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MEMORANDUM

TO: Tanya Silverfox
Election Committee, First Nation of Nacho Nyak Dun

DATE: March 16, 2019

RE: **Extension of the nomination period for the Youth Councillor position**

In your e-mail of March 13, 2019, you advised that the Election Committee was seeking legal advice with respect to its decision to extend the nomination period for the Youth Councillor position with respect to the upcoming general election for the Council pursuant to the *Election Act*. This decision was made because no nominations were made for the Youth Councillor position.

Some citizens of the First Nation Nacho Nyak Dun (the “NND”) have question why the Election Committee did not extend the nomination periods for the other elected Council positions as well.

In my e-mail responding to you, I confirmed my agreement with the Election Committee’s decision not to extend the nomination periods for the other elected Council positions since a sufficient number of nominations had been made to fill those positions in accordance with the *Election Act*. I committed to provide my comments in writing to the Election Committee which are set out below.

1. Short answer

In my view, the Election Committee was not required to extend the nomination periods for all elected Council positions when it decided to extend the nomination period under section 5.6 of the *Election Act* for the Youth Councillor position. This decision was made to provide an additional opportunity for nominations to be made for the Youth Council position since none were made during the original nomination period. A sufficient number of nominations were made with respect to the other elected Council positions to fill those positions.

For the reasons set out below, it is my view that the Election Committee’s decision to only extend the nomination period for the Youth Councillor position was correct.

2. Background

(a) Evolution of the NND’s election policies and laws. Over the past ten years, the NND has made significant efforts to establish a general election process for the elected Council positions in order to avoid the costs of separate elections for the various positions and reduce the turmoil of ongoing elections. The NND enacted the Election in 2009 and amended the *First Nation of Nacho Nyak Dun Constitution* (the “**Constitution**”), which was adopted by the NND on August 8, 1992, in 2008 and 2009.

The *First Nation of Nacho Nyak Dun Constitution* (the “**Constitution**”) provided that the Assembly would establish a process for the selection of the Chief and Deputy-Chief and directed the Clans to appoint the Councillors. The Elder Councillor was appointed by the Elders Council and the Youth Councillor was appointed by the Youth Council. The Assembly enacted the NND election regulations to establish the process, organization and rules for the selection of the Chief and Deputy-Chief.

The 2008 Annual Meeting of the Assembly amended the Constitution to provide, among other matters, for the election of the Chief, Deputy-Chief, Councillors, Elder Councillor and Youth Councillor to a four-year term by a majority vote of NND citizens in accordance with NND laws.

The NND election committee developed an election policy for the election of the Councillor, Elder Councillor and Youth Councillor in November 2008 based on the existing NND election regulations.

Following the 2008 election, the Council directed that a new comprehensive election law be developed by the election committee to update the election process based on the experience of previous elections and accommodate the constitutional changes made in 2008. Subsequently, the Assembly approved the *Election Act* in 2009.

The Assembly amended the Constitution again in 2009 to provide that the Elder Councillor would be appointed by the Elders Council for a one-year since the four-year term for the Elder Councillor was found to be too onerous.

Over the next several years, the Assembly had extensive discussions to establish a single general election for the elected Council positions. Given that the four-year terms of the elected Council members were staggered, an election or by-election often had to be held each year. This was a significant cost, created turmoil amongst citizens and undermined community governance. In addition, the continual elections and changes in the composition of the Council disrupted its ability to function cohesively and effectively. Ultimately, the Council members agreed to resign on a specific date in order to hold a general election for the elected Council positions.

(b) The 2019 election process. A general election for the elected positions of the Council was originally scheduled for April 2, 2019 in accordance with the *Election Act*. When the nomination process closed on March 4, 2019, there were: four nominations for the one Chief position; three nominations for the one Deputy-Chief position; ten nominations for the four Councillor positions; and no nominations for the one Youth Councillor position.

As a result, the Election Committee decided to extend the nomination period for the Youth Councillor position until 4:30 pm on March 18, 2019, pursuant to section 5.6 of the *Election Act*. This means that a person can make a nomination for the Youth Councillor position before that deadline. If only one nomination is made during this extended nominated period, that person would be acclaimed if he or she meets the eligibility requirements of the *Election Act*. If two or more nominations are made for the Youth Councillor position, then the election of the Youth Councillor would be part of the general election.

The Election Committee did not extend the nomination periods for the other elected Council positions. The nominations for these positions remained closed. The general election was postponed to April 24, 2019.

3. What does the *Election Act* say?

The *Election Act* establishes the process, organization and rules for the election of the Chief, Deputy-Chief, Councillors and Youth Councillor.

The *Election Act* requires a by-election if there is a vacancy in an elected Council position. Section 2.1 of the *Election Act* provides the following.

- 2.1 The Chief, Deputy-Chief, Councillors and Youth Councillor shall be chosen by way of general election and secret ballot conducted in accordance with this *Election Act*.
 - (1) General elections shall be held every four years.
 - (2) A vacancy in the office of the Chief, Deputy-Chief, Councillors and Youth Councillor shall be filled by way of general by-election and secret ballot conducted in accordance with this Act to fulfill the remainder of the term.

This means that if there is no candidate for the Youth Councillor position elected or acclaimed in the upcoming election, a by-election would have to be held to fill that position for the remainder of the four-year term, unless provided otherwise in the *Election Act*.

Section 5.6 of the *Election Act* authorizes the Election Committee to extend the nomination period for an elected Council position for no more than 14 days due to insufficient number of nominations to fill that position. Section 5.6 provides the following.

- 5.6 If, at the time nominations otherwise would close, there are fewer nominations than there are offices to be filled, the Election Committee shall extend the time for nominations by no more than 14 days, immediately cause notice to be given to the electors of that extension, and conclude the nomination process in accordance with section 5.4 by that further date.
 - (1) If, after the procedure described in section 5.6, there still are fewer nominees than there are offices to be filled, any vacancy of office upon the conclusion of the election process shall be referred to the next Assembly for a determination of the process to be followed to fill that vacancy.

Unless the nomination period for the Youth Councillor position was extended under section 5.6, a by-election would be required. But since that nomination period has been extended under section 5.6, if no nominations are made for that position during the extended nomination period, there would be no requirement for a by-election. Instead the matter would be referred to the Assembly to determine a process to fill that vacancy.

For instance, the Assembly could direct that the Youth Council appoint a NND citizen, who is no older than 26 years of age on the date set for the election, for the remainder of the four-year term or make one-year appointments until the next general election. The Assembly could also consider an amendment to section 7.3 of the Constitution to establish a process where the Youth Council appoints the Youth Councillor for a shorter term. This would be similar to the appointment of the Elder Councillor. Any such amendment would have to be approved by the Annual Meeting of the Assembly. The amendment would have to be provided in writing to Council and also included in written notices of the Annual Meeting at least thirty days prior to the Annual Meeting.

4. Interpretation of laws

In general, there is a common rule for the interpretation of laws. Courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation. This means that courts do not focus only on literal meaning of the text of laws.

In other words, courts must consider and take into account all relevant and admissible indicators of legislative meaning. An appropriate interpretation is one that can be justified in terms of: (a) its compliance with the legislative text; (b) its promotion of the legislative purpose; and (c) the outcome it produces is not unfair or unjust.

5. My comments

Based on my review of the provisions of the *Election Act*, the Election Committee has the authority to only extend the nomination period for the Youth Councillor position under section 5.6 of the *Election Act* since no nominations were made for that position during the original nomination period.

Taking into account my interpretation of the various provisions of the *Election Act*, it is my view that the Election Committee was not required to also extend the nomination periods for the other elected Council positions when it decided to extend the nomination period for the Youth Councillor position. In fact, taking into account the following, the Election Committee's decision to only extend the nomination period for the Youth Councillor position was correct.

(a) Purpose of section 5.6

In my view, a key objective for the NND was the establishment of an election process to avoid the continual cycle of elections and by-elections which were costly and serve to maintain turmoil in the community and disrupt its governance. As noted earlier, the Assembly made deliberate steps in efforts to achieve that objective, including the enactment of the *Election Act*, including section 5.6, in 2009 and the amendment of the Constitution in 2008.

In my view, the purpose of section 5.6 is to ensure that efforts are made to avoid unnecessary by-elections. It addresses circumstances where there are insufficient nominees to fill an elected Council position. It is not intended to extend the nomination period for those elected Council positions where a sufficient number of nominations were made in accordance with the *Election Act* to fill those positions.

In this case, no nominations were made for the Youth Councillor positions and, as a result, the nomination period for that position was extended to allow nominations to be made. I assume that if an insufficient number of nominations were made to fill the four elected Council positions, the nomination period for the elected Council positions would have been extended under section 5.6 too.

The costs for a by-election would be significant. I expect that those costs would be as costly as a general election. An Election Committee would have to be established to facilitate and oversee the by-election. Polling places would have to be established in Mayo and Whitehorse.

(b) Principle of fairness

It is my view that it would be unfair and unjust if a NND citizen was able to review and assess the slate of nominees after nomination period closed and then was able to make a decision as to whether he or she wishes to make a nomination. This would provide an advantage to that NND citizen that the nominees did not have. Prospective nominees should not be allowed to review the nominees and then “cherry-pick” a favourable election race.

(c) Past practice

It is my understanding that the Election Committee’s decision was consistent with the NND’s past practice to deal with such issues. In past elections, the nomination periods were extended only for the elected Council positions where an insufficient number of nominations were made to fill the position.

This practice has been accepted by the community since the previous extended nomination periods under section 5.6 for only those elected Council positions where there were an insufficient number of nominations to fill the positions were not challenged. They did not affect the election.

(d) The Election Committee’s decision was not unfair or unjust

The Election Committee’s decision to extend the nomination period for the Youth Councillor position under section 5.6 did nothing to treat any other NND citizen or nominee unfairly or unjustly.

The decision of the Election Committee to only extend the nomination period for the Youth Councillor position did not prejudice anyone’s ability to make a nomination with respect to the other elected Council positions. All NND citizens had the same and equal opportunity to make a nomination or become a nominee in accordance with the *Election Act* during the original nomination periods.

In closing, the underlying question is why would the nomination periods for the other elected Council positions be required to be extended if a sufficient number of nominations were made to fill those positions? In my view, there is no legal or policy reasons to require the extension of the nomination periods for all the elected Council positions, including those where a sufficient number of nominations were made to fill those positions.

Please do not hesitate to contact me if you require any clarification or assistance.

Thank you.

A handwritten signature in black ink, appearing to read "Daryn R. Leas". The signature is stylized and cursive, with a prominent initial "D" and a long horizontal stroke at the end.

Daryn R. Leas