

Ta'an Kwäch'än Judicial Council Report on Appeal of 30 April 2004 Election

Case Number: TKJC 04-04
Date: May 16, 2005
Appellant: Bonnie Harpe
16-606 Main Street
Whitehorse, Yukon Y1A 2C1

This is an appeal under the *Ta'an Kwäch'än Council Amended Election Rules* (February 19, 2004) (the "*Election Rules*") in respect of the April 30, 2004, election for the office of Chief of the Ta'an Kwäch'än Council. The appellant, Bonnie Harpe, is a Ta'an Kwäch'än Council citizen and was a candidate for Chief in the election. The appellant has submitted five election appeal documents to the Judicial Council. The initial appeal was dated and submitted on May 8, 2004, and there were four subsequent supplemental or additional appeals dated as follows: May 9, 2004, May 11, 2004, May 24, 2004, and May 26, 2004.

The issues raised in these appeal documents were divided into two categories by the Judicial Council. The appellant alleges:

1. That an unsuccessful candidate for Chief in the April 30, 2004, election may not have been eligible to run for that office as his criminal record check ambiguously reported that he "may or may not have" a criminal record. The appellant further asserts that, had this candidate been ruled ineligible to run for Chief, his absence from the ballot might have affected the outcome of the election.
2. That there were a number of irregularities respecting the conduct of the election that affected the outcome.

On August 10, 2004, the Judicial Council issued its decision respecting the alleged irregularities referred to in Category 2 above, but deferred its decision on the candidate eligibility matter until the Judicial Council received a copy of candidate Sam Broeren's criminal record. This record check was finally received by the Judicial Council on April 25, 2005, and required some further investigation to determine the nature of the offences referenced in it. The very considerable delay on the part of the RCMP in providing the Judicial Council with Mr. Broeren's criminal record has never been satisfactorily explained by the RCMP. We are advised that for some considerable time the request was inexplicably misfiled or misplaced. We are also told that this is not the usual practice. The delay has been very regrettable. The Judicial Council acknowledges

the important interests of the appellant and other parties to this appeal in the outcome of these proceedings, as well as the significant public interest of Ta'an Kwäch'än Council citizens generally. It has always been the view of the Judicial Council that in proceedings such as this, delays should be avoided or at least minimized. Ta'an Kwäch'än Council should endeavour to develop a relationship with the RCMP in order to ensure expeditious attention to matters such as this.

Category 1 – Certified Criminal Record Check

The criminal record for Sam Broeren provided to the Judicial Council by the RCMP confirms Mr. Broeren was convicted in 1966 for possession of stolen property contrary to section 296(a) of the *Criminal Code* (as it then was). At the time of Mr. Broeren's conviction, section 297 of the *Criminal Code* provided:

297. Everyone who commits an offence under section 296 is guilty of an indictable offence...

(Note: Subsequent to Mr. Broeren's conviction section 296(a) was repealed and replaced with what has become section 354(1) of the *Criminal Code*. An offence under section 354(1) for possession of stolen property is now a hybrid offence; meaning it can be prosecuted by indictment or by summary conviction, depending on the circumstances.)

Section 8.14 of the *Constitution of the Ta'an Kwäch'än Council* states:

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

It follows from this provision of the *Constitution* that a citizen who has been previously convicted of an indictable offence should not be a candidate in an election for the office of Chief. This principle is reflected and given effect in 5.3.1 of the *Election Rules*, which states:

5.3.1 A Citizen is not eligible to be a candidate for the office of Chief...if he or she has a criminal record for an indictable offence....

Section 5.2.2 of the *Election Rules* requires each candidate for the office of Chief to declare that he or she does not have criminal record for an indictable offence and obligates each candidate to provide the Board with a "certified criminal record check".

In a request signed and dated March 8, 2004, Mr. Broeren asked the RCMP for a criminal record check. The request directed the results to be sent to the Elections Committee, 117 Industrial Road, Whitehorse (the principal administrative offices of the Ta'an Kwäch'än Council).

In a letter dated March 9, 2004, the RCMP advised:

“Based on the information received, there may or may not be a criminal record in existence [for Sam Broeren] although the Criminal Record information can only be confirmed by fingerprint comparison.

....Results of the fingerprint search will be sent to the addressee of the return envelope **in four to six weeks**. (emphasis added)

If you have any questions, please do not hesitate to contact this office.”

It appears from the record that neither the Elections Committee nor the Board took any action in response to the March 9, 2004, letter from the RCMP. While the RCMP should have been asked to send its reply to the Board and not the Elections Committee, we are satisfied that the Board either had, or acting reasonably and with due diligence should have had, notice of this letter well in advance of the April 30, 2004, date of the vote.

While section 5.2.2 of the *Election Rules* clearly imposes an obligation on the candidate to provide a criminal record check, in our view it also places a positive obligation on the Board to take reasonable steps ensure that it receives the criminal record checks required by the *Election Rules*. In this case the Board knew or could have known as early as March 9, 2004 — a full seven weeks before the election — that Mr. Broeren was not eligible to be a candidate in the election for Chief. We find that had the Board taken reasonable steps to fulfill its responsibility prior to the election, it is reasonably likely that Mr. Broeren’s ineligibility would have been revealed and he would not have been able to stand for election as Chief.

In the event, Mr. Broeren was allowed to stand as a candidate in the election and, while he placed third, he received nearly 30 percent of the votes cast (48 of 160 votes); significantly more votes than the narrow two-vote difference between the first and second place candidates. Had Mr. Broeren’s ineligibility been determined prior to the election, the votes he received may well have been cast for one of the other two candidates. Given the number of votes received by Mr. Broeren and the narrow margin of victory, the Judicial Council is satisfied on a balance of probabilities that, in this case, the inclusion of an ineligible candidate in the election may have materially affected the election results.

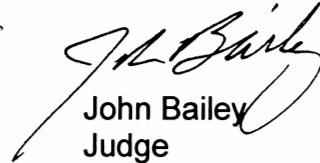
In conclusion, the Judicial Council has determined that there was a violation of the *Election Rules* in that an ineligible candidate was allowed to run for Chief. Considering the number of votes received by this candidate and the margin of victory in the election, the Judicial Council has concluded that this Rule violation may have had a material affect on the results of the election.

In accordance with 11.6 of the *Election Rules*, the Judicial Council orders that the results of the April 30, 2004, election for Chief be voided and a new election for Chief be held.

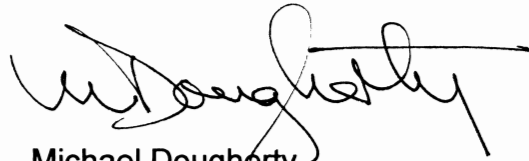
Dated this 16th day of May, 2005, Whitehorse, Yukon.



Chuck Hume
Judge



John Bailey
Judge



Michael Dougherty
Judge