CV 06113

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY-ELLEN BEAMISH, LOUIE BEAULIEU, JAMES F. BEAVER, SR., NORA BEAVER, HOWARD BENWELL, MARION BERLS, JACK BIRD, BRENDA BOURKE, DORIS BOURKE, MIKE BOURKE, CHARLIE R. BOURQUE, FRAN BOURQUE, SHANNON COLEMAN, FRED DANIELS, MATTHEW R. FRASER, SUE FREUND, BARB HERON, DON HERON, HENRY HERON, KEVIN HERON, MISTY HERON, TONI HERON, DOROTHY LAVIOLETTE, FRANK E. LAVIOLETTE, JASON ERNEST LEPINE, CHUCK LOUTITT, DESIREE LOUTITT, FLORENCE LOUTITT, JOHN LOUTITT, RAE LOUTITT, SANDRA LOUTITT, BEVERLY MABBITT, VICTOR L. MARIE, SUSAN McDONALD, LUCILLE NORWEGIAN, MARY NORWEGIAN, PHILLIP NORWEGIAN, JR., PHILLIP NORWEGIAN, JERRY PAULETTE, DAVID POITRAS, JUDY POITRAS, MARTHA POITRAS, TERRY POPPLESTONE, BEVERLY M. SALFI, ALLEN SCHAEFER, EDNA SCHAEFER, FREDA SCHUMANN, NORMAN STARR, BETTY TOURANGEAU, DON TOURANGEAU, EILEEN TOURANGEAU, JOHN L. TOURANGEAU, SHIRLEY VANDENBERGHE, GLORIA VILLEBRUN and LUCIEN VILLEBRUN

Petitioners

- and -

MICHAEL MILTENBERGER, and the RETURNING OFFICER FOR THE ELECTORAL DISTRICT OF THEBACHA

Respondents

- and -

THE CHIEF ELECTORAL OFFICER

Intervenor

Rulings on the interpretation of s.235(2) of the *Elections Act*, R.S.N.W.T. 1988, c.E-2.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Fort Smith, Northwest Territories
on October 17, 1996

Reasons filed: October 23, 1996

Counsel for the Petitioners: Robert A. Philp

Counsel for the Respondent: (Miltenberger)	John U. Bayly, Q.C. & John Donihee
Counsel for the Intervenor:	Adrian C. Wright & Holly McManus

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REASONS FOR JUDGMENT

1 These proceedings are the trial of a petition brought pursuant to the *Elections Act*, R.S.N.W.T. 1988, c.E-2, contesting the validity of the election for the Legislative Assembly held on October 16, 1995, in the Thebacha riding. The petitioners allege irregularities and illegal practices. They seek to declare the election void and to set aside the election of the respondent Miltenberger. Part way through the trial I was asked to make rulings on the interpretation of s.235 of the Act. I delivered my rulings at the time and promised written reasons to follow. These are those reasons.

2 Section 235 of the Act reads in its entirety as follows:

> 235. (1) Subject to this section, no person shall be excused from answering a question put to him or her in an action, suit or other proceeding in a court or before any judge, board or other tribunal concerning an election or the conduct of a person at an election or in relation to an election on the ground of a privilege.
>
> (2) The evidence of an elector to show if and for whom the elector voted at an election is not admissible in evidence in an action, suit or other proceeding in a court or before any judge, board or other tribunal concerning an election or the conduct of a person at an election or in relation to an election.
>
> (3) An answer given by a person claiming to be excused on the ground of privilege shall not be used or admissible in evidence against that person in any criminal trial or proceeding against that person taking place after the proceedings, other than a prosecution for perjury in the giving of such evidence.

3 The immediate controversy is with respect to the interpretation of subsection (2). Counsel for Miltenberger submitted that the phrase "the evidence of an elector to show <u>if and for whom</u> the elector voted at an election is not admissible" means that evidence respecting <u>if</u> an elector is not admissible as well as evidence of <u>for whom</u> an elector voted. Counsel for the petitioners and counsel for the intervenor, the Chief Electoral Officer, submitted that the phrase in question should be interpreted as meaning that only evidence of <u>for whom</u> an elector voted is inadmissible. This position was supported by reference to the French version of s.235(2) which reads:

> (2) Le témoignage d'un électeur portant indication de la personne pour qui il a voté à une élection n'est pas admissible en preuve dans une action, poursuite ou autre procédure intentée devant une cour, un juge, une commission ou devant tout autre tribunal, au sujet d'une élection ou de la conduite de quelque personne à une élection ou lors d'une élection.

4 There is an obvious discrepancy between the two versions. The French version does not refer to <u>if and for whom</u> but merely refers to evidence showing <u>for whom</u> (pour qui) an elector voted. The position of the petitioners and the intervenor is that the French version represents the true intent of the legislation.

5 In the Northwest Territories, the English and French versions of a statute are equally authoritative: see s.10 of the *Official Languages Act*, R.S.N.W.T. 1988, c. O-1. This gives rise to what has been termed as the "equal authenticity rule". Both language versions are authoritative and neither version enjoys priority or paramountcy over the other (even if one version can be considered as being merely a translation of the other). Discrepancies cannot be resolved by giving automatic preference to one. Both have equal status and authority: *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

6 The effect of the "equal authenticity rule" where there are discrepancies was explained as follows by Prof. R. Sullivan in *Driedger on the Construction of Statutes* (3rd ed., 1994) at page 218:

> Where the two versions of a bilingual enactment appear to say different things, the courts are obliged by the equal authenticity rule to read and rely on both versions. If an acceptable meaning common to both versions cannot be found, some way of dealing with the discrepancy must be found. However, the solution must depend on something other than preference for a particular language. It is inconsistent with the equal authenticity rule to resolve discrepancies between two language versions by giving automatic preference to one.
>
> It is clear from *Manitoba Language Rights* that the equal authenticity rule applies even where one langauge version is actually a translation of the other. From a constitutional point of view the key factor here is not preparation but enactment. So long as both language versions have at some point been enacted into law, both are original versions and have equal status and authority.

7 The fact that there is a discrepancy requires the application of the "shared meaning rule". This was described in *Driedger* (at page 220): "Where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless this meaning is for some reason unacceptable." This is not the equivalent of saying that the "lowest common denominator" is the applicable meaning although one author does suggest that where

one version has a broader meaning than another, the shared meaning is the more narrow of the two: P.- A. Côté, *The Interpretation of Legislation in Canada* (2nd ed., 1993) at pages 275-276.

8 The search for a shared meaning must also, of course, keep in mind the importance of context and of reading the provision, not in isolation, but as part of the statute as a whole.

9 I will now turn to the application of these general rules to the arguments advanced on behalf of the respondent.

10 Counsel for the respondent submitted that preference should be given to the English version because it has been consistent in its wording since enactment of the *Elections Act* in 1986. Section 10 of the *Official Languages Act* did not come into force until 1989. To give effect to this argument however is to negate the "equal authenticity rule". The law speaks as of today and the fact that the English version predates the French is irrelevant.

11 Counsel relied on the case of *Klippert v The Queen*, [1967] S.C.R. 822, in support of his argument that legislative history is relevant. I agree that history is important if there is no shared meaning. The *Klippert* case is an example of a divergence between the two language versions where there was no shared meaning. But that case is distinguishable because there the divergence resulted from an amendment to the legislation. One version changed to accord with the amendment while the other did not. The version that changed was preferred. In the case before me, there is no such legislative intervention resulting in the discrepancy. The

Elections Act is unchanged since its enactment. Both language versions are unchanged. The legislative history is therefore irrelevant.

12 I am also not convinced by counsel's submission that the only interpretation of the English version of s.235(2) is that evidence showing if the elector voted or evidence showing for whom the elector voted are both inadmissible. I conclude this from simply examining the sentence structure.

13 The subsection reads: "evidence of an elector to show if and for whom the elector voted". In effect respondent's counsel argued that the subsection can be read as: "evidence of an elector to show if the elector voted or evidence of an elector to show for whom the elector voted." In my opinion this is not the same thing. The phrase "if and for whom" is not synonymous with saying "if or for whom". The use of the conjunction "and" suggests to me that the prohibition applies to both as a unit. In that case the use of "if" is redundant because by voting for someone the "if" is implied.

14 If I am in error on this point, I can still say that there is an ambiguity in the English version. The French version, however, is unambiguous. In such situations, the shared meaning is that of the version which is unambiguous: see Côté, *supra*, at page 275.

15 If the Legislature wanted to prohibit evidence that an elector voted as a separate item from evidence of for whom an elector voted, it could have done so in clearer language. An

example was provided by respondent's counsel when he referred me to s.42(7) of the *Ontario Elections Act*:

> In any legal proceedings no person may be compelled to state for whom he or she voted or whether he or she marked his or her ballot or not.

16 As another point of comparison, I note that the *Canada Elections Act*, R.S.C. 1985, c.E-2, has the same French version as the Territorial Act but the English version refers simply to "for whom". Both versions of s.274(2) of the federal statute are reproduced for reference:

> (2) The evidence of an elector to show for whom he voted at an election is not admissible as evidence in any action, suit or other proceeding in any court or before any judge, commissioner or any tribunal touching or concerning any election or the conduct of any person thereat or in relation thereto.
>
> ---
>
> (2) Le témoignage d'un électeur portant indication de la personne pour qui il a voté à une élection n'est pas admissible en preuve dans une action, poursuite ou autre procédure intentée devant un tribunal, un juge ou un commissaire, au sujet d'une élection ou de la conduite de quelque personne à une élection.

This cross-jurisdictional comparison, especially as between statutes with the same objects, can be helpful as an interpretive tool: see *Driedger* at pages 290-293.

17 Respondent's counsel also argued that his interpretation of the English version of s.235(2) of the Act is consistent with the aims of the Act, among those being the protection of the secrecy of the ballot. He submitted that this applies as well to the privacy interest of the individual elector in not disclosing whether he or she even voted. But, as other counsel pointed out, there are other parts of the Act that do not accord with this broader privacy interest.

18 There is no dispute that maintenance of the secrecy of the ballot is an object of the Act; in my opinion, it is the primary object of the Act. But the identity of the individual voter is not placed at the same level of significance. Sections of the Act require the elector to state his or her identity when attending to vote (s.100), allow a candidate's agents to take and exchange information as to who has cast a vote (s.96), and create offences where evidence that one has voted are essential elements of a prosecution (s.214). This suggests to me that it is not necessary, for the purpose of the Act, to interpret s.235(2) as extending the evidentiary protection to evidence of <u>if</u> the elector voted. It is consistent with the purpose of the Act to limit the exception to evidence of <u>for whom</u> the elector voted.

19 I am reinforced in this opinion when I consider two further general principles.

20 First, election statutes because of their nature (both as statutes dealing with elections and with penal consequences for breach) are to be construed strictly: *Arnold v Harris*, [1993] O.J. No. 91 (Gen. Div.). Second, s.235(2) creates an evidentiary privilege. The general rule as propounded by the common law is recognized in s.235(1): "no person shall be excused from answering a question". Subsection (2) is an exception to that general rule. As such it too is to be construed strictly.

21 For these reasons I concluded that the shared meaning, and the true intent, of s.235(2) of the Act, is to make inadmissible evidence of an elector as to <u>for whom</u> the elector voted. In consequence I ruled that witnesses may be asked <u>if</u> they voted and that evidence, limited to that point, is admissible.

22 On a further point, I was asked to rule whether the term "evidence" in s.235(2) was limited to oral testimony in court or if it can be extended to include secondary evidence. The secondary evidence in question consisted of documents such as electors' lists and poll books which indicate who voted at the election (but not, of course, how any one voted). My earlier ruling on the interpretation of s.235(2) effectively disposes of this issue but I will address a few points with respect to it in light of the submissions made by counsel.

23 The arguments on this point originally revolved around the difference, if any, between the English term "evidence" and the French term "témoignage". It seems to me that strictly speaking the French term conveys a narrower meaning than the English one and is usually used to refer to oral testimony in court (although it can sometimes be used in a wider sense). I concluded, however, that I need not make a definitive statement on this point since the issue can be resolved by a contextual analysis of the subsection.

24 A contextual analysis means that "a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest": *Greenshields v The Queen*, [1958] S.C.R. 216 (at page 225). In this case the scope of the word "evidence" can be discerned when one looks at the context in which it is placed in s.235 as a whole. Subsection 235(1) refers exclusively to questions being put to a witness, hence to oral testimony in court. Subsection (3) refers to answers given by a person. Again, the reference can only be to oral testimony in court. For this reason, I concluded that the term "evidence" in subsection (2) is limited to oral testimony in court. To extend it beyond that would be implausible within the context in which it is placed.

25 These rulings, as some others during this trial, were necessitated because of problems or deficiencies in the *Elections Act* itself. For that reason, I direct the Clerk to forward a copy of these reasons to the Deputy Minister of Justice for the Northwest Territories for his consideration should there be thought given to amending the legislation in the future.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 23rd day of October, 1996

Counsel for the Petitioners:	Robert A. Philp
Counsel for the Respondent: (Miltenberger)	John U. Bayly, Q.C. & John Donihee
Counsel for the Intervenor:	Adrian C. Wright & Holly McManus

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Honourable Justice J. Z. Vertes**