

# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Harpe v. Massie and the Ta'an Kwäch'än Council*

2005 YKSC 54

Date: 20050913

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:

André Roothman and Drew Pearson  
Debra Fendrick and Jessica Sisk Roehele

For the plaintiff  
For the defendants

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] Bonnie Harpe has filed a Statement of Claim against Ruth Massie and the Ta'an Kwäch'än Council claiming, among other things, that the resolution of the Elders Council appointing Ruth Massie as Acting Chief is not valid. She now applies for an order:

- (a) to prohibit Ruth Massie from continuing as Acting Chief;
- (b) to prohibit the Board of the Ta'an Kwäch'än Council from acting until a Chief or Deputy-Chief is elected;

- (c) to appoint an Administrator for the Ta'an Kwäch'än Council until a Chief or Deputy-Chief has been elected; and
- (d) to prohibit the holding of the election for Chief and Deputy-Chief until the Court has ruled on her judicial review proceeding.

[2] The Ta'an Kwäch'än Council opposes the application and brings a preliminary application for a stay of proceedings on the grounds that this Court should decline to exercise jurisdiction. The Ta'an Kwäch'än Council says that the dispute is a matter within the jurisdiction of the Judicial Council pursuant to the Constitution of the Ta'an Kwäch'än Council (the Constitution).

## **ISSUE**

[3] The precise issue is whether the Judicial Council of the Ta'an Kwäch'än Council is empowered to review the resolution of the Elders Council appointing Ruth Massie as Acting Chief.

## **BACKGROUND**

[4] The Ta'an Kwäch'än Council is the government of the Ta'an Kwäch'än people, a Yukon First Nation situated at Lake Laberge, near Whitehorse, Yukon Territory. To avoid any misunderstanding, the name of this First Nation and its government is Ta'an Kwäch'än Council.

[5] On January 13, 2002, the Ta'an Kwäch'än Council signed the Ta'an Kwäch'än Self-Government Agreement with the governments of Canada and the Yukon. The general purpose of the Ta'an Kwäch'än Self-Government Agreement is to support the contemporary and traditional political institutions and processes of the Ta'an Kwäch'än.

[6] The Ta'an Kwäch'än Council originally had an Hereditary Chief appointed by the Elders Council. That style of governance was changed at a General Assembly in November 2003 when the citizens of Ta'an Kwäch'än Council abolished the position of Hereditary Chief and created the elected positions of Chief and Deputy-Chief.

[7] On February 19, 2004, the Board of the Ta'an Kwäch'än Council passed the Ta'an Kwäch'än Council Amended Election Rules (Election Rules).

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

[9] The Deputy-Chief, who was acclaimed, resigned on June 1, 2004. The Board has not called a by-election as required by the Constitution, to replace the Deputy-Chief. Section 8.13 states "Upon resignation or removal of the Chief or Deputy-Chief, a by-election shall be held forthwith to serve for the remainder of the term".

[10] Bonnie Harpe filed an appeal of the April 30, 2004 election to the Judicial Council alleging certain irregularities and the ineligibility of a third candidate for the office of Chief. On May 16, 2005, one year later, the Judicial Council decided, in a written judgment, that the third candidate was ineligible. The delay between the filing of the appeal and the judgment was caused by a difficulty in obtaining certain records. The Judicial Council ordered that the election of Ruth Massie on April 30, 2004 "be voided and a new election for Chief be held". The result of this ruling of the Judicial Council was that the Board of the Ta'an Kwäch'än Council did not have a quorum as there was no elected Chief or Deputy-Chief.

[11] Section 8.6 of the Constitution requires the presence of either the Chief or Deputy Chief as part of the quorum for all meetings of the Board for all business. There is no

specific provision in the Constitution of the Ta'an Kwäch'än Council setting out a procedure to appoint an Acting Chief or Deputy-Chief.

[12] On May 19, 2005, the Elders Council approved a resolution appointing Ruth Massie as Acting Chief. Bonnie Harpe alleges that this resolution is not valid thereby leaving the Board of the Ta'an Kwäch'än Council without a quorum to act.

[13] By letter dated July 19, 2005, six directors of the Board informed the citizens of Ta'an Kwäch'än Council that the Elders Council appointed Ruth Massie as Acting Chief and ordered that elections for Chief and Deputy-Chief be held no later than October 30, 2005.

[14] The Elders Council appointed the Judicial Council by resolution dated April 30, 2004. Bonnie Harpe alleges that the three judges of the Judicial Council were removed by the Elders Council. I find that the three judges of the Judicial Council have not been removed by the Elders. There is no documentary evidence to support the allegation and the Judicial Council has continued to render judgments without objection from the Elders Council. It does appear that they have not formalized their Rules of Procedure as the only document before me appears to be a draft dated April 7, 2004.

### **The Constitution of the Ta'an Kwäch'än Council**

[15] It is important to read the entire Constitution so as to fully understand the context of governance in the Ta'an Kwäch'än Council. As with other Yukon First Nations, the internal governance of the Ta'an Kwäch'än Council is quite unique in our democratic society. The citizens of Ta'an Kwäch'än Council have considerable opportunities to influence and ultimately challenge the legislative process.

[16] Each Yukon First Nation that has concluded a Self-Government Agreement with Canada and the Yukon, has similar constitutional structures but with a distinctive approach determined by each First Nation. See *Scheffen et al v. Barber et al*, 2002 YKSC 1 for a discussion of the Tr'ondëk Hwéch'in constitutional governance.

[17] Pursuant to the Ta'an Kwäch'än Self-Government Agreement, the Ta'an Kwäch'än Council has replaced the Ta'an Kwäch'än Band which operated under the *Indian Act*. The Ta'an Kwäch'än Council is a legal entity that operates according to the Constitution. The Ta'an Kwäch'än Self-Government Agreement sets out, among other things, that the Constitution shall provide for the governing bodies of the Ta'an Kwäch'än Council and challenging the validity of laws enacted by the Ta'an Kwäch'än Council and quashing invalid laws (section 10, Ta'an Kwäch'än Self-Government Agreement).

Section 4.4 of the Constitution states:

Every Citizen of the Ta'an Kwäch'än Council shall have the right to challenge the validity of any law or regulation enacted by the Ta'an Kwäch'än Council which appears to violate any freedom or right prescribed in this Constitution. The process for challenging the validity of laws and regulations shall be made in accordance with section 14.0 of this Constitution.

[18] Section 5 of the Constitution creates three branches to exercise the power and authority of the Ta'an Kwäch'än Council. Section 5.3 states that no branch of the Ta'an Kwäch'än Council shall have authority beyond the jurisdiction prescribed by the Constitution.

[19] The first branch is the General Assembly. It is composed of six representatives of each of the six Traditional Families. However, any citizen may participate in a meeting of the General Assembly and vote to nullify any law or regulation enacted by the Ta'an

Kwäch'än Council, to remove a member of the Board or Judicial Council, or to amend the Constitution, all of which require a three-quarter majority vote.

[20] The second branch is composed of the Elders Council, Board and Youth Council. Section 7.2 of the Constitution states that the Elders Council, among other things, recommends the enactment of laws, regulations and policies to the Board as well as approving laws and regulations passed by the Board. It also appoints and may remove judges from the Judicial Council.

[21] Pursuant to section 8 of the Constitution, the Board is composed of the Chief, Deputy-Chief and nine Family Directors. The Board is responsible for developing laws and regulations of the Ta'an Kwäch'än Council. The Board is also required to fulfill the mandates and directions of the General Assembly. Section 13 sets out the legislative process which requires a resolution from each of the Elders Council and Board before a law or regulation takes effect. It states the following:

### **13.0 LEGISLATIVE PROCESS**

- 13.1 Any law or regulation, or any amendment to a law or regulation, of the Ta'an Kwäch'än Council shall be enacted in accordance with this section.
- 13.2 Any proposed law or regulation shall be reviewed at two meetings of the Board. At the third meeting, the Board may approve the proposed law or regulation in accordance with section 8.9 of this Constitution.
- 13.3 The approved law or regulation shall be submitted by the Board to the Elders Council for its review and approval. At its meeting, the Elders Council may approve the proposed law or regulation in accordance with section 7.4 of this Constitution.
- 13.4 A proposed law or regulation will be brought into legal effect in accordance with a resolution from each of the

Elders Council and Board that approves that proposed law or regulation in accordance with this Constitution.

[22] Pursuant to section 10 of the Constitution, the Youth Council is composed of a representative of each Traditional Family and advises and assists the Board and Elders Council, among other things.

[23] The third branch of the Ta'an Kwäch'än Council is the Judicial Council which is composed of three judges, one of whom must be an elder. Citizenship in the Ta'an Kwäch'än Council is not a requirement. For the purposes of this application, the relevant responsibility of the Judicial Council is to determine the validity of a law or regulation enacted by the Ta'an Kwäch'än Council which has been challenged under section 14 of the Constitution.

[24] As the process for legislative review is at heart of this application, I set out section 14 in full:

#### **14.0 LEGISLATIVE REVIEW**

- 14.1 The validity of any existing law or regulation enacted by the Ta'an Kwäch'än Council may be challenged by a Citizen in accordance with this section.
- 14.2 The Family Spokesperson and elder of a Traditional Family may submit a written notice to the Board challenging the validity of any existing law or regulation if they believe it to be inconsistent with:
  - 14.2.1 the custom and traditions of the Ta'an Kwäch'än;
  - 14.2.2 the provisions of the Ta'an Kwäch'än Council Final or Self-Government Agreement; or
  - 14.2.3 any provision of this Constitution.
- 14.3 The Board shall review the written notice in an expedient manner and shall make a decision to:

- 14.3.1 amend the law or regulation in accordance with section 13.0 of this Constitution;
  - 14.3.2 repeal the law or regulation; or
  - 14.3.3 disregard the written notice.
- 14.4 Within thirty days of the Board's decision under section 14.3 of this Constitution, the Family Spokesperson and elder, who submitted the written notice challenging the validity of a law or regulation, may then submit the written notice to the Judicial Council.
- 14.5 The Judicial Council shall declare a law or regulation of the Ta'an Kwäch'än Council to be invalid and void if it finds the law or regulation to be inconsistent with the grounds set out in sections 14.2.1, 14.2.2 or 14.2.3 of this Constitution.

## **THE LAW**

[25] The law on whether it is appropriate for a court to exercise its jurisdiction, when a statute has already granted jurisdiction to a tribunal, has recently been restated and discussed in the case of *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16.

[26] In *Okwuobi*, some parents in the province of Québec wanted their children to be educated in English. They attempted to bypass the administrative appeal process by seeking injunctive and declaratory relief in the Superior Court. The Supreme Court of Canada decided that the Administrative Tribunal of Québec (ATQ) had exclusive jurisdiction to hear appeals for entitlement to English language education in Québec. The administrative process in Québec requires that a person must first apply to a designated person for a certificate of eligibility and then appeal to the ATQ before turning to the Superior Court.

[27] Section 83.4 of the *Charter of the French language*, R.S.Q., c. C-11 permits an appeal from a designated person to the ATQ.

[28] Section 14 of the *Act respecting administrative justice*, R.S.Q., c. J-3, states that “the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or body.” Section 15 gives the ATQ the power to decide any question of law or fact necessary for the exercise of its jurisdiction which includes the power to confirm, vary or quash the contested decision and, if appropriate, make the decision that should have been made.

[29] Section 31 of the *Code of Civil Procedure*, R.S.Q., c. C-25 states that:

The Superior Court is the court of original general jurisdiction; it hears in first instance every suit not assigned exclusively to another court by a specific provision of law.

[30] At paragraph 38 of *Okwuobi*, the Supreme Court of Canada ruled that the parents did not have the right to bypass the ATQ and seek relief from the Superior Court. They found the clear intent of the Québec legislature was to make the jurisdiction of the ATQ exclusive.

[31] In so deciding, the Supreme Court conducted the following analysis. Firstly, it examined the scope of the ATQ jurisdiction and whether it could deal with constitutional questions. The court concluded that the legislature granted the ATQ the power to consider and decide legal issues, including constitutional questions. At paragraph 30, the court reiterated the principle that “... where an administrative tribunal has either explicit or implied jurisdiction to decide questions of law arising under a legislative provision, it is presumed that the tribunal also has concomitant jurisdiction to decide on the constitutional validity of that provision. The only way to rebut this presumption is to

show that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law".

[32] Secondly, it considered the extent to which the ATQ has the necessary remedial authority to deal with incidental constitutional questions, and whether its decisions are binding on school boards. The court decided, at paragraphs 44 – 46, that although the ATQ cannot issue a formal declaration of constitutional invalidity (which only a court can do), that is not a reason to bypass the exclusive jurisdiction of a tribunal. Thus, a tribunal can find a breach of the *Canadian Charter*, conclude that it is not saved under section 1, and disregard the provision. The school board is bound by the decision even though it is not a party. The Québec Superior Court could grant injunctive relief if a school board refused to comply with an order of the tribunal.

[33] Thirdly, it considered the residual exclusive jurisdiction of the Superior Court to grant injunctive relief. At paragraphs 52 and 53, the court decided that recourse to urgent injunctive relief is possible in rare exceptions so as to complement the administrative process rather than weaken it. At paragraph 54, the court concluded that superior courts retain residual jurisdiction to hear direct constitutional challenges to a legislative scheme in proper circumstances but not where it is an attempt to circumvent the administrative process.

### **Rules Governing the Interpretation of Yukon First Nation Constitutions**

[34] A distinctive feature of this case is that it involves the interpretation of a Yukon First Nation Constitution.

[35] The *Yukon First Nation Self-Government Act*, R.S. 1994, C. 25 provides the following:

Preamble

...

WHEREAS those final agreements provide that Her Majesty and the Government of Yukon are to enter into negotiations with those first nations for self-government agreements appropriate to the circumstances of each of them and in accordance with the Constitution of Canada;

...

2. In this Act,

...

“self-government agreement” means an agreement concluded by a first nation with Her Majesty the Queen in right of Canada and the Yukon Government respecting government by and for the first nation;

...

3. (1) Subject to subsection (2), in the event of a conflict or inconsistency between this Act and any other Act of Parliament, this Act prevails to the extent of the inconsistency or conflict.

(2) In the event of a conflict or inconsistency between this Act and the *Yukon First Nations Land Claims Settlement Act* or a final agreement or transboundary agreement, within the meaning of that Act, that Act or the final agreement or transboundary agreement prevails to the extent of the inconsistency or conflict.

FIRST NATION CONSTITUTIONS

...

8 (1) The constitution of a first nation named in Schedule II shall, in a manner consistent with its self-government agreement, provide for

(a) a citizenship code that includes the requirements for citizenship in the first nation and the procedure for determining whether a person is a citizen;

- (b) the governing bodies of the first nation and their composition, membership, powers, duties and procedures;
- (c) a system of reporting, by audits or otherwise, through which the governing bodies are financially accountable to citizens;
- (d) the recognition and protection of the rights and freedoms of citizens;
- (e) challenging the validity of the laws of the first nation and quashing invalid laws; and
- (f) the amendment of the constitution by the citizens.

...

9. (1) The powers of a first nation named in Schedule II shall be exercised in accordance with the first nation's constitution and, subject to subsection (2), by the bodies and persons specified in the constitution.

...

## ADMINISTRATION OF JUSTICE

...

15. (1) For greater certainty and subject to section 14, the Supreme Court of Yukon has jurisdiction in respect of any action or proceeding arising out of this Act or out of a self-government agreement of a first nation named in Schedule II.

[36] The effect of the legislation is that the Constitution of the Ta'an Kwäch'än Council has the protection afforded by sections 25 and 35 of the *Constitution Act, 1982*, which state:

### Enforcement

**25. Aboriginal rights and freedoms not affected by Charter** – The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or

freedoms that pertain to the aboriginal people of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

## **PART II - RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA**

**35. (1) Recognition of existing Aboriginal and treaty rights** - The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

**(2) Definition of “Aboriginal peoples of Canada”** - In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

**(3) Land claims agreements** - 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) Aboriginal and treaty rights are guaranteed equally to both sexes** - 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.

[37] I conclude that the Constitution of the Ta'an Kwäch'än Council should be interpreted as a constitutional document rather than a statute. The result is the application of a number of principles of interpretation that would not necessarily apply to the interpretation of statutes. What follows is not an exhaustive list, but some principles of interpretation that may assist in this case.

[38] The first is the application of the ‘living tree doctrine’. The doctrine is explained in P.W. Hogg, *Constitutional Law of Canada*, loose-leaf, 4<sup>th</sup> ed. (Toronto: Thomson Canada Limited, 1997) at page 33-16:

A constitution differs from an ordinary statute in that a constitution is expressed in language sufficiently broad to accommodate a wide and unpredictable range of facts; a constitution is difficult to amend and a constitution is likely to remain in force for a long time. These considerations call for a flexible interpretation, so that the constitution can be adapted over time to changing conditions. That is the source of the doctrine of progressive interpretation, which was elegantly captured in *Edwards v. A.-G. Canada*, (1930) [[1930] A.C. 124, 136], by Lord Sankey’s metaphor of a “a living tree capable of growth and expansion within its natural limits”.

[39] The Supreme Court, in *Reference re Same Sex Marriage*, 2004 SCC 79, explained again its preference for the living tree doctrine of constitutional interpretation at paragraph 23:

A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada’s constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted. ...

[40] However, the Supreme Court has also placed limits on the application of the living tree doctrine. In *R. v. Blais*, 2003 SCC 44, the court declined to interpret the word “Indian” as found in paragraph 13 of the Natural Resources Transfer Agreement (NRTA), as including the Métis. While acknowledging that the NRTA is a constitutional document, to be read generously within its contextual and historical guidelines, the court stated at paragraph 18:

Applied to this case, this means that we must fulfill -- but not "overshoot" -- the purpose of para. 13 of the *NRTA*. We must

approach the task of determining whether Métis are included in "Indians" under para. 13 by looking at the historical context, the ordinary meaning of the language used, and the philosophy or objectives lying behind it.

[41] There is a further principle of interpretation that is applied to treaties or statutes involving disputes between Aboriginal people and the Crown. In *R. v. Nowegijick*, [1983] 1 S.C.R. 29 at page 36, the court concluded that the ambiguity principle should apply so that where there are doubts about the most fitting interpretation, the provisions should be liberally construed and doubtful expressions resolved in favour of Aboriginal people.

[42] In *Mitchell v. Pequis Indian Band*, [1990] 2 S.C.R. 85, at paragraph 13, Dickson C.J. quoted *Nowegijick* and stated:

Two elements of liberal interpretation can be found in this passage: (1) ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians, and (2) aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. ...

[43] The case before me is not one of Indian people versus the Crown in the classic sense. It is a dispute between members of a Yukon First Nation and to that extent the interpretation to be given to their constitution should not favour one side or the other. In the context of this case, it should more appropriately result in an interpretation that is the least intrusive into the affairs of the First Nation. I say this because the very concept of aboriginal self-government, as set out in the Preamble to this Constitution, is "to assume and exercise full responsibility for our own well-being . . . ."

[44] The case at bar also requires an interpretation to be given to the word "law" as it arises in the Constitution. The definition of law found in the Ta'an Kwäch'än Council Self-Government Agreement includes the common law. Historically, the common law

was understood to arise when a court made a judgment based upon justiciable issues.

See *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. Thus, the common law arose after a judgment not before.

[45] That concept requires some modification when applied to aboriginal law.

[46] In aboriginal communities, customs or traditions may attain the status of law. This is well recognized in Canadian law and perhaps best expressed by Williamson J. in *Campbell v. British Columbia (Attorney General)* (2000) 189 D.L.R. (4<sup>th</sup>) 333 at paragraph 85 where he quoted Lord Denning:

These customary laws are not written down. They are handed down by tradition from one generation to another. Yet beyond doubt they are well established and have the force of law within the community.

[47] In this context, the Vision expressed at the beginning of the Constitution gives useful guidance to interpretation:

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.

## **ANALYSIS**

[48] The issue to be decided is whether the Judicial Council of the Ta'an Kwäch'än Council is empowered to review the resolution of the Elders Council appointing Ruth Massie as Acting Chief. In other words, can the resolution of the Elders Council be

interpreted to be a law under the Legislative Review section of the Constitution? If the resolution of the Elders Council to appoint an Acting Chief is characterized as a law, then it could be subject to Legislative Review by the Judicial Council of the Ta'an Kwäch'än Council. If it is not characterized as a law, then it will be a question to be determined by this court as it falls between the cracks, so to speak, in the sense that the Constitution may not provide a review mechanism for this resolution of the Elders Council. In analysing this issue, I give no greater weight to submissions of counsel for the Ta'an Kwäch'än Council and Ruth Massie than submissions of counsel for Bonnie Harpe. Both have legitimate submissions to make. In the context of the Constitution of the Ta'an Kwäch'än Council the citizen is accorded substantial powers to challenge the laws and regulations enacted by the branches of the Ta'an Kwäch'än Council.

### **Judicial Council**

[49] The Judicial Council is an independent body. It is composed of three judges who are not members of the Ta'an Kwäch'än Council. The fact that they are not members of the First Nation enhances their independence and acceptance by the First Nation. The written judgments of the Judicial Council indicate an understanding of the judicial function they are mandated to perform. They have been appointed by the Elders Council after a call for applications from the general public. I am not concerned about the fact they have yet to formalize their procedures although it would be useful to do so.

[50] The Judicial Council has a wide variety of constitutional powers such as adjudicating violations of the Ta'an Kwäch'än Council laws, removing Board members who compromise the dignity of that office and receiving additional responsibilities such as election appeals pursuant to the Election Rules.

[51] The Constitution does not contain the words “exclusive jurisdiction” or “final and binding”. The fact that it is part of a constitutional document satisfies me that the Judicial Council has the necessary power to decide questions of law. In fact, that power is explicit in section 14.5 where it is empowered to declare a law or regulation to be invalid and void according to the criteria set out in section 14.2. The Judicial Council is implicitly empowered in section 14.2 to determine the custom and traditions of the Ta'an Kwäch'än Council in the context of assessing the validity of any existing law or regulation enacted by the Ta'an Kwäch'än Council. It is interesting to note that a custom or tradition of the Ta'an Kwäch'än Council could invalidate an enacted law without that custom or tradition becoming a law enacted in accordance with the legislative process set out in section 13 of the Constitution of the Ta'an Kwäch'än Council.

[52] As there is no provision in the Constitution of the Ta'an Kwäch'än Council prohibiting or excluding the *Charter of Rights and Freedoms* from the Judicial Council's authority, it is presumed that the tribunal has the jurisdiction to decide questions of constitutional validity.

[53] For the purpose of this decision on whether this court should exercise its jurisdiction, it is not necessary to decide the question of the exercise of the residual jurisdiction of the Court to grant the injunctive relief sought by Bonnie Harpe, except to say that the residual jurisdiction exists.

### **The Question of Jurisdiction**

[54] Counsel for the Ta'an Kwäch'än Council submits that a generous interpretation of the Constitution of the Ta'an Kwäch'än Council would treat the resolution of the Elders as a law subject to review by the Judicial Council. She submits that the broader meaning

of the word law is supported by the inclusion in section 14.2.1 of the custom and traditions of the Ta'an Kwäch'än Council as one of the grounds upon which a law enacted by the Ta'an Kwäch'än Council can be declared invalid. She submits that the resolution of the Elders Council is part of their law-making power, or at the very least has the effect of a law.

[55] The Constitution of the Ta'an Kwäch'än Council states that no branch of the Ta'an Kwäch'än Council, and this includes the Judicial Council, shall have authority beyond the jurisdiction prescribed by this Constitution. In my view, this signifies an intention not to exclude the living tree doctrine, but rather to avoid expanding the powers of the branches of the Ta'an Kwäch'än Council beyond what the ordinary meaning of the words will bear.

[56] My analysis is as follows. Firstly, the Legislative Process set out in section 13 states that any law or regulation must be "enacted in accordance with this section". Section 13.4 states:

A proposed law or regulation will be brought into legal effect in accordance with a resolution from each of the Elders Council and Board that approves that proposed law or regulation in accordance with this Constitution.

[57] The resolution of the Elders Council was only approved by the Elders Council. The Board did not approve the resolution first and then submit it to the Elders Council, the procedure required for an "enacted" law. Section 14.1 refers to challenging "any existing law or regulation enacted by the Ta'an Kwäch'än Council." In this case, the Legislative Process has not been completed so it would be incorrect to refer to the resolution of the Elders Council as "enacted".

[58] Secondly, it is only the Board of the Ta'an Kwäch'än Council that is empowered under section 8.7.1 to "develop laws and regulations of the Ta'an Kwäch'än Council which shall be enacted in accordance with section 13 of this Constitution." The Elders Council was not empowered to "develop laws" but rather to recommend the enactment of laws by the Board and ultimately to approve the laws so developed.

[59] Thirdly, the Legislative Review in section 14.2 provides that the written notice challenging the validity of a law may be submitted to the Board. Section 14.3 permits the Board to amend or repeal the challenged law, or simply disregard the written notice. The fact that there is no reference to the Elders Council in section 14 supports the interpretation that the Legislative Review set out in section 14 was not intended to include a review of a resolution from the Elders Council.

[60] I conclude that the Judicial Council has not been given the jurisdiction to review this resolution passed by the Elders Council. It does not appear that a challenge to the Elders Council was contemplated in the Constitution of the Ta'an Kwäch'än Council. In my view, the words used in section 14, even with a generous interpretation, do not permit the Judicial Council to review a resolution of the Elders Council.

## **DECISION**

[61] In summary, this Court will exercise its jurisdiction and hear the application.

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VEALE J.