chief under Section 9.5.2?
 - 5) When the Chief, under Section 9.5.2, and the Ta'an Kwäch'än Council, under Section 8.7.5, fail to fulfill their obligations to implement a direction of a General Assembly, is the only remedy available for a future General Assembly to use its powers under Section 6 to address the breach?
 - 6) When the Ta'an Kwäch'än *Constitution* Sections 8.7.5 and 9.5.2 have been violated, but no specific sentences are provided by law, may the Ta'an Kwäch'än Judicial Council provide a remedy?

RESPONSES

- 1) Respondents clearly affirmed the obligation of the Ta'an Kwäch'än Council to call a future General Assembly after a resolution from a previous General Assembly directs it to do so.
- 2) The Ta'an Kwäch'än Council and General Assembly have a noted obligation under Section 6.2 of to see that a General Assembly is held at least once a year. The respondents were divided as to whether this authority to call a General Assembly implies the authority to cancel a meeting.
- 3) The question on the Ta'an Kwäch'än Council's responsibility once it has called a General Assembly on the direction of a previous General Assembly, and then cancelled it, drew mixed responses. Some respondents saw that circumstances may develop that required a change in date or cancellation. Others believed that no circumstances could justify the cancellation of a General Assembly once called.
- 4) Responses to the question of the obligation of the Chief if the Ta'an Kwäch'än Council cancels a duly called General Assembly also drew mixed responses. The responsibility of the Chief to oversee the administration of the First Nation was pointed out. Opinion was divided on who bore the responsibility for the cancellation of a General Assembly – the Chief, the Ta'an Kwäch'än Council or both.
- 5) Respondent's saw the General Assembly and the Ta'an Kwäch'än Judicial Council as both able to remedy this situation.

6) Most saw the Ta'an Kwäch'än Judicial Council as able to impose a remedy when a violation of a statute of the Ta'an Kwäch'än *Constitution* occurs that has no established remedy. One respondent felt that this power was outside its authority. They argued that the Ta'an Kwäch'än Judicial Council must not fill the legislative void.

ANALYSIS

The Ta'an Kwäch'än Judicial Council takes its responsibility to adjudicate this matter seriously. Central to any decision is our interpretation of the Ta'an Kwäch'än *Constitution*. The sections of that document in question are 6.2, 6.4, 8.7.5 and 9.5.2.

The TKJC accepts the authoritative supremacy of the General Assembly in the governance structure of the Ta'an Kwäch'än First Nation as implied under section 6 of the Ta'an Kwäch'än *Constitution*. The Ta'an Kwäch'än *Constitution* sees the Ta'an Kwäch'än Council as a collaborative, though subordinate, independent body to the General Assembly.

The supreme constitutional law of the Ta'an Kwäch'än directs under Section 6.2 that a General Assembly be held "at least once each year and at such other times as the General Assembly or Council may direct."

On November 8, 2015, the General Assembly directed by Resolution that the "the Council call a General Assembly to specifically address the proposed constitutional amendments specific to those subject matters outlined in this resolution on or before February 28, 2016."

Section 6.4 states "the Council shall be responsible for arranging the meetings of the General Assembly." The Ta'an Kwäch'än Council on January 3, 2016 in accordance with this November 8, 2015 General Assembly resolution called a new General Assembly for February 20 and 21, 2016.

To this point, the conduct of the Chief and Council are clearly in line with the Ta'an Kwäch'än *Constitution*. Both the Chief and Council were meeting their constitutional obligations regarding fulfilling General Assembly directions.

On February 15, 2016, a complaint was received by the Ta'an Kwäch'än Judicial Council from Ms. Bonnie Harpe alleging that Chief Kane and Vice-Chief Telep had compromised the dignity and effectiveness of their positions under sections 12.2 and 12.2.1 of the Ta'an Kwäch'än *Constitution* by "using the Ta'an Kwäch'än Council's (TKC) VISA to take personal cash advances" and by accessing the Ta'an Kwäch'än Emergency Accounts. The complaint sought the removal of both Chief and Deputy Chief from their elected positions. These complaints were designated by the TKJC as TKJC 16-01(Kane) and 16-02 (Telep).

Copies of the two complaints were forwarded to the Respondents (Kane and Telep) and the TKC. At the TKC meeting of Wednesday, February 17, 2016 the Ta'an Kwäch'än

Council passed Resolution #2016-07 which concludes: “*Therefore Be It Resolved that the TKC Council agrees to postpone the special General Assembly scheduled for February 21, 2016 until the matters implicating the Chief and Deputy Chief are resolved, or otherwise directed by Council.*”

This resolution was decided without the need of a vote by Chief Kane.

The Resolution postponed the Special General Assembly to a non-specific timeframe. The Ta’an Kwäch’än Council would later call a General Assembly for August 26 & 27, 2016 following the conclusion of hearings conducted in the matters of TKJC 16-01 and TKJC 16-02.

The Ta’an Kwäch’än Council has the constitutional power to call a General Assembly on its own or in fulfillment of its duties with regard to the direction of a General Assembly resolution to call one. The Ta’an Kwäch’än Judicial Council accepts the arguments that this power also implies that the Ta’an Kwäch’än Council has the power to postpone or cancel a General Assembly.

This power, however, has very real limits. The Ta’an Kwäch’än *Constitution* calls for a General Assembly to be held at least once each calendar year under Section 6.2. It obligates the Ta’an Kwäch’än Council to arrange these General Assemblies under Section 6.4. This is a duty that it must fulfill in order to insure a truly participatory and functioning government for the Ta’an Kwäch’än First Nation.

In fulfilling its duty to call and arrange for a General Assembly, a wide variety of circumstances may arise that force the postponement of a duly called General Assembly. In order to constitute ‘just cause’ for the postponement or cancellation of a scheduled General Assembly, the reasons for this action must be of sufficient gravity or import as to call into question the possibility of achieving the ends for which the General Assembly was called. The dictates of the Ta’an culture, the death of an elder, storms or other natural disasters as well as major legal issues can be cited as examples of serious circumstances that would force the Ta’an Kwäch’än Council to cancel or postpone a General Assembly.

In such an event the Ta’an Kwäch’än Council should be open and transparent with the members of the Ta’an Kwäch’än First Nation and clearly state why the cancellation was necessary. It should attempt as well as possible, to inform Ta’an Kwäch’än citizens as to when the General Assembly likely will be rescheduled.

In Resolution #2016-07 the Ta’an Kwäch’än Council attempted to meet this standard. The rationale offered for postponing the meeting implied that the controversy arising from the complaints leveled at the Chief and Deputy Chief would have had a serious, possibly deleterious impact on the successful conduct of the proposed agenda of the Special General Assembly called for February 20 & 21. The Ta’an Kwäch’än Council stated the reasons for postponing the General Assembly and proposed a timeframe for rescheduling the General Assembly.

Under Section 9.5 of the *Constitution* the duties of the Chief are laid out. While the Chief

presides over meetings of the Council (9.5.4) the Chief only casts a vote in order to break a tied vote of the Council (9.5.7). The Chief is required to comply with the directives not only of the GA, but also of the Council which is charged collectively to make decisions for the whole of the Ta'an Kwäch'än First Nation.

CONCLUSION

The Chief has a duty to maintain the efficient administration of the government of the Ta'an Kwäch'än First Nation. The Ta'an Kwäch'än Council is charged with arranging General Assemblies. Both have an obligation to follow the directions received from a General Assembly. Given these, the Ta'an Kwäch'än Judicial Council recognizes that Ta'an Kwäch'än Council, while having the responsibility of responding to the GA directives and resolutions, also has the authority, in appropriate circumstances where it is in the best interest of the whole of the Ta'an First Nations, to postpone a duly called General Assembly.

The Ta'an Kwäch'än Council resolution #2016-07 meets the criteria of a 'just cause' reason, as stated in the Resolution for postponing the Special General Assembly called for February 20 & 21, 2016.


Both the General Assembly and the TKJC have the authority to call individuals, such as the Chief or bodies such Ta'an Kwäch'än Council, to account if either fails to respond to a General Assembly directive. Such failures should be censured.

In this case neither the Chief nor the Ta'an Kwäch'än Council failed to respond to the General Assembly directive. By majority vote, the TKC Resolution postponed the Special General Assembly for what they believed was 'just cause' and in the best interest of the whole of the Ta'an membership. From the perspective of the TKJC, the decision was a difficult but reasonable action taken in response to: the filing of the complaints by Ms. Harpe to have both the Chief and Deputy Chief removed from elected office; the public knowledge of the complaints; and the reasonable impacts of such allegations.

DECISION

The Ta'an Kwäch'än Judicial Council dismisses the complaint against Chief Kristina Kane for having allegedly breached section 9.5.2 of the Ta'an Kwäch'än *Constitution* in regard to the cancellation of the Ta'an Kwäch'än Special General Assembly scheduled for February 21 & 21, 2016.

Issued by the Ta'an Kwäch'än Judicial Council this 19th day of April 2017.



Michael Dougherty, Judge

Barbara Evans, Judge

