

**KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL**

**In the Matter of an Appeal under Section 159(1) of the *Election Act***

**WILLIAM CARLICK**

**Appellant**

**Date of Hearing:** May 1, 2020

**Appeal Panel:**

Debra Thibodeau, Chairperson  
William Webber, Elder Representative  
Margaret McKay, Elder Representative  
Haily Bill, Member

**REASONS FOR DECISION**

**Introduction**

1. On March 18, 2020, the Kwanlin Dün First Nation (“KDFN”) held a general election for Chief and Councillor positions of the KDFN government.
2. The appellant, William Carlick, was a Councillor candidate in the election. Immediately before the election, he was the serving non-voting Elder Councillor on the KDFN Council. As a result of the election, Mr. Carlick was not elected to a Councillor position.
3. On March 20, 2020, William Carlick delivered to the Judicial Council his handwritten Application for Appeal under section 159(1), subparagraphs (a) and (b), of the KDFN *Election Act* (“the Act”). Mr. Carlick’s Application form was accompanied by evidence in the form of a purported copy of an open “Letter to KDFN Citizens” published on KDFN Chief Doris Bill’s Facebook page on March 17, 2020. The Facebook excerpt also included comments, as well as “thumbs up” and “heart” icons in reaction to Chief Bill’s posting, all of which comprised approximately 18 pages of Mr. Carlick’s submission.

4. Later, on March 24, 2020, Mr. Carlick submitted to the Judicial Council an amended Application for Appeal which specified more clearly the grounds for his appeal and included a written submission supporting his grounds of appeal. The Judicial Council is treating the appeal documents Mr. Carlick submitted on both March 20 and March 24 as all part of a single, combined appeal package.
5. The details of Mr. Carlick's allegations are discussed at greater length later in these reasons.

## **Procedure**

6. Section 159(3) requires the Judicial Council to hear and determine appeals as soon as possible and ensure that the appeal proceedings are conducted as expeditiously as possible. In the present case, Mr. Carlick's appeal was based on an objectively verifiable act by Chief Bill during the election campaign – namely, her March 17 Facebook posting.
7. In accordance with section 160 of the Act, the Judicial Council forwarded copies of Mr. Carlick's appeal and all supporting documents to the chief returning officer, all candidates in the election, and the election committee. As required by the Act, the Judicial Council allowed each of the recipients 14 consecutive days within which the designated recipients may submit written submissions responding to the appeal and providing any relevant supporting documents.
8. The Judicial Council received only two written submissions from the designated recipients in response to Mr. Carlick's appeal: one from Mr. Sean Smith, a candidate in the election for the position of Chief; and one from Chief Doris Bill, who was running for re-election.
9. The submission from Mr. Smith was made on the Judicial Council's standard form for Application for Appeal; however, in substance, Mr. Smith's submission merely stated support for Mr. Carlick's appeal, including his reasons in that regard. To avoid any ambiguity regarding the nature of Mr. Smith's submission, the Judicial Council Administrator contacted Mr. Smith and received his confirmation that his intent was to support Mr. Carlick's appeal, not to submit his own appeal, as might have been inferred from the choice of the form he submitted.
10. Doris Bill's submission, dated April 1, 2020, provided her detailed explanation about the events leading up to and about which Mr. Carlick's appeal is concerned. The details of Chief Bill's submission, as well as those of Mr. Carlick and Mr. Smith, are discussed at greater length elsewhere in these reasons.

11. Given that Chief Bill's Facebook posting speaks for itself and does not require additional testimony to help the Judicial Council to determine whether the posting could constitute a corrupt election practice or a breach of the Act, as Mr. Carlick has alleged. Accordingly, and in the spirit of the Act's requirement for expeditious proceedings, the Judicial Council determined that a full hearing would not be required.
12. Instead, the Judicial Council conducted a so-called "paper hearing", relying on the written evidence and submissions of Mr. Carlick, which were supported by Sean Smith's submission, as well as Chief Bill's rebuttal submissions. All candidates in the election received notice of Mr. Carlick's appeal, and the only submissions the Judicial Council received were those of Mr. Carlick, Mr. Smith and Chief Doris Bill.

## **Background**

13. Important to the background of this appeal is the emergence of the global pandemic of the COVID-19 virus in early 2020 and the increasing public concern over measures to limit the spread of the disease through such measures as self-isolation at home, social distancing, avoiding large gatherings, and similar measures.
14. By early March, Yukon public health authorities were advising the public to adopt increasingly stringent precautions to avoid transmission of the disease. Thus, by the eve of the March 18 general election, there was a heightened state of fear and concern within the KDFN community about social distancing, gathering in large groups, and the implications for holding the election, as scheduled.
15. In her written submission, Doris Bill stated that in the days leading up to the election she had personally received, in her capacity as KDFN Chief, various communications from KDFN citizens expressing concern about going ahead with the election in the face of the Territorial health authorities' cautions about observing the recommended pandemic precautions.
16. In response to these concerns, Chief Bill stated in her Facebook posting that she contacted Yukon's Chief Medical Officer, Dr. Brendan Hanley, about whether the KDFN election should proceed on March 18. Dr. Hanley provided Chief Bill with his recommendation in a letter dated March 17, 2020, a copy of which accompanied Chief Bill's response to this appeal. In that letter, Dr. Hanley stated: "*Due to the current COVID-19 pandemic situation, I recommend that the 2020 KDFN General Elections to [sic] be suspended for next 6 six months or until we reach a status of civil stability.*"

17. Ms. Bill stated that she felt her duty as Chief, upon receiving the recommendation from Dr. Hanley, was to bring it to Council for a discussion about whether the election should proceed the following day. Accordingly, Chief Bill called an emergency meeting of Council for 2:00 p.m. on March 17.
18. In her submission, Chief Bill expressed some uncertainty about who would have jurisdiction to make a decision in response to Dr. Hanley's recommendation; however, she indicated such issues could be discussed at a properly convened Council meeting where the Council members would have the benefit of legal advice from KDFN's legal counsel.
19. About an hour before the 2:00 Council meeting, an informal meeting convened in Chief Bill's office involving Chief Bill and Councillors William Carlick, Ray Sydney and Sean Smith. Also attending were KDFN legal counsel, Peter Sandiford, the Chief's Executive Assistant Eileen Duchesne, the Council's Executive Assistant, Heather O'Grady, and the Executive Director who participated by telephone. Chief Bill stated her intent for the emergency Council meeting was to inform the Councillors about Dr. Hanley's letter and about the concerns communicated to her by KDFN citizens about holding the election in the face of the pandemic precautions.
20. According to Chief Bill, the informal meeting did not progress very far before some of those in attendance raised their voices and questioned her motivation for convening the Council meeting, alleging they believed she wanted to postpone the election for political reasons in order to retain power longer. Due to the direction the conversation took, it appears this meeting did not last very long before the three Councillors left the Chief's office.
21. In recounting their versions of the meeting in Chief Bill's office, both William Carlick and Sean Smith had differing recollections or interpretations of what occurred, and both alleged that Chief Bill's version of the informal meeting, as expressed in her Facebook posting of March 17, omitted a number of important facts. For example, both stated that when Councillors Carlick and Sydney tried to express their views about not postponing the election, they were interrupted by Chief Bill and KDFN staff members present in the room. They, as well as Councillor Smith, felt such conduct was disrespectful of Councillors Carlick and Sydney, both of whom are KDFN Elders.
22. Councillor Smith posted on his own Facebook page, apparently on March 17, comments about his recollection of the events earlier that day, which included his following statement:

*"I understand there was a post tonight by one of the candidates and sitting chief which relayed some information about today's discussion at the office.*

*Unfortunately, the story posted to facebook by the other candidate is **accurate to a certain degree** but leaves out some important pieces of information which was not relayed to the current sitting Council and Citizens."* [Emphasis added.]

23. From this comment, it can be reasonably inferred that Councillor Smith was not challenging the truth of Chief Bill's statements in her Facebook posting, but was stating his belief that the information conveyed was incomplete in certain material respects.
24. Following the meeting in Chief Bill's office, the Chief and several other KDFN Councillors convened in the Council Chambers, expecting the meeting to proceed at 2:00 p.m., with a call-in by the Chief Medical Officer, Dr. Hanley. However, Councillors Carlick, Sydney and Smith refused to enter the Chambers, expressing their intent that they did not wish to enable a quorum of Council to pass a resolution to postpone the election. In his submission in support of William Carlick, Sean Smith expressed concerns about possible criminal ramifications if he were to participate in what he feared might be an illegal vote of Council.
25. As a result of the boycott by the three Councillors, there was no opportunity for KDFN Council, as a whole, to meet and discuss the question of whether to postpone the election. Further, Council lost the opportunity to seek the advice of KDFN legal counsel about whether there would be any clear legal basis on which to do so. Therefore, without a Council resolution to the contrary, but with additional safety measures in place due to COVID-19, the scheduled general election took place on March 18, 2020.

### **Appeal Allegations and Issues**

26. In his appeal, Mr. Carlick cited two grounds of appeal under section 159(1) of the Act, relying on subparagraphs (a), corrupt practices in connection with the election, and (b), a violation of this Act that might have affected the result of the election. The third possible ground of appeal under that section of the Act is that a candidate in the election was ineligible to be a candidate. Mr. Carlick's appeal does not rely on that ground of appeal.
27. With respect to the corrupt practices allegation, Mr. Carlick mentioned "electoral fraud" and "libel", both of which presumably relate to Chief Bill's Facebook posting on March 17. Unfortunately, however, Mr. Carlick failed to offer any details or evidence in support of how he believes Chief Bill allegedly committed electoral fraud, nor did he offer any

specifics about the alleged libel he says Chief Bill committed against him and his reputation.

28. Regarding the second ground of appeal – violation of the *Election Act* – Mr. Carlick offers no explanation of what provision or provisions of the Act Chief Bill allegedly violated, nor did he offer any argument as to how any such violation might have affected the election results.

### **Grounds of Appeal and Jurisdiction**

29. The *Election Act* grants specific and limited jurisdiction to the Judicial Council to hear appeals of election results, the two grounds material to the present appeal being corrupt election practices and violation of the Act affecting the election outcome.

30. The Act does not grant to the Judicial Council any jurisdiction to directly entertain claims based on libel or any other form of defamation, unless perhaps libel could be characterized as a form of corrupt practice or a violation of the Act. Otherwise, neither the KDFN Constitution, nor any other known KDFN legislation, grants to the Judicial Council any jurisdiction to entertain claims based on defamation.

31. Accordingly, the Judicial Council has limited its consideration of Mr. Carlick's appeal to the two grounds previously identified, as discussed below.

### **Analysis – Corrupt Election Practices**

32. “Corrupt practices” in connection with an election is not a term defined by the Act, so the proper approach to interpreting what that means is to adopt the plain meaning of the term, which may be aided by referring to common dictionary definitions.

33. According to the Oxford Dictionary, a corrupt practice is defined as including the use of bribery or fraudulent activity. So, it would appear Mr. Carlick's allegation of fraud, as a general proposition, likely fits within the definition of a corrupt practice, provided fraud itself can be proven.

34. The Oxford Dictionary definition of fraud includes “*criminal deception; the use of false representations to gain an unjust advantage... a dishonest artifice or trick.*” So, to establish fraudulent conduct on the part of Doris Bill, Mr. Carlick must establish that she conducted herself in a way that fits within the definition of fraud stated above.

35. Alleging that someone has committed fraud is a serious matter that can harm a person's reputation, so proof of fraud should not be taken lightly. The person alleging

fraud has the legal onus to state clearly what the alleged fraudulent conduct was and must provide persuasive evidence to support the allegation.

36. In his appeal documents, Mr. Carlick failed to state clearly the particular statements in Chief Bill's March 17 Facebook posting he was alleging to be false, nor did he offer any evidence to support the allegation. He simply made a bald allegation of electoral fraud and falsehoods without anything further to support it.
37. As noted above, Mr. Carlick's allegation of false statements on Doris Bill's part was actually rebutted by evidence provided by Councillor Sean Smith in his own March 17 Facebook posting.
38. So, without a clear statement of what Chief Bill's alleged fraudulent conduct was, without any evidence to support a finding of fraudulent electoral conduct, and in light of Sean Smith's affirming the relative accuracy of Chief Bill's Facebook post, the Judicial Council cannot find any basis for upholding this aspect of Mr. Carlick's claim.
39. Similar problems arise with Mr. Carlick's allegation that Chief Bill's Facebook posting of March 17 libelled him. His written appeal submissions did not specifically identify what aspects of the Facebook posting he considered to be libelous, nor did he offer any evidence to support the allegation. He merely made generalized statements that his reputation was harmed by what Doris Bill wrote in her posting. He further alleged that the posting likely impacted adversely on his election results the following day. This latter assertion is not very persuasive, as Councillor Raymond Sidney was also mentioned in Chief Bill's Facebook posting, and yet he was successful in being re-elected.
40. Libel, as a form of defamation, is defined as including the publication of false, defamatory words about another person that harm the person's reputation. So, to establish that Chief Bill defamed him, Mr. Carlick must identify the specific words he alleges to be defamatory, and he must prove that those words were false. Finally, if the first two criteria are established, he then needs to prove with reasonable evidence that the defamatory words harmed his reputation.
41. As with the electoral fraud allegation, Mr. Carlick has failed to identify the specific words in Chief Bill's Facebook posting that he alleges to be defamatory, and he has offered no evidence to demonstrate that such words – whatever they might be – were false. Given this shortage of information to support Mr. Carlick's appeal on this issue, the Judicial Council considers it unnecessary to express any opinion as to whether allegedly defamatory comments made during an election campaign could come within the meaning of electoral fraud as a possible component of corrupt election practices.

42. Finding that someone has engaged in corrupt election practices carries a very serious public stigma that could ruin a person's reputation and practically end their prospects of public service in the political sphere. Because of this impact, candidates in an election should be very cautious about making such allegations without ensuring that they are accurate and well supported by evidence.
43. The Judicial Council would not be serving the interests of the Kwanlin Dün First Nation and its citizens if it were to allow appeals based on such claims without applying sufficient rigour to the proof of such claims. Otherwise, potential candidates might shy away from running for public office for fear of being accused of corruption on the basis of unspecific and unsupported allegations by their electoral opponents.

### **Analysis – Violation of *Election Act***

44. Mr. Carlick's second ground of appeal is based on subparagraph (b) of section 159(1) of the Act, namely that Doris Bill committed a violation of the Act "*that might have affected the result of the election.*"
45. Unfortunately, Mr. Carlick once again failed to be specific about the nature of the alleged violation nor the section or sections of the Act allegedly violated. He offered no evidence to support this allegation, nor did he present any submissions on this issue in his appeal documents.
46. The Judicial Council can find nothing in Mr. Carlick's appeal submissions to support this second ground of appeal.

### **Decision**

47. The Judicial Council's role in appeals under the *Election Act* is a purely adjudicative function, and does not include inquisitorial duties such as investigating the background of appeals, or trying to find evidence to support the grounds of appeal. In other words, the Judicial Council bases its appeal decisions solely on the evidence and arguments submitted by parties before it. It does not take any steps to acquire further evidence beyond that supplied by the parties.



48. Therefore, it is the responsibility of an appellant in an election appeal to ensure that he or she states the basis for appeal in a detailed manner and supplies the Judicial Council with sufficient evidence to support the allegations underlying the specific grounds of appeal.
49. Further, all parties presenting a case before the Judicial Council must make their case based on the evidence presented, and then make submissions or arguments that apply the evidence to the law that governs the issue. The Judicial Council cannot be relied on to “make” the case for appellants who do not do so themselves.
50. Based on Mr. Carlick’s appeal submissions and the additional submissions and evidence offered by Sean Smith, the Judicial Council can find no basis on which to allow Mr. Carlick’s appeal. As discussed above, the serious allegations of corrupt election practices by Doris Bill were vague and general and lacked any substantial evidence to support the allegations.
51. Accordingly, the Judicial Council has no alternative but to dismiss the appeal as unfounded.

## **Conclusion**

52. Even taken in the most unfavourable light, Doris Bill’s March 17 Facebook posting could not reasonably be said to represent a corrupt election practice, nor a breach of the Act. On its face, the posting can more reasonably be interpreted as Chief Bill’s attempt to respond to numerous KDFN citizens’ expressed concerns about holding the election during the COVID pandemic precautions.
53. Chief Bill reasonably attempted to fulfill her duty to inform KDFN citizens about the Chief Medical Officer’s recommendation to postpone the election, and in so doing necessarily had to explain the background circumstances that led to the election going ahead, despite the health authority’s strong recommendation to the contrary.
54. The Judicial Council was presented with no evidence to indicate anything in Chief Bill’s Facebook posting was false, though both William Carlick and Sean Smith suggested that the Facebook posting did not tell the entire story, meaning that it was incomplete in their view. However, regardless of whether Chief Bill’s Facebook post sufficiently conveyed the entire story (from the perspectives of Mr. Carlick and Mr. Smith) there were no proven falsehoods whatsoever, let alone ones sufficiently serious to support allegations of corrupt election practices, including alleged libel.

55. Similarly, Mr. Carlick's appeal contained absolutely nothing to identify or support his allegation that Doris Bill violated the *Election Act*.

56. For the foregoing reasons, the Judicial Council dismisses this appeal.

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



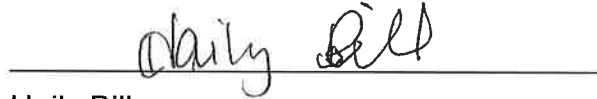
Debra Thibodeau, Chair



William D. Webber



Margaret McKay



Haily Bill