

KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL

In the Matter of an Application Concerning
the Kwanlin Dün First Nation General Election, March 18, 2020

KEITH SMITH

Applicant

Date of Consideration: May 1, 2020
Reasons Issued: May 29, 2020
Reasons Edited: November 3, 2020

Appeal Panel:

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

REASONS FOR DECISION

[These reasons are an “anonymized” version of those issued in this matter on May 29, 2020. They have been edited to protect the identity and privacy of a person (referred to herein as “the Citizen”) who is not a party to this proceeding. The Applicant’s application to the Judicial Council for Appeal or Review made certain unsubstantiated allegations against the Citizen about matters that are outside the Judicial Council’s jurisdiction and, for the reasons stated herein, the Judicial Council has summarily dismissed the application without requiring the Citizen to respond.]

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. On April 17 2020, the Applicant, Keith Smith, delivered to the Judicial Council his Application for Appeal or Review, using the Judicial Council’s standard form for that purpose.

3. Mr. Smith also submitted with the application several documents, among which was a petition, dated April 5, 2020, addressed to the KDFN Judicial Council, the Chief Electoral Officer, Norman Eady, KDFN Chief Doris Bill, and several KDFN Councillors. The petition purported to be signed by 22 "Voters" of KDFN.
4. Mr. Smith's Application form was submitted 29 days following the March 18 general election; however, there was nothing in the Application document itself to indicate that the appeal or application was being brought under the *Election Act* (referred to in these reasons as "the Act"). The accompanying petition, however, indicated on the reference line that it related to an appeal of the election of the Citizen to the KDFN Council in the March 18, 2020, Kwanlin Dün Election.

Nature of the Application

5. Due to the way the written submission was prepared, there was some ambiguity about the nature of Mr. Smith's application to the Judicial Council. It is not entirely clear whether it was intended as an appeal of the Citizen's election pursuant to the *Election Act*, or whether it was more in the nature of an application to impeach the Citizen because of alleged misconduct during a prior term of public service with KDFN.
6. As noted, the Application document itself makes no mention of the Act. Instead, it alleges a violation of the Kwanlin Dün Constitution, Chapters 1 and 2, and the Citizen's prior oath of office. The Application document says nothing further of substance about the basis for the application/appeal, but it does refer to certain attached documents.
7. The petition explicitly requests an appeal of the Citizen's election as a KDFN Councillor; however, it makes no reference to the Act as the legal basis for the appeal. Instead, it requests that the Citizen be removed from their position as a KDFN Councillor, citing as grounds alleged improper conduct by the Citizen during their prior term of service to KDFN, which ended some years ago.

Applicable Legislation

8. The *Election Act* is specific in setting out the Judicial Council's jurisdiction for hearing election appeals. Under section 159(1) of the Act, "a voter may appeal the results of the election in writing to the Judicial Council detailing the evidence with respect to
 - (a) corrupt practices in connection with the election;
 - (b) a violation of this Act that might have affected the result of the election; or
 - (c) a candidate in the election who is ineligible to be a candidate."

9. Apart from this provision in the Act, no other KDFN legislation, nor the KDFN Constitution, grants to the Judicial Council jurisdiction to entertain any other grounds for appealing election results, nor is there any other general jurisdiction to interfere with a person's election to the KDFN Council.
10. Therefore, if Mr. Smith's application is intended as an appeal of the Citizen's election as KDFN Counsellor at the March 18 general election, it must comply with the criteria of the Act set out above.
11. Alternatively, if Mr. Smith is seeking to have the Judicial Council impeach the Citizen from their current office as Councillor, then different considerations may apply, as discussed below. Because of the ambiguity as to the nature of Mr. Smith's application, the Judicial Council's analysis will be done in two sections.

Analysis – Election Act Appeal

12. To bring an appeal under the Act, an appellant must identify, and submit evidence in support of, one of the three grounds of appeal set out in section 159(1) of the Act, as noted above. This information is necessary to show the Judicial Council that the appeal may have merit. The appellant is responsible for providing this information, as without it, the Judicial Council has no basis for deciding whether there is sufficient merit to warrant accepting and considering the appeal.
13. Mr. Smith's application is deficient in this regard, as it does not identify (a) any corrupt practice committed by the Citizen in connection with the election; (b) any violation of the Act that might have affected the results of the election; nor (c) any basis on which the Citizen was ineligible to be a candidate in the election.
14. Moreover, judging from the substance of the allegations contained in the documents accompanying Mr. Smith's application, it appears it has little, if anything, to do with the recent election itself. Rather, the concerns involve allegations about the Citizen's conduct several years in the past. Accordingly, treating the application as an appeal under the Act is inappropriate, given the substance of the allegations.
15. So, for these reasons, the Judicial Council is unable to find any merit in this aspect of Mr. Smith's application, assuming he did indeed intend it to be an appeal under the Act.

Timing of the Application

16. A further problem of noncompliance with the Act is that Mr. Smith did not deliver the application to the Judicial Council within the mandatory 14-day time period stipulated in section 159(1) of the Act. His application was received on April 17, 2020, which was 29 days after the March 18 election. The fact of the late filing puts the application for an appeal outside the Judicial Council's jurisdiction to deal with it under the Act.
17. The lateness of Mr. Smith's submission may be somewhat understandable if he was relying only on the Election and Referendum Code, which is Schedule 3 of the KDFN Constitution. Unfortunately, determining the correct time for bringing an appeal is somewhat more involved.
18. Read on its own, section 16 of Schedule 3 says that an appeal may be made within 30 days after the election decision. However, this provision can be misleading if one does not read it in the full context of the Constitution. In that regard, sections 2(3) and 22(6) of the Constitution, when read together, indicate that the 14-day appeal period stated in the *Election Act* supersedes what is stated in Schedule 3.
19. Section 2(3) of the Constitution states:

*“Each Schedule attached to this Constitution is part of the Constitution, **unless a provision of this Constitution expressly states that a particular Schedule has the status of ordinary Kwanlin Dün First Nation legislation.**”* [Emphasis in bold font added.]
20. Section 22(6) of the Constitution states:

*“The Kwanlin Dün Electoral Code set out in Schedule 3 **has the status of ordinary Kwanlin Dün legislation, as if it had been enacted in accordance with this Constitution, on the Effective Date.**”* [Emphasis in bold font added.]
21. These two provisions of the Constitution effectively mean that its Election Code (Schedule 3) is to be treated as ordinary KDFN legislation and therefore can be amended by a subsequent piece of ordinary KDFN legislation. In this case, the most recent version of the *Election Act*, enacted in 2016, provides in section 159(1) that the time for appealing election results under the Act is 14 days, superseding the 30 days stated in Schedule 3 of the Constitution.
22. Because of these provisions, Mr. Smith's application, submitted 29 days after the election, is too late to be considered as an appeal under the Act.

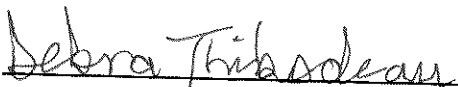
Analysis – Application to Impeach the Citizen


23. Because of the ambiguity in Mr. Smith's application, and because the Judicial Council considers it appropriate to give greater importance to matters of substance, rather than matters of form, it is necessary to consider the alternative possibilities associated with Mr. Smith's submission.
24. Having disposed of the possibility of the matter being dealt with as an appeal under the *Election Act*, the Judicial Council turns to the question of whether Mr. Smith's intent, in substance, is to impeach the Citizen from their position as a KDFN Councillor because of alleged conduct during a previous term of KDFN public service.
25. Before the Judicial Council can consider an application of this nature, it must determine whether it has any jurisdiction related to the subject matter. The starting point for considering the Judicial Council's jurisdiction is Chapter Eight of the Constitution, section 56, which deals with the Judicial Council's powers and responsibilities.
26. Section 56(1)(a) states that the Judicial Council may "*exercise any authority specifically assigned to it elsewhere in this Constitution, or in Kwanlin Dün First Nation law.*" Beyond this general statement, section 56 goes on to list several specific powers dealing primarily with KDFN administrative decisions or decisions by Chief and Council, but none of these powers includes any authority for the Judicial Council to deal with an application to impeach a KDFN Councillor.
27. As the Constitution grants no authority to the Judicial Council to deal with an application in the nature of impeachment, any such authority, if it exists, must be found in some other KDFN law. This requirement is echoed in section 7 of the *Judicial Council Act*, which states: "*The Judicial Council may exercise any authority assigned to it in the constitution or in any law made by the Kwanlin Dün First Nation.*"
28. In his application, Mr. Smith did not cite any KDFN law that would give the Judicial Council authority to entertain his application concerning the Citizen; nor is the Judicial Council aware of any such authority within KDFN law.
29. Accordingly, the Judicial Council finds no basis on which it could, acting within its jurisdiction, consider Mr. Smith's application challenging the Citizen's continuing position as a KDFN Councillor.

Conclusion and Decision

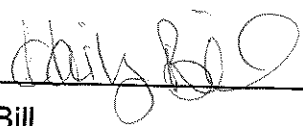
- 30. As discussed above, Mr. Smith's application lacks sufficient details to enable the Judicial Council to determine clearly the nature of his application and the legal authority on which the Judicial Council could consider the application. This lack of detail has required the Judicial Council to try to resolve the ambiguity by analyzing both the form and substance of what Mr. Smith is seeking.
- 31. If it was Mr. Smith's intent to bring an appeal under the *Election Act* in connection with the Citizen's election following the March 18 general election, as hinted in the application documents, that appeal application was fatally flawed. It failed to cite any of the three grounds of appeal set out in section 159 of the Act, and the allegations made did not come within the scope of those appeal grounds.
- 32. In addition, Mr. Smith submitted his application to the Judicial Council 29 days after the March 18 election, putting it outside the 14-day appeal period provided for under the Act, which further deprived the Judicial Council of jurisdiction to hear the appeal.
- 33. If, on the other hand, Mr. Smith's intent was to impeach the Citizen now for allegedly improper conduct during a years-old period of public service to KDFN, he has not identified any legal basis on which the Judicial Council could properly exercise jurisdiction to consider that subject matter.
- 34. For the foregoing reasons, the Judicial Council dismisses Mr. Smith's application as being outside its jurisdiction to consider.

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


Debra Thibodeau, Chair


William D. Webber


Margaret McKay


Haily Bill