

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Harpe v. Massie and Ta'an Kwäch'än Council*, 2006 YKSC 01

Date: 20060203
Docket No.: S.C. No. 05–A0080
Registry: Whitehorse

Between:

BONNIE HARPE

Plaintiff

And

RUTH MASSIE and THE TA'AN KWÄCH'ÄN COUNCIL

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Andre W.L. Roothman
Debra L. Fendrick and
Anna Pugh

Counsel for the Plaintiff
Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a case about the role that elders play in the governance of a First Nation. It is about the merging of oral customs and traditions with the written constitution of the Ta'an Kwäch'än Council, a Yukon First Nation situated near Whitehorse, Yukon Territory. It is about a struggle for political power between two traditional families in the context of a new regime of self-governance. Bonnie Harpe challenges the authority of the Elders Council of Ta'an Kwäch'än to appoint an acting Chief pending an election for Chief. The issues are whether the elders had that power traditionally, and if so, whether

they can exercise that power under the Constitution of the Ta'an Kwäch'än Council. The latter issue is a question of interpretation of a First Nation Constitution under the *Yukon First Nations Self-Government Act*, RS 1994, c. 35. This statute establishes some basic rights and principles to be included in a First Nation Constitution.

[2] The issue arose because of a gap in the Constitution of the Ta'an Kwäch'än Council. There is no provision that provides for the appointment of an acting Chief or Deputy Chief in the present situation where the offices of Chief and Deputy Chief are vacant pending an election. The Board of the Ta'an Kwäch'än Council has a quorum that requires the presence of the Chief or Deputy Chief. Having no quorum, the Board cannot function or even call a General Assembly for direction.

THE FACTS

[3] In setting out the facts, I will provide a short history of the Ta'an Kwäch'än, the role of the elders in Ta'an Kwäch'än society, the development of the Constitution of the Ta'an Kwäch'än Council, the 2004 Constitution and the context of the Elders Council's decision to appoint an acting Chief. For those interested in the legal analysis only, turn to page 19. The following section provides the context for that analysis. These facts are based upon sworn affidavits as well as oral testimony of elders.

A SHORT HISTORY OF THE TA'AN KWÄCH'ÄN COUNCIL

[4] This short history cannot do justice to the rich cultural traditions and history of the Ta'an Kwäch'än. There is a large amount of written history and research beginning in the 1980's, when the cultural renewal of the Ta'an Kwäch'än began. Since 1990, the Ta'an Kwäch'än have kept a remarkable written record of every meeting in the form of

verbatim transcripts. These transcripts were of great assistance in this case and will provide a useful historical record for future generations.

[5] Historically, the Ta'an Kwäch'än lived and travelled in a large area that stretched from Tagish to the Big Salmon and Teslin rivers. Today, their extensive traditional territory is focussed on the country around Lake LaBerge, one of the Yukon's largest lakes north of Whitehorse.

[6] There are no greater Yukon historic figures than the legendary Chief Mundessa and Chief Jim Boss, both Hereditary Chiefs of the Ta'an Kwäch'än. The traditional families of the Ta'an Kwäch'än trace their lineage back to Chief Mundessa, who came from Hutshi, and his wife Lande, who came from Tagish. The traditional families take great pride in their connection to Chief Mundessa and that connection is a source of power in the present day Constitution of the Ta'an Kwäch'än Council.

[7] Chief Jim Boss succeeded Chief Mundessa as the Hereditary Chief of the Ta'an Kwäch'än. The word "hereditary" has been used to indicate that the position was not an elected one. The Hereditary Chief was always male and had to be a direct descendant of Chief Mundessa and Lande.

[8] Chief Jim Boss was famous for being the first Yukon Chief to petition the government of Canada for a land claim settlement during the Goldrush. Chief Boss retained a Whitehorse lawyer to write the letter. Although a reserve was established at Lake LaBerge, Chief Boss expressed concern for his people as a result of the impact of the Klondike miners who numbered 30,000 at the height of the Goldrush in 1898. Lake LaBerge was on the Goldrush route and Chief Boss' people were directly affected.

Unfortunately, it took the governments of Canada and Yukon 100 years to fulfill the claim put forward by Chief Jim Boss.

[9] The political organization of the Ta'an Kwäch'än was not respected by the government of Canada. When Jim Boss died in 1950, Canada's Indian policy was one of assimilation. The government of the day refused to recognize existing Indian reserves and declined to create any further reserves. The department responsible for Indian Affairs began a process of amalgamating First Nations. In 1956, the Ta'an Kwäch'än were amalgamated, without their consent, into what was then the Whitehorse Indian Band, now the Kwanlin Dun First Nation. The Ta'an Kwäch'än never accepted the amalgamation and continued to maintain their separate identity.

[10] Status members of Ta'an Kwäch'än remained under the administration of Indian Affairs, as members of the Whitehorse Indian Band. In the Yukon, status Indians were administered under the *Indian Act* according to the Indian Band they were registered in. They received education, health and welfare benefits. Non-status Indians, those without status under the *Indian Act*, became so by giving up their Indian status for employment, acquiring the right to drink alcohol or by virtue of being born to a non-Indian father. The Ta'an Kwäch'än consisted of both status and non-status persons.

[11] In the Yukon, in the 1970's, there were two First Nations political organizations. The Yukon Native Brotherhood represented the status Indians and the Yukon Association of Non-Status Indians represented the non-status. These organizations were amalgamated in 1980 under the Council of Yukon Indians (CYI) to pursue a land claim with equality for all Indian people.

[12] It was through the vehicle of the CYI, now Council for Yukon First Nations, that the Ta'an Kwäch'än began to assert its independence. CYI accepted the Ta'an Kwäch'än Council as a member in 1987. Canada and the Yukon recognized the Ta'an Kwäch'än Council as a separate First Nation in 1998 after the Ta'an Kwäch'än separated from the Kwanlin Dun First Nation and became a band under the *Indian Act*. The Ta'an Kwäch'än Council entered into a Self-Government Agreement with Canada and the Yukon on January 13, 2002. The Ta'an Kwäch'än Council is responsible for the administration of significant amounts of land and money for its citizens.

ROLE OF THE ELDERS

[13] Yukon First Nations generally, and the Ta'an Kwäch'än particularly, treat their elders with deep respect. Witnesses in this trial testified to being taught as young children to listen to and respect elders. The reasons for this are embedded in the cultural and economic fabric of First Nations. In a society that lived according to an unwritten code, the elders passed on their culture and traditions through stories told to children and grandchildren. Many witnesses recalled hearing such stories from their parents and grandparents. Children spent a lot of time with their grandparents to learn their culture and traditions.

[14] The respect for elders was also grounded in reality. Elders knew hunting skills and *duli* which spoke to the proper method of hunting, holding a meeting or conducting a burial by delineating certain forbidden practices or ways of doing things. Traditional members of the Ta'an Kwäch'än follow these practices today.

[15] The elders had considerable political power. One elder from the Tagish Kwan described elders as having a judge-like role. Another described their words as "law"

when, for example, they intervened when a husband assaulted his wife. The decisions of elders were always collective decisions, most often made in times of crisis or emergency. Three respected elders, one of whom was a witness for Ms. Harpe, testified that the elders historically had the power to appoint a Hereditary Chief when a vacancy occurred and there was no designated successor. The first written constitution of the Ta'an Kwäch'än (the 1990 Constitution) confirmed this historical power exercised by the elders. The elders played a significant role in the drafting of the 1990 Constitution and ensured that the customs and traditions of the Ta'an Kwäch'än were maintained. The 1990 Constitution became the written expression or codification of the power of the elders.

[16] Respect for elders remains strong in the Ta'an Kwäch'än Council. The transcript of any General Assembly is evidence of the respect for elders when they speak or are referred to by other citizens of the Ta'an Kwäch'än Council.

DEVELOPMENT OF THE TA'AN KWÄCH'ÄN CONSTITUTION

[17] In the 1990 Constitution, the first written constitution of the Ta'an Kwäch'än, the Elders Council was given a very powerful role reflecting their traditional role in Ta'an Kwäch'än society. Among other things, the Elders Council had the responsibility to appoint members of the Judicial Council for open-ended terms, introduce legislation to the Board of Directors for its approval, fill vacancies on the Board of Directors, appoint, with the Chief, the Chairperson, and aid the Chief in the selection of the next Hereditary Chief. In the event the Chief was permanently incapacitated or removed by a Ta'an Kwäch'än referendum before the next Chief was selected, the Elders Council had the power to select the next Hereditary Chief.

[18] Under Article II, Section 1(c) entitled *The Hereditary Chief*, the Elders Council had considerable power:

“The Hereditary Chief is selected following traditional custom with final decision resting with the current Hereditary Chief and the Elders Council.”

[19] The 1990 Constitution introduced a new position called Chairperson who was to follow the direction of the Hereditary Chief and elders. The 1990 Constitution is the crossroads or intersection between the traditional powerful role of the Hereditary Chief and Elders and their new role in a more democratic form of governance under a written constitution. Ruth Massie, Francis Woolsey and Alice Maguire, all witnesses for the defendants, were directly involved in the meetings to create a written constitution.

[20] The Ta’an Kwäch’än genuinely desired a more democratic form of governance while retaining important customs and traditions.

[21] The Ta’an Kwäch’än amended their Constitution in 1998 (the 1998 Constitution). This Constitution contained a Preamble and Vision which modified the 1990 Constitution by referring to traditional values as “practiced today” thereby incorporating a constitutional principle of growth and change to reflect the new and growing responsibilities of the Ta’an Kwäch’än Council.

[22] In the 1998 Constitution, the Hereditary Chief assumed a more symbolic role and the Board of Directors became the centre of power although operating “in consultation” with the Hereditary Chief. The Elders Council and the Board now appointed the Chairperson who reported to the Board. The Chairperson had a term of three years and could be re-appointed.

[23] The power of the Elders Council and the Hereditary Chief to appoint a successor as Hereditary Chief remained, but the executive power now resided with the Chairperson and the Board.

[24] Thus, the Elders Council evolved from its powerful role with the Hereditary Chief to shared power with the Board. The final steps in the process towards the election of a Chief and Deputy Chief came in the 2004 Constitution.

THE 2004 CONSTITUTION

[25] In November 2003, the Ta'an Kwäch'än amended their Constitution (the 2004 Constitution) to provide for the election of a Chief and Deputy Chief in the place of the Chairperson and the Hereditary Chief. The 2004 Constitution makes no reference to the Hereditary Chief. It gives no express power to the Elders Council in the election of Chief and Deputy Chief. The problems raised in this court action arise out of the growing pains of implementing a democratic election of Chief and Deputy Chief.

[26] The 2004 Constitution begins with a Vision Statement from the 1998 Constitution which includes the following:

“Our vision for the Citizens of the Ta'an Kwäch'än is for the preservation, balance and harmony of our traditional territory. We will honour, respect, protect and care for our environment, people, economy and traditional culture as practiced by our elders.

...

The mission of our Citizens and its government is to provide, promote, protect and sustain a healthy and strong lifestyle for our Citizens and future generations consistent with the traditional values of the Ta'an Kwäch'än as practiced today, through governing our natural, human and financial resources effectively.”

[27] One of the stated objectives in the 2004 Constitution is to establish a government to:

“1.1.2 teach and preserve traditional values based on our culture, wisdom, language and heritage;”

[28] The governing bodies of the Ta’an Kwäch’än Council are the General Assembly, the Elders Council, the Board, the Youth Council and the Judicial Council.

[29] Section 5.3 of the 2004 Constitution states:

“No branch of the Ta’an Kwäch’än Council shall have authority beyond the jurisdiction prescribed by this Constitution.”

[30] There are about 432 citizens of the Ta’an Kwäch’än Council. Approximately 400 of these citizens are members of one of the six traditional families. The power in the 2004 Constitution is divided between the six traditional families who are descendants of Chief Mundessa and Lande.

[31] About 20 citizens do not belong to a traditional family. While those 20 citizens have equal rights to traditional family members in many respects, they do not have the right to run for the office of Chief or Deputy Chief unless they have the consent of all six traditional families. They will also not be represented on the Board.

[32] The General Assembly is composed of six representatives from each of the traditional families. Its meetings are called by the Board and the agenda is arranged by the Board. However, at a General Assembly, any citizen may participate and vote on nullifying laws and removing members of the Board or a judge of the Judicial Council. The General Assembly has the power to amend the constitution.

[33] The Elders Council is composed of all citizens who are at least 60 years of age. No laws can be passed without its approval. The Elders Council appoints one of its members to be a judge on the Judicial Council and has the power to remove any judge. It also has the following powers:

“7.0 The Elders Council

...

- 7.2 The Elders Council shall have the responsibility to:
 - 7.2.1 provide advice and guidance to Citizens, including members of the Board;
 - 7.2.2 establish a cultural and heritage committee to oversee all traditional activities in order to ensure that the values of the Ta’an Kwäch’än are respected and followed;
 - 7.2.3 recommend to the Board the enactment of laws, regulations, and policies;
 - 7.2.4 approve laws and regulations passed by the Board in accordance with section 13.0 of this Constitution;
 - 7.2.5 appoint an elder to sit on the Youth Council in order to provide guidance and direction to the members of the Youth Council;
 - 7.2.6 appoint members of the Judicial Council in accordance with section 11.0 of this Constitution;
 - 7.2.7 appoint a member of the Elders Council as an ex-officio member of the Board; and
 - 7.2.8 establish its procedures based on custom and traditions of the Ta’an Kwäch’än.”

[34] Some elders, on behalf of the defendants, testified that they always interpreted the role of the Elders Council in the 2004 Constitution as a directive one and not merely advisory with specific reference to the wording of sections 7.2.1 and 7.2.8.

[35] Notably missing from the 2004 Constitution is the power found in the 1990 Constitution where the Elders Council assisted the Hereditary Chief to appoint a successor or actually made the appointment when the Hereditary Chief was

permanently incapacitated or removed before the new appointment occurred. Nor is there any reference to the Hereditary Chief as found in the 1998 Constitution where the Elders Council and Hereditary Chief made the appointment of the successor Hereditary Chief.

[36] The Board of Directors is made up of nine appointed directors from the six traditional families. The Board is defined as “the main governing body of the Ta’an Kwäch’än”. It develops the laws and regulations of the First Nation for the approval of the elders. A proposed law or regulation is only brought into effect with a resolution of approval from both the Board and the Elders Council.

[37] The Chief and Deputy Chief sit on the Board. The 2004 Constitution provides for resignation or removal of the Chief or Deputy Chief by the Judicial Council. It provides that a by-election “shall be held forthwith”. It is silent on the appointment of an acting Chief or Deputy Chief. The Board quorum requires the presence of the Chief or Deputy Chief and any six representatives of the traditional families.

[38] The 2004 Constitution sets out the eligibility requirements for a candidate for Chief and Deputy Chief. A candidate for Chief must be a direct descendant of a traditional family or obtain the consent of each traditional family. The Judicial Council can order a citizen to be a Chief over the objection of a traditional family. The responsibilities of the Chief include:

- 9.5.1 *act as the spokesperson of the Ta’an Kwäch’än Council in the context of inter-governmental affairs;*
- 9.5.2 *implement the directions of the Elders Council and the General Assembly;*
- 9.5.3 *oversee the traditional activities of the Ta’an Kwäch’än Council;*

- 9.5.4 *preside over meetings of the Board or General Assembly;*
- 9.5.5 *oversee the departments and agencies of the Ta'an Kwäch'än Council and the administration of programs and services to Citizens;*
- 9.5.6 *arrange and organize the meetings of the General Assembly;*
- 9.5.7 *cast a vote in order to break a tied vote of the Board;*
- 9.5.8 *oversee the implementation of the Ta'an Kwäch'än Council Final and Self-Government Agreements; and*
- 9.5.9 *sign and bring into force all laws and regulations.*

[39] It is not possible for the Board of the Ta'an Kwäch'än Council to function without a Chief or Deputy Chief.

[40] The Judicial Council is composed of three judges which must include one elder appointed by the Elders Council. Interestingly, the judges do not need to be citizens of the Ta'an Kwäch'än. 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. It also 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. A further discussion of the power and jurisdiction of the Judicial Council may be found in a previous decision in this case cited as *Harpe v. Massie and the Ta'an Kwäch'än Council*, 2005 YKSC 54.

THE DECISION OF THE ELDERS

[41] On February 19, 2004, following the constitutional change from the appointment of a Hereditary Chief to the election of a Chief and Deputy Chief, the Board passed the Ta'an Kwäch'än Council Amended Election Rules (election rules).

[42] The date of the election of Chief and Deputy Chief was April 30, 2004. Ruth Massie was elected Chief by a margin of two votes over Bonnie Harpe.

[43] The Deputy Chief, who was acclaimed, resigned shortly after the election. Despite a constitutional requirement to hold a by-election forthwith, the Board has not called a by-election and the Deputy Chief position remains vacant. Needless to say, the present constitutional impasse would not have occurred if the Board had fulfilled its constitutional obligation. Ruth Massie testified that the Board wanted to change the election rules first as a result of some controversies in the April 30, 2004 election.

[44] Bonnie Harpe filed an appeal of the April 30, 2004 election with the Judicial Council alleging, among other things, that the third candidate for the office of Chief was ineligible because he had been convicted of an indictable offence. The 2004 Constitution provides that a candidate for Chief or Deputy Chief is not eligible if they have been convicted of an indictable offence.

[45] The Judicial Council encountered some difficulty verifying whether the third candidate had been convicted of an indictable offence. Finally, on May 16, 2005, one year after the appeal was filed, the Judicial Council decided in a written judgment that the third candidate was indeed ineligible and that this ineligibility may have had a material effect on the outcome of the election. The Judicial Council ordered that the election of Ruth Massie on April 30, 2004, be voided and a new election for Chief be held.

[46] The result of this decision was that the Board of the Ta'an Kwäch'än Council did not have the required quorum to transact business. Section 8.6 of the 2004 Constitution requires the presence of either the Chief or Deputy Chief for all meetings of the Board. As stated earlier, the 2004 Constitution does not have a specific provision setting out a procedure to appoint an acting Chief or acting Deputy Chief.

[47] On May 18, 2005, the Chief and Board met with legal counsel to consider the decision of the Judicial Council. This meeting was held *in camera* without a transcript. It was a meeting without a quorum. Ruth Massie concluded that the Board had no ability to meet and transact business and was no longer a governing body that could function. She decided that a meeting should be held with the Elders Council, which was still functioning.

[48] On May 19, 2005, Ruth Massie met with the Elders Council. Ruth Massie, legal counsel and members of the Board were present along with Frances Woolsey, Chair of the Elders Council, and six elders. A transcript of that meeting describes it as a Special Meeting. The Rules of Procedure for the Elders Council provides for joint meetings with the Board to deal with specific matters. At this meeting, the Elders Council appointed Ruth Massie as acting Chief until a new Chief was elected or Ruth Massie became a candidate for Chief. The Elders Council directed that the election date for Chief and Deputy Chief be held no later than October 30, 2005. This court action has resulted in the election not being held until a decision is made on the validity of the resolution of the Elders Council.

[49] There is a dispute about the validity of this meeting based on allegations of a lack of quorum, conflict of interest and what I will call undue influence by Ruth Massie and legal counsel.

[50] There was also an allegation that the Elders Council did not respect the custom of delaying business meetings as there had been a death of a family member. There is no doubt that such a custom exists but I am not going to second-guess the decision of the Elders Council to proceed. This is not a matter set out in the 2004 Constitution and

the Elders Council can proceed according to custom and tradition and their own rules of procedure.

THE QUORUM

[51] There are 41 citizens of Ta'an Kwäch'än Council who qualify as elders.

Approximately 20 of these elders do not live in the Yukon and are unable to attend meetings. Of the 21 elders in Whitehorse, there are some who cannot be contacted by phone and others who are not well. The result is that approximately 17 elders are available to attend meetings. The usual attendance is between 6 and 10 elders.

[52] At the May 19, 2005 meeting of the Elders Council, 7 elders attended thereby satisfying the required quorum of six elders from at least three of the traditional families. While some of the elders expressed the view that they would have preferred to have a greater number of elders present to make the decision, I do not find that those views affected the validity of the meeting. The elders who expressed those views continued to participate in arriving at the consensus decision to appoint Ruth Massie as acting Chief.

THE ALLEGED CONFLICT OF INTEREST

[53] There were a number of allegations of conflict of interest raised in the affidavits and evidence. The following alleged conflict is the only one that needs to be dealt with.

[54] Frances Woolsey is the Chair of the Elders Council. She is a cousin of Ruth Massie, the person appointed by the Elders Council as acting Chief. Ruth Massie stated that she considered the relationship of cousin to be "immediate family". Frances Woolsey did not consider her relationship with Ruth Massie to be a conflict of interest.

[55] The Rules of Procedure for the Elders Council state as follows:

27. *A member of the Elders Council shall disclose to the Elders Council any direct or indirect financial or other personal interest that he or she or a member of his or her immediate family has in any matter before the Elders Council and shall not take part in the discussions of the Elders Council with respect to that matter or vote on that matter.*

[56] Frances Woolsey did not declare her relationship with Ruth Massie a conflict of interest. She participated fully in the consensus decision to appoint Ruth Massie as acting Chief.

[57] I point out that there was no specific pleading filed that set out this alleged conflict of interest, nor was any specific relief pled. There was no case law filed on conflicts of interest. In these circumstances, I would not normally make any ruling, particularly where the entire focus of legal submissions has been on the traditional power of the elders and the interpretation of the 2004 Constitution.

[58] However, it would not be appropriate to leave this allegation without a response. The definition of a conflict of interest in the context of a First Nation of 432 citizens, the majority of which come from six traditional families, cannot be interpreted broadly without bringing the transaction of business and holding of meetings to a standstill.

[59] At the same time, the section on conflicts of interest has a purpose to prevent family members from providing benefits to their own immediate family members. My view is that the term "immediate family" in its ordinary meaning would include parents, spouses and children but would not extend to cousins. The allegation of a conflict of interest has no merit and does not invalidate the decision of the Elders Council.

UNDUE INFLUENCE

[60] The joint meeting of the Elders Council and the Board was called at the request of Ruth Massie on May 19, 2005. At that point, Ruth Massie was no longer Chief

because of the decision of the Judicial Council. The factual issue raised in this section is whether the Elders Council made an independent decision or whether they were simply following the direction of legal counsel and Ruth Massie.

[61] The meeting began with a presentation by Daryn Leas, the legal counsel for the Ta'an Kwäch'än Council. He spoke at some length to explain the decision of the Judicial Council to void the election of Ruth Massie as Chief.

[62] The specific concerns raised by Ms. Harpe are as follows:

1. Mr. Leas explained that the Board could no longer function and it could not appoint an acting Chief as it lacked a quorum.
2. He stated that the Elders Council has inherent or residual powers to act in the best interest of the Ta'an Kwäch'än but, he advised, "From a legal point of view, it's pretty thin ice though".
3. He concluded, "What we're asking, I think, is for somebody to be appointed on an interim basis until there's an election to fulfill the duties of the Chief".

[63] Ms. Harpe also raised concerns about statements by Ruth Massie, the former Chief, as follows:

1. Ms. Massie stated that the Elders Council was brought together to make a decision to empower the Board in the absence of a Chief.
2. She specifically stated that "You have the ability to appoint an acting Chief. You have the ability to empower the Board of Directors to conduct business."

[64] Ms. Harpe is of the view that Mr. Leas and Ms. Massie convinced the Elders Council that they had the inherent and residual power to appoint an acting Chief based on their custom and traditions. She also argues that the appointment of a woman as Hereditary Chief is not part of the Ta'an Kwäch'än tradition. I note that Ms. Harpe did not testify in court except by filing lengthy affidavits with helpful documentation. She does not profess to have any personal knowledge of the traditional powers of elders. She became a citizen of the Ta'an Kwäch'än Council in 2001. She had no involvement in the constitutional discussions prior to 2001.

[65] To some extent, the court action was very personal for Ms. Harpe. She had been the acting Chairperson prior to the election of Chief. She stated in her examination for discovery that the Elders Council had the option of asking her to take over until the election and she was hurt that she did not have the opportunity.

[66] Ms. Harpe has also alleged that Ruth Massie is not from a traditional family, despite the clear wording of the 2004 Constitution. This is not a matter for this Court to determine.

[67] My finding of fact is that Mr. Leas and Ms. Massie did indeed have opinions and recommendations that they freely gave to the Elders Council. I find nothing unusual in that because the Elders Council may hear advice from legal counsel and the opinion of a former Chief.

[68] I am satisfied that the Elders Council made an independent decision. The Chair told Ms. Massie and other Directors to leave the meeting of the Elders Council. The Elders Council then discussed the situation and went around the table to hear each elder present. Mr. Leas remained to assist the Elders Council but did not play an

influential role except to take the direction of the Elders Council to prepare the appropriate resolution.

[69] I find as a fact that the Elders Council made an independent decision by consensus to appoint Ruth Massie as acting Chief until the new Chief was elected or Ms. Massie become a candidate in the election.

ISSUES

[70] The issues to be resolved are:

1. Did the Ta'an Kwäch'än Elders Council, by custom and tradition, have the power to appoint an acting Chief?
2. If the power of the Elders Council to appoint an acting Chief existed, can it be exercised in the Ta'an Kwäch'än Council 2004 Constitution?

ANALYSIS

ISSUE 1: Did the Ta'an Kwäch'än Elders Council, by custom and tradition, have the power to appoint an acting Chief?

[71] Canadian jurisprudence has for some time recognized and incorporated First Nations law of custom and tradition.

[72] Indeed, it is now part of the Canadian Constitutional framework as set out in s. 35 of the *Charter of Rights and Freedoms*:

- 35(1) *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*
- (2) *In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.*
- (3) *For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.*

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[73] The Ta'an Kwäch'än Council entered into a Self-Government Agreement with Canada and Yukon on January 13, 2002. Section 2.1 of the Self-Government Agreement sets out the principle that "the Ta'an Kwäch'än Council has traditional decision-making structures and desires to maintain these traditional structures."

[74] The Self-Government Agreement is formally recognized in the *Yukon First Nations Self-Government Act*, R.S. 1994, c. 35 (the *Act*), which provides in section 8 that a First Nation constitution must provide, among other things, a citizenship code, the governing bodies of the First Nation and their composition, membership, powers, duties and procedures.

[75] It is stated in section 9 of the *Act* that:

9(1) The powers of a first nation ... shall be exercised in accordance with the first nation's constitution and, ... , by the bodies specified in the constitution.

[76] Except as stated in sections 2.1 and 9(1), the *Act* is silent on the role of tradition and custom in First Nation constitutions.

[77] However, as stated previously, the Vision Statement set out in the Ta'an Kwäch'än Council 2004 Constitution contains the following:

"... We will honour, respect, protect and care for our environment, people, economy, and traditional culture as practiced by our elders."

...

The mission of our Citizens and its government is to provide, promote, protect and sustain a healthy and strong lifestyle for our Citizens and future generations consistent with the traditional values of the Ta'an Kwäch'än as practiced today"

[78] The 2004 Constitution makes reference to each governing body establishing its procedures based upon “the customs and traditions of the Ta’an Kwäch’än”. It permits any family spokesperson or elder to challenge the validity of any existing law or regulation if they believe it to be inconsistent with the customs and traditions of the Ta’an Kwäch’än. There can be no doubt that the Ta’an Kwäch’än intended that the customs and traditions of the Ta’an Kwäch’än would continue to play an important role in their society and laws.

[79] This is not a dispute between the Ta’an Kwäch’än and the Crown. It is an internal dispute between citizens of the Ta’an Kwäch’än.

[80] Although it was decided in the context of a First Nation claim against the Crown, *Mitchell v. M.N.R.*, 2001 SCC 33, at paragraph 30, established that oral histories and ancestral practices may be accepted in the context of the general rules of evidence so long as the evidence is reliable and its probative value outweighs its prejudicial effect.

[81] There is one further test that must be met in the context of this dispute between citizens of a First Nation as to the precise nature of a traditional custom or practice. The custom or practice must be generally acceptable to the members of the First Nation: *Bigstone v. Big Eagle*, [1992] F.C.J. No. 16. This is not to say that there must be a consensus, which in Yukon First Nations terms would require that every citizen must agree on the precise nature of a custom or tradition, but rather that there be a general acceptance.

[82] I have concluded from the evidence that there is general acceptance among the Ta’an Kwäch’än that historically the elders had the power to appoint a Hereditary Chief

when a vacancy occurred and there was no designated successor. The evidence supporting this came from three elders, one of whom testified for the plaintiff.

[83] This oral evidence was supplemented by the fact that the first written constitution of the Ta'an Kwäch'än Council, the 1990 Constitution, incorporated significant powers for the Elders Council, which included the power in conjunction with the current Hereditary Chief to appoint the new Hereditary Chief. The 1990 Constitution also empowered the Elders Council to select the next Hereditary Chief if the existing Hereditary Chief was permanently incapacitated or removed by referendum.

[84] Once a traditional custom is placed into a written constitution, there can be no doubt as to its general acceptability.

[85] Counsel for Ms. Harpe, in the alternative, submits that since this power is not expressly set out in the 2004 Constitution, it could only be accepted in its original context as the power to appoint a male person who is a direct descendant of Chief Mundessa and Lande. I do not agree with this submission for several reasons.

[86] Firstly, the case law supports the view that custom and tradition are not static principles frozen in time. In the same way that traditional hunting methods have evolved over time, the customs and traditions of inherent self-government may also change and evolve: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[87] This principle was applied in *Wanderingspirit v. Marie*, 2003 FCT 670, where the trial judge rejected the holding of an election, purportedly by band custom, where there was no notice of an election, no nominations in advance and the voting was done without secret ballot at a meeting with approximately 10 percent of the electors present. Rouleau J. stated at para. 45:

"It is true that "custom" is not frozen in time and may be changed. However, any change requires a broad consensus of the members of the band. Unless and until an established custom for the selection of chief and councillors has been changed the established custom continues to apply. An election conducted in a manner inconsistent with the pre-existing custom will, therefore, be invalid unless there is proof that the pre-existing custom has been changed by the broad consensus of the band. Such a consensus requires more than a simple majority. It requires a manifestation of the will of the band members to be bound by a new set of rules."

[88] In my view, the constitutional change for the election of a male or female person as Chief indicates a general acceptance that a traditional custom has evolved to become gender equal. Indeed, Ms. Harpe herself had no objection to being considered for the position of acting Chief.

[89] Secondly, section 35(4) of the *Charters of Rights and Freedoms* states that aboriginal rights are guaranteed equally to male and female persons. I interpret the power of the Elders Council to appoint an acting Chief to be an aboriginal right and thus the power would include both male and female persons.

[90] Thirdly, the 2004 Constitution recognizes the evolution of traditional concepts when it refers to its government being consistent with "the traditional values of the Ta'an Kwäch'än as practiced today".

[91] I conclude that it would not be appropriate, nor would it be acceptable to the citizens of Ta'an Kwäch'än, to limit the appointment of an acting Chief to male persons. It is interesting to note that Ms. Harpe was previously appointed as a Chairperson. She also stated she was hurt that she was not offered the opportunity to be acting Chief. I find that it is doubtful that this court action would have commenced if Ms. Harpe had been appointed acting Chief.

[92] To conclude, I find that the traditional power and custom of the elders to appoint an acting Chief when the position was vacant for some reason is well established. It would also be well accepted to appoint a woman to the position in the context of the present constitution and its equal treatment of citizens in the election of a Chief.

[93] It remains to be determined if the 2004 Constitution can be interpreted so as to incorporate this traditional power of the Elders Council.

ISSUE 2: If the power of the Elders Council to appoint an acting Chief existed, can it be exercised in the Ta'an Kwäch'än Council 2004 Constitution?

[94] The interpretation of a First Nation constitution is not the same as the interpretation of a statute. I have already set out my views on the interpretation of a First Nation constitution in this case in *Harpe v. Massie and the Ta'an Kwäch'än Council*, 2005 YKSC 54, which I will summarize and expand upon. I summarize the applicable principles of constitutional interpretation as follows:

1. a First Nation constitution must be interpreted as a constitutional document, not a statute;
2. the living tree doctrine should be applied to a First Nation 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 (see *Reference Regarding Same Sex Marriage*, 2004 SCC 79, at para. 23 and R.W. Hogg, *Constitutional Law of Canada*, loose leaf, 4th ed. (Toronto: Thomson Canada Limited, 1997) at page 33-16);

3. while a constitutional document should be read generously within its contextual and historical guidelines, it must not overshoot its purpose by giving it an interpretation the words cannot bear (see *R. v. Blais*, 2003 SCC 44, at para. 18);
4. aboriginal understanding of words are to be preferred over more legalistic interpretations (see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at para. 13); and
5. the right to self-government for First Nations should be preserved by giving an interpretation that is the least intrusive (see *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1055).

[95] There is clearly a tension within these principles of constitutional interpretation. The living tree doctrine does not necessarily result in overriding the limiting words of section 5.3 of the 2004 Constitution that no branch shall have “authority beyond the jurisdiction prescribed”.

[96] Counsel for Ms. Harpe submits that this should be interpreted narrowly to mean that unless the power is expressly stated in writing, it cannot be implied. It follows, in this interpretation, that the constitution does not grant the Elders Council the power to appoint an acting Chief as it is not expressly stated. Ms. Harpe has pleaded the remedy that an administrator be appointed to govern the affairs of the Ta’an Kwäch’än Council, pending the calling of a General Assembly to set the date for an election and decide on changes to the election rules.

[97] Counsel for Ms. Massie submits that the words in section 7.2.1, that the Elders Council has the responsibility to “provide advice and guidance”, must be given a

meaning that includes “direction” or as some defence witnesses stated, implying an action. Alternatively, counsel submitted that the court should fill the gap in the constitution by applying the established custom or tradition of the Elders Council appointing an acting Chief.

[98] I am not of the view that words “provide advice and guidance” should be interpreted as including the giving of a binding direction. To my mind, that would set an unfortunate precedent of giving the words “advice and guidance” a greater meaning than advisory. It would mean that “advice and guidance” would become a legally binding direction. The words cannot bear such an interpretation.

[99] Nevertheless, the Elders Council faced a constitutional crisis on May 19, 2005. It was an unusual circumstance to find that both offices of Chief and Deputy Chief were vacant thereby making it technically impossible for the Board to govern with a quorum. The matter could not be resolved by calling a General Assembly as the Board could not call it, nor could it arrange the agenda or appoint an impartial person to chair it.

[100] In these circumstances, I find that the Elders Council quite appropriately and validly exercised their traditional power. In the same way that the customs and traditions of the Ta’an Kwäch’än can override laws of the Ta’an Kwäch’än Council, the customs and traditions can appropriately be resorted to in times of crisis to fill a gap in the constitution. The 2004 Constitution did not abolish custom and tradition. In fact, the wording of the 2004 Constitution preserves the customs and traditions of the Ta’an Kwäch’än. Although such customs and traditions cannot override the express words of the constitution, custom and tradition may be called upon in exceptional circumstances where a gap or oversight exists.

[101] I reject the alternative of declaring that the gap cannot be bridged and that an administrator should be appointed. That would be an unnecessarily intrusive interpretation completely out of character with the customs and traditions of this First Nation. It would be an unfortunate throwback to *Indian Act* band council status and completely contrary to the self-governing principle that underlies this First Nation Constitution.

[102] However, the principle that a First Nation constitution should be interpreted as a constitutional document rather than a statute raises the stakes considerably for judicial intervention. A constitutional document contains the fundamental principles of a First Nation. A constitution cannot be changed because it suits the political objectives of one party or another. In other words, constitutional interpretation may have some similarities with the interpretation of statutes or contracts, but the consequences are far more profound and invasive.

[103] Our courts have been reluctant to fill legislative or statutory gaps. In *Professional Institute of the Public Service of Canada v. Northwest Territories* (1988), 53 D.L.R. (4th) 530 (NWTCA); affirmed [1990] 2 S.C.R. 367, the Northwest Territories Court of Appeal filled a legislative gap in the *Public Service Act*, R.S.N.W.T. 1974, c. P-13. This *Act* limited collective bargaining to those employees' associations incorporated by statute and excluded by inference those associations that were merely "recognized". It was clear that the legislators had not been aware that some employees' associations were not incorporated but were nevertheless recognized. In that case, counsel for the Northwest Territories proposed a modification of the statute by inserting the word "recognized" before "employees' associations". Kerans J., at pages 535 – 536, in stating

that courts should not ordinarily fill legislative gaps, set out four criteria that must be met:

1. the problem arose only by reason of legislative oversight;
2. the change is that which the legislature would have made had it addressed the issue, which almost always means that it is a straightforward alteration;
3. no harm is done by the proposed change to the legal rights created by the legislation; and
4. harm will be done to legal rights created by the statute if the change is not made.

[104] I find these criteria to be useful in the context of constitutional interpretation as well with some modifications.

[105] The Supreme Court of Canada has resorted to unwritten constitutional principles to assist in interpretation.

[106] In *Re Remuneration of Judges*, [1997] 3 S.C.R. 3, the court went beyond the written text of constitution to enshrine the principle of judicial independence as a constitutional principle. However, Lamer C.J., at paragraph 83, indicated that the principle of judicial independence was “unwritten in the sense that [they are] exterior to the particular sections” at issue.

[107] The Supreme Court of Canada went further in the *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217, when the court was called upon to determine whether Quebec could secede unilaterally from Canada. The court found at paragraph 32 that

the wording of section 52(2) of the *Constitution Act, 1982* was not exhaustive and that unwritten rules exist because:

“...problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. ...”

[108] Thus, the Court was able to “fill in the gaps” in the Constitution by referring to principles that were never specifically addressed within its text. The Supreme Court held that the unwritten principle of the rule of law required that a government, even one mandated by a popular majority in a referendum, must still obey the rules of the Constitution. A secession would require an amendment of the Constitution of Canada, and as such would have to be accomplished in accordance with the Constitution’s amending procedures which would require Quebec to negotiate with the rest of Canada. On the other hand, the unwritten constitutional principles of democracy and federalism mandate that if a referendum in Quebec yielded a clear majority on a clear question of secession, the federal government and other provinces would have a legal obligation to negotiate constitutional changes with Quebec.

[109] In the case at bar, it is not so much a question of invoking unwritten constitutional principles. Rather, it is a question of whether and how a gap in the constitution may be filled by a court.

[110] In my view the following criteria must be met to fill a constitutional gap:

1. there must be an oversight or gap in the First Nation constitution;

2. the oversight or gap must result in a constitutional crisis that could result in harm being done to the administration or governance of the First Nation;
3. the method employed to fill the gap must be consistent with the customs and past practices of the First Nation;
4. the method of filling the gap must be reasonably consistent with the written principles in the First Nation constitution;
5. the method of filling the gap must be a less intrusive means of resolving the constitutional crisis.

[111] I find that all five criteria have been met in this case. The first criterion is established as the 2004 Constitution has a gap in that no provision exists for the appointment of an acting Chief. The Elders Council previously held the power to appoint an acting Hereditary Chief but in the amendments abolishing the Hereditary Chief, there was an oversight in not providing for the appointment of an acting Chief during a vacancy in the position of Chief and Deputy Chief.

[112] The second criterion is met as there would be a constitutional crisis if the Board was incapable of transacting the business of the First Nation. No other governing body could appropriately intervene.

[113] The third criterion is met in that the Ta'an Kwäch'än had a custom and practice of empowering the elders to appoint acting Hereditary Chiefs .

[114] The fourth criterion is met as the 2004 Constitution has a Vision Statement that requires respect for the traditional culture as practised by the elders. The 2004 Constitution provides for challenges to any law or regulation that is not consistent with

the customs and traditions of the Ta'an Kwäch'än. In short, the 2004 Constitution expresses a clear intent to retain customs and traditions.

[115] Finally, the appointment of an acting Chief can be made in a timely manner by the Elders Council which is the repository of the customs and traditions of the Ta'an Kwäch'än. It is much more appropriate and less intrusive than having the court appoint an administrator.

[116] I conclude that the Elders Council has the traditional power to appoint an acting Chief in these unique circumstances. The election of Chief and Deputy Chief should proceed as soon as possible, subject to the requirements of the 2004 Constitution and the *Elections Act* passed in July 2005.

[117] There is a further concern over whether Ms. Harpe is eligible to be a candidate in the election. The past and present *Elections Act* contains a provision that makes a person ineligible to be a candidate if they have an outstanding legal action against the Ta'an Kwäch'än Council that remains outstanding at the time of his or her candidacy. If there is no appeal of this decision, Ms. Harpe would be eligible to be a candidate. In the event that there is an appeal of this decision, there may be doubt as to Ms. Harpe's eligibility. That doubt should be resolved by an immediate application by Ms. Harpe to the Judicial Council for a ruling. I say this to avoid the further possibility of another election being challenged and possibly set aside. I note that the Board and Elders Council could amend the law to permit Ms. Harpe's candidacy without requiring a decision from the Judicial Council.

[118] The Ta'an Kwäch'än Council has not had an elected Chief or Deputy Chief for many months. The election for Chief and Deputy Chief must proceed as soon as possible.

[119] There shall be no order as to costs as the defendants have indicated they do not seek costs.

VEALE J.