

KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL

**IN THE MATTER OF AN APPEAL UNDER SECTION 159(1)
OF THE KWANLIN DÜN FIRST NATION *ELECTION ACT***

JACQUELINE SHORTY

Appellant

**NORMAN EADY, CHIEF RETURNING OFFICER,
KWANLIN DÜN FIRST NATION ELECTION COMMITTEE,
and SEAN SMITH**

Respondents

REASONS FOR DECISION

Issued: June 23, 2017

Background

1. These reasons relate to an appeal brought by Ms. Jacqueline Shorty about perceived irregularities alleged to have occurred during the Kwanlin Dün First Nation's general election on March 15, 2017. Ms. Shorty was a candidate in the election.
2. Ms. Shorty filed her initial appeal application with the Judicial Council on March 17, 2017, promptly following the election. In that initial application, Ms. Shorty based her appeal on section 170(1) of the KDFN *Election Act* (the "Act"), which is the offence section under the Act. The alleged breach of the Act referenced in that application was that one of the candidates in the election, Sean Smith, committed a breach of the Act by allowing his wife, Sarah Johnston Smith, to serve as a scrutineer on his behalf at the polling place and afterwards to observe the ballot count.
3. On March 19, 2017, the Judicial Council wrote to Ms. Shorty to advise her that it did not have jurisdiction to deal with charges laid or proposed under section 170 of the Act and therefore ruled that the request for appeal or review was denied.
4. Subsequently, Ms. Shorty submitted a revised appeal application dated March 28, 2017, which was received by the Judicial Council on March 29, 2017, just within the

14-day appeal period allowed under section 159(1) of the Act. In her revised appeal application, Ms. Shorty reframed her appeal under section 159(1) of the Act and reiterated her concerns about the unlawful participation of Sarah Johnston Smith as her husband's scrutineer. However, she added a further ground of appeal alleging that the Chief Returning Officer ("CRO"), Norman Eady, failed to comply with the Election Act because some electors had received mail-in ballots too late before the election to enable them to return their ballots to be counted on election day.

5. As of the final day of the statutory appeal period, March 29, 2017, the only grounds of appeal explicitly identified in Ms. Shorty's appeal application were (1) the allegation that Sarah Johnston Smith served as an unqualified scrutineer for her husband; and (2) Norman Eady, as CRO, failed to comply with the Act by failing to issue mail-in ballots in a timely manner.
6. In an addendum (dated March 27, 2017) to her appeal application, Ms. Shorty made the following clarifications sought by the Judicial Council:
 - a. The specific relief or order she was seeking from the Judicial Council was that:
 - i. in respect of Sean Smith's alleged breach of the Act, he should be reprimanded and required to issue a letter of apology "to other candidates and/or community";
 - ii. a review of the CRO's conduct in relation to the election process, but specifically regarding accountability and fairness regarding KDFN election legislation (no specifics provided);
 - iii. a review of the CRO's conduct in relation to alleged failure to issue mail-in ballots in a timely manner.
 - b. The subparagraphs of section 159 (1) of the Act Ms. Shorty was relying on were (a) corrupt practices in connection with the election; and (b) a violation of the Act that might have affected the result of the election.
 - c. In response to the question as to how the alleged violations may have affected the outcome of the election, including any supporting evidence, Ms. Shorty allowed that the presence of an unauthorized scrutineer may not have affected the outcome of the election. Regarding the allegation that the CRO issued the mail-in ballots late, Ms. Shorty concluded that if some electors received their ballots too late to vote, then that would certainly impact the outcome of the election.

7. As required by section 160 of the Act, the Judicial Council Administrator sent copies of Ms. Shorty's appeal application to the CRO, Norman Eady, the Election Committee, and Sean Smith, the only candidate whose interests the Judicial Council considered to be potentially affected by the outcome of the appeal.
8. All three Respondents provided written responses to Ms. Shorty's appeal application. Sean Smith, in his response, admitted appointing his wife to serve as his scrutineer, being unaware of a recent legislative change that made this impermissible. He stated his breach of the Act was unintentional, and he extended his sincere apologies to Ms. Shorty, to the other candidates in the election, to his family and to the community members of KDFN. He also noted that, in any event, his error did not in any way change the outcome of the March 15 election.
9. The CRO's written response contested Ms. Shorty's appeal on the grounds of alleged corrupt practices, as well as on her ground that alleged violation of the Act affected the results of the election. Mr. Eady noted that Ms. Shorty had provided no evidence of substance to support either ground of appeal and went on to provide evidence refuting Ms. Shorty's inferences that the mail-in ballots were sent out late; he stated the ballots were mailed out on February 9, 2017, 34 days before election day, in accordance with the Act.
10. The Election Committee responded through its lawyer, Peter Sandiford, who stated the Election Committee's grounds for opposing the appeal. Those grounds, stated concisely, are that Ms. Shorty has provided insufficient evidence to support a viable appeal. She offered no evidence whatsoever of what could be characterized as a corrupt practice, and she admitted that the scrutineer issue may not have affected the outcome of the election. The Election Committee submitted that the appeal has no merit and that it should be dismissed.
11. Following receipt of these written submissions, the Judicial Council convened a pre-hearing conference on April 26, 2017, the purpose of which was to clarify the issues going forward on the appeal and to deal with any procedural questions that may arise. Attending at that pre-hearing conference were Ms. Shorty, all three Respondents, and the Chair of the Judicial Council, Linda Moen. Also attending were the Judicial Council's Administrator and legal counsel.
12. At the pre-hearing conference, Sean Smith reiterated his admission and apology concerning his wife serving as his scrutineer at the polling station. Upon receiving this apology, Ms. Shorty stated that that was sufficient to satisfy her concerns, and she formally withdrew the scrutineer issue from her appeal.

13. With respect to Ms. Shorty's remaining issues of appeal, the Respondents expressed concerns about the lack of specificity in Ms. Shorty's request for a review of the conduct of the CRO in the overall conduct of the election, as well as the absence of sufficient evidence to support her complaints and the lack of clear relief being sought within the jurisdiction of the Judicial Council. These concerns were put to Ms. Shorty during the pre-hearing conference, but she deferred responding until they were expressed clearly in writing. At that point, the pre-hearing conference was adjourned.
14. On May 4, 2017, the Judicial Council Administrator sent Ms. Shorty the clarification letter she requested. In relation to the allegation that the CRO erred in issuing the mail-in ballots too late, Ms. Shorty was asked to confirm whether this entailed a corrupt practice or whether it might have affected the results of the election. She was also asked: (1) to provide documentary evidence or the names of witnesses who would testify in support of the allegation; (2) to specify what specific relief she was seeking from the Judicial; and (3) specific law giving the Judicial Council the jurisdiction to grant the relief sought.
15. Regarding the ground of appeal alleging shortcomings of the CRO in respect of accountability, fairness and adherence to regulations, Ms. Shorty was asked to identify specific incidents comprised within this generalized allegation and to state whether these allegations involved a corrupt practice or may have affected the results of the election. She was also asked to provide any documentary evidence or witnesses who might testify support of the allegation. Finally, she was asked to specify the particular relief she was seeking in relation to this generalized ground of appeal, as well as the legal authority giving the Judicial Council jurisdiction to grant such relief.
16. Ms. Shorty provided her written response to the Judicial Council's request for clarification by way of a letter dated May 12, 2017. With respect to the matter of the ballot mail-out issue, Ms. Shorty conceded that she did not perceive any corrupt practice to have been involved, stating that the problem arose from "scattered management" of the election. She did not offer any evidence to support her assumption that the ballots were mailed out too late to be effective; rather, her only evidence offered was that one elector received her ballot on the day of the election.
17. Ms. Shorty stated that the relief she was seeking in relation to the ballot mail-out issue was a recommendation for legislative changes to better clarify timelines for issuing mail-in ballots, as well as some other procedural suggestions.
18. In response to the request for details concerning her more generalized ground of appeal, Ms. Shorty provided a list of allegations not previously identified in these proceedings. These allegations included: erased ballots being counted as marked ballots; cell phone and social media use occurring within the ballot area during

counting; election staff leaving part way through the ballot count; ballot boxes not being secured; use of pencils, rather than pens; election staff concerns not being addressed when they were presented during the count.

19. With respect to this list of issues, Ms. Shorty said she was not alleging any corrupt practice, only mismanagement of proper election procedures. She suggested that such mismanagement may have affected the results of the election, but she offered no specific statement of how the results may have been affected, nor did she offer any evidence to support her speculation.
20. Again, in respect of this second ground of appeal, Ms. Shorty did not provide any specific relief she was seeking that would be within the jurisdiction of the Judicial Council. Instead, she said she is seeking to have recommendations made to improve various election procedures for the future.
21. Ms. Shorty's letter of clarification was circulated to the Respondents, which resulted in written responses from Norman Eady and Mr. Sandiford on behalf of the Election Committee. These Respondents took similar positions on several points, which may be summarized as follows:
 - a. Ms. Shorty raised new issues or grounds of appeal not articulated in her revised appeal application, received on March 29, 2017. As such, these new issues were raised outside the 14-day statutory appeal period under the Act and therefore should be disallowed.
 - b. Contrary to the requirements of the Act, Ms. Shorty has not provided sufficient evidence to support her appeal, despite having been given the opportunity following the pre-hearing conference to offer greater clarity and supporting evidence.
 - c. The relief Ms. Shorty is seeking in the form of a review and recommendation of election procedures is outside the range of remedies the Judicial Council has jurisdiction to grant.

Analysis and Decision

22. The Judicial Council's jurisdiction under the *Election Act* is described in section 159 of the Act. A voter may make a written appeal to the Judicial Council within 14 days following the close of the vote, detailing the evidence with respect to: (a) corrupt practices in connection with the election; (b) a violation of the Act that might have affected the election result; or (c) a candidate being ineligible to run in the election.

23. Ms. Shorty's appeal initially addressed the first two grounds; she did not allege anything in relation to an ineligible candidate in her appeal. In her later submissions, she also conceded that she was not alleging any corrupt practices. Thus, the one remaining ground of appeal arising from Ms. Shorty's submissions was that there was a violation or violations of the Act that might have affected the results of the election.
24. As indicated above, Ms. Shorty withdrew her allegation concerning the scrutineer issue upon receipt of Mr. Smith's written apology, followed by his oral reiteration of that apology at the pre-hearing conference. Thus, that issue is no longer of concern.
25. Subsection 159(4) of the Act allows the Judicial Council to refuse to hear an appeal if it deems the appeal to be without merit. This is the provision the Respondents have urged the Judicial Council to apply to decline to hear the appeal as being without merit.
26. After having given Ms. Shorty ample opportunity to clearly articulate her grounds for appeal, the evidence in support of it, and the relief she is seeking which might be within the Judicial Council's jurisdiction, the Council has determined that Ms. Shorty has not been able to demonstrate that her appeal has sufficient merit to proceed to a hearing.
27. Absent any grounds for alleging corrupt practices, the only remaining ground of appeal is that violations of the Act occurred which might have affected the outcome of the election. With the scrutineer issue withdrawn, the only remaining issues Ms. Shorty has put forward are the concerns about the alleged late issuance of the mail-in ballots and the series of "mismanagement" issues described in Ms. Shorty's clarifying letter of May 12, 2017.
28. The Judicial Council accepts the Respondents' submissions concerning this latter group of issues, which were disclosed only long after the 14-day appeal period had passed. The Act requires appeal applications to be presented with reasonable detail, and this latter list of concerns was not part of the appeal received within time. To allow Ms. Shorty to amend her appeal to include new issues so late in the process would defeat the intent of the Act to process election appeals as expeditiously as possible. Therefore, this aspect of the appeal is dismissed.
29. The remaining issue is the question of whether the CRO mailed the mail-in ballots out to voters in a timely manner according to the Act. On this issue, the only evidence Ms. Shorty submitted related to when certain voters actually received their ballots, but there was no evidence from her to indicate when the ballots were mailed out. Nor did Ms. Shorty offer any evidence to support the one ground of jurisdiction on which the Judicial Council might consider the matter, namely that the alleged error may have affected the results of the election. That the election outcome may have been affected

was merely a matter of unsupported conjecture. Regarding this issue, as well, Ms. Shorty is not demonstrated sufficient merit to warrant taking the matter to a hearing.

30. Finally, Ms. Shorty is not seeking any relief that is within the Judicial Council's jurisdiction to grant. What she has asked for in her submissions are recommendations from the Judicial Council concerning improvements to the administration of election procedures of various sorts. She has not sought any of the remedies stated in section 164 of the Act, which outlines the Judicial Council's remedy-granting authority.

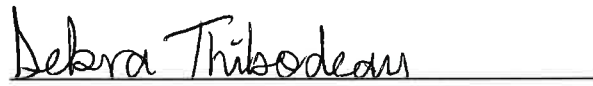
31. The Judicial Council recognizes Ms. Shorty's good intent as a KDFN citizen to have a general review of KDFN election procedures with a view to possible recommendations for change. However, the Judicial Council's jurisdiction in relation to election procedures is specifically outlined in the *Election Act*, and it cannot go beyond that jurisdiction to assume a broader role not assigned to it. The concerns Ms. Shorty has expressed might be better addressed elsewhere, perhaps by way of submissions to KDFN Chief and Council.

32. For the reasons stated, and applying section 159(4) of the Act, the Judicial Council declines to hear Ms. Shorty's appeal as being without merit.

BY THE FOLLOWING MEMBERS OF KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL:



Linda Moen, Chair



Debra Thibodeau



William D. Webber



Katherine Pelletier