

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the Tulita Land Corporation, a corporation incorporated under the laws of Canada to receive and hold in trust money and lands settled on the community of Tulita by the Sahtu Dene and Métis Land Claim Agreement with the Government of Canada;

AND IN THE MATTER of the 2011 election of the Board of Directors of the Tulita Land Corporation;

AND IN THE MATTER of an application by the Returning Officer to seek a determination and direction of the Court.

BETWEEN:

MARLENE MENACHO in her capacity as RETURNING
OFFICER FOR TULITA LAND CORPORATION

Applicant

- and -

TULITA LAND CORPORATION

Respondent

MEMORANDUM OF JUDGMENT

The Applicant, Marlene Menacho, is the Returning Officer for the Tulita Land Corporation (the Corporation). The Corporation had an election to select its Board of Directors on September 26, 2011. At the time of that election, Ms. Menacho was the Deputy Returning Officer. She became the Returning Officer on October 3, 2011. On October 27, 2011, she filed this Application seeking directions and determinations from this Court with respect to various concerns arising from the September 26 election.

I) BACKGROUND

In the Affidavit filed in support of the Application, Ms. Menacho provides an overview about the Corporation, its role, how it operates, all of which is useful to put this matter in context.

The Corporation is incorporated pursuant to the laws of Canada. It is set up to receive and hold trust monies and lands settled on the community of Tulita by virtue of the Sahtu Dene and Metis Land Claim Agreement with the Government of Canada (The Agreement). The Corporation is responsible for Tulita's share of Sahtu lands and for the community's share of monies paid by Canada to the Sahtu beneficiaries. The Agreement provides that the Corporation has certain obligations and permitted activities.

Every adult and child beneficiary is a member of the Corporation. The Board of Directors carries out the day to day operations of the Corporation; the Corporation also has staff members who help carry out its projects and administer its trust fund.

Schedule One to the By Laws of the Corporation sets out the parameters that govern the election of its Board of Directors. The Schedule requires that an election be held every two years for the positions of President, Vice-President and Directors. It also provides that elections are to take place on the 3rd Monday of August on each election year.

Section 5 of the Schedule sets out how the Returning Officer must proceed to hold the election, including the mechanism whereby beneficiaries who do not reside in Tulita can vote:

(...) The Returning Officer shall conduct an election by:

(...)

Making a ballot available to every voting member whose address is other than Tulita, Northwest Territories X0E 0K0 with a self addressed return envelope for each ballot with the instruction that each envelope must be postmarked no later than midnight on the 2nd Monday in August each election year to be delivered in person to the Returning Officer by 5:00PM on the Friday immediately following the 2nd Monday in August in each election year. The ballots shall be held in a safe and secure position designated by the Returning Officer.

There are 215 voting members of the Corporation who live outside of Tulita and who were entitled to vote by mail on the September 26 election.

The 2011 election was not held on the third Monday in August, because a Canada Post strike made it impossible to mail out the election packages to voting members who lived outside of Tulita. This was why the date of September 26 was chosen for the election instead.

Ms. Menacho deposes that “the Returning Officer did not provide sufficient time for the mail in ballots to arrive on or before the day of the Election”. There is no evidence as to when the packages were mailed out; no evidence as to how long before election day the packages are usually mailed out; and no explanation for why they were mailed late on this occasion. Evidence about those matters would have been helpful to better understand what transpired in the weeks leading up to the September 26 election.

Be that as it may, Ms. Menacho’s assertion that the ballots were not mailed in sufficient time for the voters to vote and mail them back is supported by the evidence that two members, Lisa Zoe and Dean Doctor, wrote letters complaining that they received their packages very late and that this compromised their rights as voters.

Apart from the timing issue, it appears that the instructions that were sent with the mail ballots were not consistent with the requirements set out at Schedule One of the By Laws. The instructions stated that the mail ballots had to be postmarked no later than 5:00PM on September 26, the day of the election, whereas Schedule One contemplates that the mail ballots must be postmarked no later than 5:00PM one week before the election date, and received by the Returning Officer no later than 5:00PM on the Friday before election day.

Ms. Menacho deposes that she verily believes that voting members may have thought that the ballots had to be received by the Returning Officer on or before the day of the election, even though the instructions stated otherwise. This seems to be what Ms. Zoe and Mr. Doctor thought, as they expressed concerns that the late receipt of their election package would deprive them from their ability to vote.

Finally, an issue also arose when the votes were counted. It was discovered that five ballots for the position of Vice-President had been placed in the ballot box for the position of President. The Returning Officer ultimately determined the ballots were valid. Directions are being sought from this Court on that issue as well.

This Application was first spoken to in Civil Chambers on November 18, 2011. No one appeared for the Corporation, although it had been duly served. After having heard submissions from counsel for the Returning Officer, I directed that additional evidence and written submissions be filed to clarify certain aspects of the matter, including issues of notice and jurisdiction. These additional materials were filed on December 7.

2) JURISDICTION OF THE COURT AND NOTICE

Schedule One sets out how elections are to take place, but does not provide for a mechanism to deal with complaints or concerns arising from an election. This was one of the reasons I directed counsel to file further materials to clarify the jurisdictional basis for this Court to entertain this Application.

The Corporation was created pursuant to the Agreement. Chapter 6 of the Agreement sets out a dispute resolution mechanism. Actions arising out of the Agreement are to be dealt with by arbitrators. Decisions made by arbitrators can, in turn, be reviewed by this Court on questions of law or jurisdiction. Those provisions are not engaged directly in this Application, but are consistent with this Court having jurisdiction to provide directions on questions of law on matters arising from the Agreement.

In addition, the Corporation is incorporated pursuant to the *Canada Corporations Act*, RSC 1970, c. C-32. For the purposes of that statute, “court” is defined to mean this Court. This Application is not brought pursuant to a specific provision of that *Act*. However, the manner in which “court” is defined in the statute supports the notion that this Court has jurisdiction to deal with matters arising from the election of the Board of Directors for a body incorporated under the statute. This is particularly so if there is no mechanism set out to deal with such an issue in the corporation’s by-laws.

Therefore, having reviewed the additional materials filed, I am satisfied that this Court is the proper forum for this matter.

As for potential issues related to notice, the Corporation was properly served with this Application. The Returning Officer also took steps to advise the members of the Corporation that she was instituting these proceedings, and to make them aware of the date on which the matter was scheduled to be heard. No one appeared on the date of the hearing. There is no indication of anyone having communicated with the Court or with the Returning Officer to inquire about the hearing. That being so,

I am satisfied that there are no issues as to notice, and that I can rule on the Application on the basis of the materials and submissions that have been presented by the Returning Officer.

3) ANALYSIS

The Returning Officer seeks direction about a number of aspects of what transpired at the September 26 election. As I have concluded that a new election should take place, it is not necessary for me to address the other aspects of the Application.

The procedure set out in Schedule One of the Corporation's By Laws is designed to ensure that voting members who do not reside in Tulita have a full opportunity to exercise their right to vote at these elections. This does not appear to have been the case here. There is direct evidence that two people received their election packages a very short time before the election was to take place and understood this to mean they would be unable to vote in the election. This raises an obvious concern that other voting members who do not reside in Tulita were confronted with the same problem.

The evidence is unclear as to how many people did vote by mail on this election. The Returning Officer deposes that as of October 21, "no other mail ballots have been received by the Returning Officer". This suggests that some mail ballots were received. One of them was Ms. Zoe's, as her letter states that she mailed her package back on September 22. It is not clear whether Mr. Doctor mailed his back. There is no other evidence about how many other mail ballots were received, if any.

But what is clear is that 215 voters were directly affected by the late mailing of the packages. And based on the complaints received from Ms. Zoe and Mr. Doctor, there is a very real possibility, one might even say probability, that the late receipt of the election packages discouraged at least some of them from exercising their right to vote in this election. The election results show that even a few additional votes could have affected the results for some of the positions. And participation of even a fraction of the voters who reside outside of Tulita could have affected the results for all the positions.

This Court has had the opportunity to comment about the governing principles when dealing with contested elections:

Many Canadian cases dealing with contested elections have made the point that in practically every election there will be irregularities in some form or another. But

those cases also affirm that elections should not be easily overturned and the public put through another election. That is why the guiding principle is to try to give effect to an election result provided that the election was conducted substantially in accordance with the law and that any irregularities or non-compliance did not affect the results

Keefe v. Pukanich, 2007 NWTSC 90, at para. 33.

This Application is not an application to contest the election. It is an Application by the Returning Officer herself for directions. But it arises in a context where strong concern was expressed by two voting members who felt that their right to vote was compromised by the manner in which matters were carried out. While neither of them launched a court action to contest the election results, their expressions of concerns are an important part of the context that underlies this Application.

The late mailing of the election packages was, in my view, an irregularity that flawed the entire process. The evidence adduced on the Application is that the Returning Officer verily believes that notwithstanding the instructions sent with the election package, voting members may have thought that their ballots had to be received by the Returning Officer on or before the date of the election. As this was the usual practice, in accordance with Schedule One, anyone who had voted in prior elections would have expected this to be the case.

An irregularity that has the potential effect of preventing people from exercising their right to vote is always very problematic, because it goes to the very heart of a democratic process. Where, as here, the irregularity impacts a large number of voters, it casts a shadow over the election results that nothing can dispel. It is not a problem that can be remedied after the fact. And it is impossible to establish that it did not affect the outcome of the election.

Under the circumstances, I conclude that the September 26 election process was seriously flawed. The only appropriate remedy is for another election to be held. The Returning Officer is in the best position to decide when the election should be held, and should be given some flexibility to organize its logistics. I will simply, as part of my Order, set out general parameters to ensure that the problems that occurred at the September election do not arise again.

4) CONCLUSION

For these reasons, an Order will issue on the following terms:

1. The election held on September 26, 2011 is hereby overturned;
2. The Returning Officer shall set a date for a new election within 14 days of the filing of this Memorandum;
3. Once the date for the new election is set, the Returning Officer shall send an election package to every voting members whose address is outside of Tulita as soon as possible, and in any event no later than 21 days before the date of the election. The election package shall comply with Section 5 of Schedule One to the By Laws of the Tulita Land Corporation, with the necessary adjustments as to dates.

Counsel for the Returning Officer is to prepare a Formal Order to this effect.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
4th day of January, 2012

Counsel for the Applicant: Denis Lefebvre
The Respondent did not appear on this Application

S-1-CV-2011000162

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