IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Ta'an Kwäch'än Council (In the matter of),* 2006 YKSC 62

Date: 20061214
Docket No.: S.C. No. 06-A0102
Registry: Whitehorse

IN THE MATTER OF THE ELECTION FOR CHIEF AND DEPUTY-CHIEF FOR TA'AN KWÄCH'ÄN COUNCIL

Between

TA'AN KWÄCH'ÄN COUNCIL

Petitioner

Before: Mr. Justice R.S. Veale

Appearances:

Debra L. Fendrick — Counsel for the petitioner
André Roothman — Counsel for Bonnie Harpe

REASONS FOR JUDGMENT

INTRODUCTION

[1] On February 3, 2006, this Court ordered that the election of Chief and Deputy-Chief of the Ta'an Kwäch'än Council should proceed. The Ta'an Kwäch'än Council applied for a declaration that the election should take place on November 20, 2006. On November 8, 2006, I declared that the election should proceed on November 20, 2006, notwithstanding the lack of a quorum at the meeting of the Board of the Ta'an Kwäch'än Council on August 27, 2006, when the election writ was issued.

[2] These are my reasons.

BACKGROUND

[3] The Ta'an Kwäch'än Council is the name of a self-governing First Nation situated near Whitehorse, Yukon. The main governing body of the Ta'an Kwäch'än Council is the Board. The Board consists of an elected Chief and Deputy-Chief and nine Family Directors who are appointed by the respective Traditional Families.

[4] The Ta'an Kwäch'än Council held its first election of Chief and Deputy-Chief on April 30, 2004. Ruth Massie was elected as Chief but the Deputy-Chief resigned shortly after the election.

[5] The election was challenged by Bonnie Harpe, the other candidate for the office of Chief. The Judicial Council of the Ta'an Kwäch'än Council ruled that the Deputy-Chief was ineligible to be a candidate and set aside the election of April 30, 2004.

[6] The 2004 Constitution of the Ta'an Kwäch'än Council requires the presence of either the Chief or Deputy-Chief in order for the Board to have a quorum to transact business. As the election of the Chief was set aside, the Board did not have a quorum.

[7] The 2004 Constitution does not have a provision setting out a procedure to appoint an Acting Chief to allow the Board to function in the absence of a Chief or Deputy-Chief. The Elders Council resolved the constitutional crisis by exercising their traditional power to appoint a Chief. On May 19, 2005, the Elders Council appointed Ruth Massie as Acting Chief. That decision was challenged in this Court by Bonnie Harpe. On February 3, 2006, this Court decided that the Elders Council had the traditional power to appoint the Acting Chief pending a new election in the unique circumstances of this constitutional group. See *Harpe* v. *Massie and Ta'an Kwäch'än Council,* 2006 YKSC 1. The court also declared that the election of Chief and Deputy-Chief should proceed.

[8] Since that court decision, the Board passed a new Elections Act in July 2006. This Act deleted a previous provision prohibiting members of the Ta'an Kwäch'än Council from running for the office of Chief if they had a current lawsuit against the First Nation. This Court recommended that amendment in *Harpe* v. *Massie*, cited above, to ensure that Bonnie Harpe could be a candidate in the new election.

THE ELECTION WRIT

[9] On August 27, 2006, the Board met and issued a writ for the election of Chief and Deputy-Chief to be held on November 20, 2006. The Acting Chief and six Family Directors formed the required quorum.

[10] As fate would have it, one of the Family Directors, Roberta Behn, was not a citizen of the Ta'an Kwäch'än Council and therefore was ineligible to sit as a Family Director. This fact was not brought to the Board's attention until after the election writ was issued.

[11] A member of Roberta Behn's family has now challenged the quorum of the Board and its authority to issue the election writ before the Judicial Council. I have previously ruled that the Judicial Council does not have the jurisdiction to review a resolution of the Elders Council. See *Harpe* v. *Massie,* 2005 YKSC 54. That decision applies to this resolution of the Board as well. The Judicial Council does not have the jurisdiction to review the resolution of the Board to issue an election writ for November 20, 2006.

[12] An independent Elections Office has been rented. Advertising of the election writ and the voting date has been completed.

[13] The status of the election at this hearing was that the nominations closed on October 6, 2006. Bonnie Harpe and Ruth Massie were the only candidates for the office of Chief and three citizens have been nominated for the office of Deputy-Chief. Mail-in

ballots have been mailed out and 20 mail-in ballots have been received. The advance poll was being conducted on the date of this hearing.

[14] The only uncertainty is the application before the Judicial Council to declare the election date void based on the lack of quorum at the Board meeting of August 27, 2006, when the election writ was issued for November 20, 2006.

ISSUE

[15] The issue to be determined is whether this Court has the power to declare that the future election date of November 20, 2006, should proceed and whether that power should be exercised.

ANALYSIS

[16] It is most unusual that a governing body, charged with conducting an election, applies to a court for a declaration that an election should proceed on a specific date. I draw some comfort from the fact that both candidates for the office of Chief were present in court and consented to the declaration. Bonnie Harpe, who had successfully challenged the previous election for Chief, was represented by counsel. Thus, the two protagonists from the previous contested election are consenting to a declaration that the election proceed on November 20, 2006.

[17] Generally speaking, courts deal with cases that involve challenges to past election results based on irregularities that occurred in the election process. Typically these challenges are based upon the ineligibility of candidates, the ineligibility of electors, or irregularities in the marking or counting of ballots. Courts are called upon to review the electoral process to determine whether the outcome should be confirmed or set aside.

[18] Most challenges to election outcomes arise under statutes that set out the principles for controverting elections.

[19] However, in the case of *Beamish* v. *Miltenberger*, [1997] N.W.T.J. No. 19 at paragraphs 30 – 31, Vertes J. found that the common law principles still existed so long as they were not clearly intended to be changed by the applicable election statute. Assuming this to be the case, the common law principles that apply to electors are summarized at paragraph 31 of *Beamish* by a quote from Lord Denning in *Morgan* v. *Simpson*, [1974] 3 All E.R. 722 (C.A.) at page 728:

> “(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not … (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election … (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.”

[20] The general common law principle is that the will of the people as expressed in an election will not be set aside unless the irregularity or non-compliance with election law or practice is such that the outcome would have been materially affected. Obviously any irregularity affects the election process in some way. Unless it materially affects the validity of the election results, courts will not set aside the decision of the voters.

[21] In my view, it would not be appropriate for courts to engage in the prospective assessment of electoral conduct before an election date. It makes little sense to pronounce on electoral conduct or procedures before it can be measured against the election outcome.

[22] This case is quite different. The court is not being asked to validate an election result but to decide whether or not the election should proceed when the Board that set the election date did not have the required quorum. The question is really whether the court should give certainty to the holding of the election or whether the issue of the Board's lack of quorum should be left until after the election.

[23] The citizens of the Ta'an Kwäch'än First Nation have been without an elected Chief and Deputy-Chief since April 30, 2004, some two and one half years. Part of that delay resulted from litigation to resolve the constitutional crisis on whether the Elders Council could appoint an Acting Chief pending the holding of an election. The other part of the delay was amending the Elections Act to ensure a valid election process.

[24] I have previously ordered that this election should be held. I rely upon the general supervisory or inherent jurisdiction of the court to consider whether the date of the election should be confirmed.

[25] The Supreme Court of Canada has discussed the difficulty of defining the inherent jurisdiction of a Superior Court in its decision in *MacMillan Bloedel* v. *Simpson*, [1995] S.C.J. No. 101. Although that decision focussed on the contempt power of a superior court, the Supreme Court described inherent jurisdiction generally at paragraph 30:

> "While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court."

[26] Again at paragraph 33, the Supreme Court stated:

> "Although the inherent jurisdiction of superior courts is difficult to define, there is no doubt that the power to control its process and enforce its orders, through, in part, punishing for contempt, is within that jurisdiction. …"

[27] In my view, the validity of the date for holding the election should not be left in doubt. There is no evidence to indicate that the lack of a quorum has, in any way, materially affected the nomination of candidates or any part of the election process to date. The Board of the First Nation had an apparent quorum when it issued the election writ. The fact that one Traditional Family erred in its nomination procedure should not be permitted to cast doubt on the validity of the election day itself.

[28] I declare that the election for Chief and Deputy-Chief of the Ta'an Kwäch'än Council shall take place on November 20, 2006, notwithstanding the lack of quorum of the Board at the time it issued the election writ. This does not in any way affect the common law or statutory jurisdiction of any elector to challenge the electoral outcome arising from flaws in the process, voting irregularities, or the ineligibility of candidates or electors that may materially affect the election result. This decision simply states that there should be no doubt that the election of Chief and Deputy-Chief should take place on November 20, 2006.

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VEALE J.