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

Trial of a Petition to declare election in the Thebacha riding void. Petition dismissed.

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

Heard at Fort Smith, Northwest Territories
on October 15, 16, 17, 18 and December 9, 10, 11, 12, 1996,
and February 18 and 19, 1997

Reasons filed: March 27, 1997

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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 On October 16, 1995, a general election was held in the Northwest Territories for the election of members to the Legislative Assembly. In the riding of Thebacha, Michael Miltenberger was declared elected with a total of 607 votes. This was 36 votes more than the total of 571 votes received by the incumbent member, Jeannie Marie-Jewell. There were two other candidates, Sean Mageean who received 119 votes and Allan Heron who received 96 votes.

2 On November 16, 1995, fifty-five electors from the Thebacha riding filed a Petition pursuant to the *Elections Act*, R.S.N.W.T. 1988, c.E-2, seeking a declaration from this court that the election in Thebacha was invalid and ordering that a new election be held. None of the unsuccessful candidates were petitioners. A trial of that Petition has now been held and the issues come down to these: Were there 36 or more invalid votes cast in the election? If there were, must the election be declared void? The contested votes were all ones cast by the system of proxy voting established by the *Elections Act*.

3 It should be noted at the outset that neither in the Petition nor in the evidence at trial was there any allegation or suggestion of illegal or corrupt activities by any candidate in the election. Nor was there any suggestion of improprieties or negligence by any election official. The question of the validity of the contested votes rests solely on an analysis of the statutory requirements for a valid proxy vote.

History of These Proceedings:

4 One may well ask why it has taken so long to have this matter decided. Delay in the resolution of this dispute must be a great concern not only to the respondent Miltenberger, who has been carrying out his duties as the member of the Legislative Assembly for Thebacha, but also to all of the constituents of the Thebacha riding who are left with the uncertainty of not knowing whether Mr. Miltenberger will continue to be their member. This court has continually taken the position that there is a significant public interest aspect to these proceedings and therefore delays were to be avoided or at least minimized.

5 As noted above, the Petition was filed one month after the election. The *Elections Act* (the AAct@), in section 187(1), requires the Chief Electoral Officer=s consent to the bringing of a petition. This consent was granted on January 30, 1996. By this time, investigations into alleged election

irregularities had been commenced by the R.C.M.P. and by the Chief Electoral Officer (AC.E.O.@). These investigations continued until May 15, 1996, when it was announced that the R.C.M.P. had decided not to commence any criminal prosecutions and the C.E.O. had decided not to initiate any prosecutions for infractions of the Act. On July 5, 1996, the C.E.O. was granted intervenor status in these proceedings.

6 The C.E.O. has taken no position with respect to the outcome of these proceedings. The intervention is brought so as to put forward information that the C.E.O. considers relevant to the issues. In addition, the C.E.O. participated in these proceedings so as to advance arguments that he feels are fundamental to the principles of the electoral process and necessary to any consideration of whether the election should be declared void.

7 Because of the police investigation, the election documents were not delivered to the clerk of this court until July. It was therefore only after July that counsel for the petitioners and the respondent Miltenberger were able to access those documents for purposes of preparation for the trial. It should be noted that Mr. Miltenberger is the sole respondent to the Petition. The Returning Officer for Thebacha was named as a respondent purely as a formality and no liability attaches to that respondent.

8 The lead-up to the trial was made easier by a series of case management conferences between myself and counsel for all parties. Numerous procedural and evidentiary issues were resolved by means of these conferences so as to simplify and shorten the actual trial as much as possible.

9 The trial was held in Fort Smith in three sessions totalling 10 days. I heard from 49 witnesses and received into evidence several boxes of documents as exhibits. I had the benefit of extensive oral and

written submissions from counsel. By the conclusion of the trial, 14 of the original 55 petitioners discontinued their involvement in these proceedings.

Issues:

10 The Petition seeks a declaration setting aside the election and directing that a new election be held. The petitioners originally raised issues relating to allegations about ineligible voters, problems with election documents, inaccuracies in the number of proxy ballots cast and counted, the casting of ballots by proxy voters who knew or ought to have known that the electors for whom they were acting were ineligible to vote, mistakes with respect to the use of proxy documents by an election official, and allegations as to improper activities by one of the candidate=s campaign workers at the polling station. By the conclusion of the trial, all of these points were abandoned by the petitioners.

11 During the trial an issue arose as to the use of faxed proxy forms. This became a non-issue in light of evidence that on election day the C.E.O. expressly authorized the use of faxed proxies due to inclement weather conditions in parts of the Territories. While there may be debate as to the proper interpretation of what is meant by a faxed proxy form, the mere fact that some forms were faxed is not material to the outcome of this case.

12 The evidence at trial centered on the practice of proxy voting. The validity of 56 proxy votes was questioned. By the end of the trial, the petitioners took the position that 43 of these proxy votes should be declared invalid. The respondent Miltenberger says that at most 14 proxy votes may be invalid. The C.E.O. took no position as to the validity of any particular proxy but confined his submissions to the principles and interpretations that this court should apply.

13 As noted earlier the issues come down to these impugned proxy votes. First, what are the requirements for a valid proxy vote? The petitioners and the C.E.O. suggest a far more extensive list of requirements than does the respondent. This question requires an investigation into the intent of the legislation. Second, are any of these proxy votes invalid based on the evidence heard at the trial? Third, what is the result if I invalidate 36 or more of these votes? The petitioners and the C.E.O. argue that, since the margin of victory was 36 votes, the election must be declared void. This argument is premised on an interpretation of the principle of voting secrecy. The respondent, however, argues that this principle does not preclude my ability to draw inferences from the evidence as to whether any such invalid votes might have affected the final result. This last issue has significant implications because, to put it bluntly, the evidence revealed that the people directly involved with most of the questionable votes were in some way connected not to the winning candidate but to the candidate who finished second.

Grounds to Set Aside an Election:

14 One of the basic preliminary questions that must be addressed is: On what grounds may a court declare an election void?

15 The *Elections Act* sets out the right to bring a petition in s.187:

> 187. (1) Where the Chief Electoral Officer considers that it is in the public interest that a petition be brought, a candidate at an election or an elector may bring a petition before the Supreme Court to contest
>
> (a) the validity of an election in an electoral district;
> (b) the validity of the election of a candidate;
> (c) the right of a person to sit in the Legislative Assembly as a member; or
> (d) whether a person is guilty of an offence that is a corrupt or illegal practice.

16 There are a number of circumstances set out in s.194 of the Act that expressly stipulate when an election may be declared void: if the successful candidate is guilty of a Acorrupt or illegal practice@ as

those terms are defined in the Act (ss.1); if any person is guilty of a corrupt or illegal practice and its commission affected the result of the election (ss.3); and, if any act or omission of an election official affected the result (ss.5). It is conceded that none of the circumstances in s.194 apply in this case.

17 The Act also contains, in s.233, a curative proviso with respect to non-compliance and irregularities:

> 233. No election shall be declared invalid by reason of
> (a) non-compliance with this Act relating to
> (i) limitations of time, or
> (ii) the taking of the poll or the counting of the votes,
> (b) a lack of qualifications in the persons signing a nomination paper,
> (c) an error in the name, or omission of, or error in the address or occupation of any candidate as stated on a nomination paper received by a returning officer, or
> (d) an insufficiency in any posting or publication of a proclamation, notice or other document, or a mistake in the use of the forms contained in or approved under this Act,
> if it appears to the court that is considering the question that the election was conducted in accordance with this Act and that the non-compliance did not affect the result of the election.

18 The section is worded in a peculiar negative manner. The same or a similar provision can be found in all Canadian election statutes. It has its origins in an English statute of 1872. In construing a similar provision in the Alberta election statute, McGillivray C.J.A. wrote as follows in *Wright v Koziak*, [1981] 1 W.W.R. 449 (Alta. C.A.), at page 460:

> Some help as to the interpretation of this section may be gained from the decision of the English Court of Appeal in *Morgan v. Simpson*, [1975] Q.B. 151, [1974] 3 All E.R. 722. There, the section of the Act under review read as follows [p. 725]:
>
> ANo local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.@
>
> Lord Denning then said this at p. 725:
>
> AThat section is expressed in the *negative*. It says when an election is *not* to be declared invalid. The question of law in this case is whether it should be transformed into the *positive* so as to show when an election *is* to be declared invalid. So that it would run:-A local government election *shall* be declared invalid

> (by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules) if it appears to the tribunal having cognizance of the question that the election was *not* so conducted as to be substantially in accordance with the law as to elections *or* that the act or omission *did* affect the result=.
>
> AI think that the section should be transformed so as to read positively in the way I have stated.@
>
> I am of the view that similar reasoning is applicable to [the section in the *Alberta Election Act*]. This section will only save an election provided both conditions precedent are met:
>
> 1. There must be no breach of the principles; and
> 2. The court must be satisfied that the non-compliance, mistake or irregularity did not affect the result.

19 I have no difficulty with a reformulation of s.233 as suggested above. The question becomes, however, whether the casting of invalid proxy votes can be said to be the type of non-compliance or irregularity that is covered by the section. The implication of course is that other types of non-compliance or irregularity not covered by this saving provision must result in a declaration of invalidity.

20 Counsel for the petitioners suggested that the casting of an invalid proxy vote can be considered to be Aa mistake in the use of the forms contained in or approved under@ the Act (as stated in ss.(d) of s.233). The difficulty with that position is that the proxy form, prepared and distributed by the Returning Officer and used by every proxy voter, is not a form Acontained in@ the Act or Aapproved under@ the Act. Nowhere is the form currently used either authorized or mandated for use.

21 It may also be argued that the casting of invalid proxy votes is Anon-compliance@ with respect to Athe counting of the votes@ (as stated in ss.(a)(ii) of s.233). The difficulty with this argument is that the matters described in ss.(a) of s.233 are those relating to the conduct of election officials. There is no suggestion here that any election official did not comply with the provisions of the Act. The claim for a declaration of invalidity is based on the conduct of those electors who failed, either deliberately or inadvertently, to follow the requirements of the Act for a valid proxy vote.

22 Most of the cases that deal with curative sections such as s.233 involve non-compliance or irregularities committed by election officials. In many cases where the Anon-compliance@ is that of a purported elector, such as an ineligible person casting a vote, the curative section has been held not to apply. But in those cases the real concern is usually whether the election results have been affected. Other cases draw a distinction between irregularities or non-compliance of a non-substantive nature and the substantial omission of a mandatory requirement. It could be argued in this case that compliance with whatever the statutory requirements are for the creation of a valid proxy is a condition precedent to the entitlement to cast a proxy vote and therefore non-compliance is a substantive failure not saved by s.233. The case law in this area is distinctly unhelpful.

23 Counsel for the C.E.O. argues, however, that the grounds to set aside an election are to be found not just in the specific provisions of the Act but also in the common law. His argument is that s.187 of the Act entitles a petitioner to contest the validity of an election for any cause. Sections 194 and 233 are merely some of the particular grounds that may be invoked.

24 Counsel for the C.E.O. relies to a great extent on the case of *Lamb v. McLeod*, [1932] 3 W.W.R. 596 (Sask. C.A.), one of the leading Canadian cases on contested elections. There Turgeon J.A. noted that there are two distinct types of election petitions. One type is where the petitioner seeks to oust the candidate who has been declared elected and to have another candidate declared to be duly elected. In such a case both candidates accept the validity of the election and the only issue is who won. That is not the type of case before me.

25 The second type of petition is like this one. Here the petitioners are not asking that another candidate be declared elected. The petitioners are questioning the validity of the election itself so that the sought after result is the holding of a whole new election. Turgeon J.A. wrote (at page 598):

> In petitions of this kind the Court is not confined to a balancing of the relative rights and merits of two candidates. The inquiry may go beyond the candidates and strike at the election itself. As was remarked by Madden, J. In the *North Louth Case* (1911) 6 O.M. & H. 103, at 114, Aan election may be voided on two very different classes of cases, personal to the candidate or his agent, or affecting the constituency as a whole.@ The question then becomes (and in the present case it did become) *having regard to the rights of the electors:* Was a valid election held? The petitioner asserts the negative of this proposition, and the burden which he thereby assumes is that of showing that facts occurred at some step in the election proceedings which interfered in a substantial manner with the free choice of a member for the constituency by the majority of the electors, in accordance with the principles laid down in *The Saskatchewan Election Act*, R.S.S., 19830, ch.4. Now it is the clear intention of the law that the member for a constituency shall receive a majority, over his nearest opponent of the qualified votes cast at the election. If the facts disclosed make it impossible to determine that any candidate is in this position, no candidate can validly be declared elected, and the election is void. That it is the duty of the Court to investigate such questions, I have no doubt. . . Upon a petition of this sort the Court therefore has the power, and the duty, to ascertain whether the petitioner has shown the existence of circumstances which render the election invalid in the interest of the constituency as a whole. If so, the petitioner has proved his case and the election must be set aside, however unfortunate this result may be to the respondent, who may suffer from no personal disqualification and may have deserved no blame.

26 This extract highlights two points. The first is, as I stated before, that there is a significant public interest aspect to this type of proceeding. What is at stake is the right of the electors to be represented by the candidate selected by the will of those electors entitled to vote. The second is that it is the duty of the court to investigate any matter that may call into question the essential validity of the election.

27 One way of analyzing this question is by a review of the antecedents to the contested election provisions of the current Act. Historically, in Canada, an AElections Act@ provided for the manner of conducting an election. The mechanism for judicially challenging an election was a AControverted Elections Act@. As discussed by J.P. Boyer in his Elections Law in Canada (1987), at page 1056: AA

Controverted Elections Act is not so much concerned with punishing corrupt or unlawful election practices as it is with ensuring the propriety of the election itself.@ Mr. Boyer goes on to explain how the main ground recognized by AControverted Elections Acts@ is that of an Aundue election@. He writes (at page 1062):

> Another of the grounds upon which an election petition may be based is that of the undue election or undue return of a member. This complaint, along with allegations of unlawful or corrupt practices, are the two principal and most common grounds for an election petition.
>
> As to what constitutes an Aundue@ election or return, the generality of this expression allows for the inclusion of any type of wrongdoing or lack of legal capacity which can be said to have resulted in an election that was not valid. It is, in short, a catch-all category. Indeed, in electoral jurisdictions which have recently updated their controverted elections laws, the tendency has been to retain this general concept of Aundue election@ and delete the more specific references to grounds for a petition.

28 Today, as an example, the *Dominion Controverted Elections Act*, R.S.C. 1985, c. C-39, contains some specific provisions for voiding an election in the case of corrupt practices by a candidate. There is, however, no specific provision listing an Aundue election@ as a ground except by a reference in the definition of Apetition@:

> Apetition@ or Aelection petition@ means a petition complaining of an undue return or undue election of a member, of no return or a double return, of matters contained in a special return made or of any unlawful act by any candidate not returned by which he is alleged to have become disqualified to sit in the House of Commons;

29 In the Northwest Territories, the *Controverted Elections Ordinance*, R.O.N.W.T. 1974, c. C-14, contained no specific grounds to set aside an election. It merely stated in section 5:

> 5. Any person who was a duly qualified elector at an election may , at any time within thirty days after publication in the *Canada Gazette* of the name of a person declared elected as a member of the Council for an electoral district as such election, bring a petition against the election of such person.

This Ordinance was repealed in 1986 with the enactment of the current *Elections Act*.

30 Having regard to this history I conclude that the grounds for setting aside an election are to be found not just in the statute but also in the common law. The few specific provisions in the Act for invalidating an election cannot be considered an exhaustive code. This view accords with the presumption that statutes are not to be construed so as to make any alteration in the common law or to change any established principle of law except in so far as they clearly and unambiguously intend to do so: Halsbury=s Laws of England (4th ed., 1995), vol. 44(1), at para. 1438.

31 In the case of *Morgan v Simpson*, [1974] 3 All E.R. 722 (C.A.), quoted with approval in the extract from the *Wright v Koziak* case above (as well as in other Canadian cases), the English Court of Appeal discussed how the intention of Parliament, in enacting election statutes in the 19th century, was to apply to the statutory scheme the same principles for declaring elections invalid as those applied by the common law prior to the enactment of such statutes. Lord Denning summarized the law by stating it in three propositions (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.

32 This exposition of the governing law, taken as it was from a statute which embodied the common law principles, was adopted in its essential features in this jurisdiction in *Camsell v Rabesca*, [1987] N.W.T.R. 186 (S.C.), at page 198:

> So the rule, then, on a review of these authorities and subject to statutory modification, could be stated, in my view, as follows: that the vote should be vitiated only if it is shown that there were such irregularities that, on a balance of probabilities, the result of the election might have been different; and secondly, that the vote could not be said to have been a vote, that is, it was not conducted generally in accordance with electoral practice under existing statutes. . .

33 Putting the grounds for invalidating an election on these common law principles also comports in my view with the underlying fundamental principles of the electoral process. The Canadian Charter of Rights and Freedoms enshrines, in section 3, the right of every citizen to vote in federal and provincial/territorial elections. The exercise of that right by the citizenry leads to the election of the candidate who receives more votes than any other candidate. The common law=s emphasis on substantial compliance with appropriate electoral practice so that the true will of the people can be said to have been implemented accords with this right. This will is not to be defeated by mere technicalities. This is no different than saying, as does s.233 of the Act, that an election will not be invalidated, even if there are irregularities, so long as it appears that the election was conducted in accordance with the Act and the result was not affected by such irregularities.

34 Accordingly, the applicable test is the same whether the act complained of here – the casting of invalid proxy votes – can be said to be contained within the context of s.233 or is such that it falls into a general category of election irregularity or non-compliance. In this case the parties agree that the election in Thebacha was conducted substantially in accordance with the Act. The petitioners, however, claim that there were a number of invalid proxy votes and the result of the election was affected thereby.

Standard and Burden of Proof:

35 There are two related questions that also need to be addressed as preliminary issues: What is the standard of proof in contested election cases? And, which party carries the burden of proof? These questions may appear to be overly technical but the answers to them are critical when one comes to assess the evidence to determine what, if anything, has been proven.

36 With respect to the standard of proof, the parties agree that the applicable standard is the same as that applied in all civil cases, that being proof on a balance of probabilities. This accords with the conclusions reached in most of the case law: see, for example, *Storey v Zazelenchuk* (1984), 36 Sask. R. 103 (C.A.), at page 125.

37 The question of who carries the burden of proof is less straight forward. Many cases have held that, while the petitioners carry the initial burden to show that there have been irregularities, once they do then the burden shifts to the respondent, to the party seeking to uphold the validity of the election, to establish the saving provisions, that is to say, that the election was conducted in accordance with the statutory requirements and that the irregularities did not affect the result of the election.

38 I do not agree with this approach to the burden of proof. I prefer the approach taken by Marshall J. of this court in the previously mentioned *Camsell v Rabesca* case. That case dealt specifically with a challenge to a local plebiscite but the discussion of the applicable burden of proof is relevant generally to contested election cases. Marshall J. outlined the opposing views and concluded that the burden of proof does not shift but remains throughout on those seeking to set aside the election. He wrote (at pages 198 - 199):

> I turn again to the question of onus or burden of proof. The confusion in the cases, it seems to me, arises from the interpretation of the early statutes in which showing that the irregularity was innocuous was treated as a proviso. So the cases cast a burden on the petitioners to show an irregularity, and the cases held that this in itself would give rise to the petitioner=s right. Showing that the irregularity did not offset the result, it seems, was treated as a special fact, and the burden for this was placed on the party seeking to uphold the election. Later statutes and some of the cases recognized this, but others, especially those that followed the strong precedent in the *Hickey* case, did not.
>
> The problem with that allocation of onus, aside from the fact that it does not accord with the general rule as to onus or with the English and some of the Canadian authorities that I have cited, is that it will not lead to a proper result, I think, in some of the cases. As I have said, most elections will give rise to irregularities in the taking of the vote. In many instances of irregularities there may be no evidence on the issue, other than that the irregularity occurred. If the rule

> in *Hickey*, supra, were the law, such election would have had to be declared invalid, that is, if there was *no evidence* on the question of whether the result might have been affected by the irregularity or not, or indeed if the evidence on the point *were in balance*. That, as this case shows, I think, will not uncommonly be the case.
>
> On the other view, that is, following the decision in the *Morgan*, case, supra, and the other cases I cited, taking the view that the onus throughout is on the petitioners, the petitioners are asserting and should be required to prove not only that there were irregularities but that these irregularities might have affected the result. It should not be just a part of but the entire factual situation that must be shown, to give rise to the right in the petitioners: see *Vines v Djordjevitch* (1955), 91 C.L.R. 512 (Aus. H.C.). . .
>
> This view as to onus, it seems to me, as well comports with the general rule regarding the legal or persuasive burden of proof. The general rule is that he who asserts must prove: see *Woolmington v D.P.P.*, [1935] A.C. 462, 25 Cr. App. R. 72, [1935] All E.R. Rep. 1 (H.L.). The reason for the rule is grounded in plain common sense, that is, that he who would call another to account in the courts, with all the trouble and expense that that entails, should be able to make out a case. The rule discourages harassment in the courts and the improper use of the legal process by enemies, adversaries, busybodies, and others.

39 I conclude therefore that the burden of proof is on the petitioners throughout. They bear the onus of proving that there were invalid proxy votes cast and that the result of the election was affected thereby. The effect of this conclusion, of course, is that if, with respect to each contested proxy vote, the evidence fails to prove on a balance of probabilities that it was invalid, or the evidence is equivocal, then that vote must be considered valid.

Requirements for Proxy Voting:

40 To determine whether any particular proxy vote in this case was invalid, one must of course start with an analysis of the statutory requirements for proxy voting. There are however some interpretive rules that bear on this analysis.

41 Canadian jurisprudence has consistently held that the right to vote is so fundamental to a free and democratic society that a broad and liberal interpretation must be given to election statutes. This was emphasized by Cory J. in his judgment in *Haig v Canada* (1993), 105 D.L.R. (4th) 577 (S.C.C.), at page 614:

> The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound, it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley v Branchflower* (1884), 1 B.C.R. (Pt.II) 35 (S.C.). There Crease J. wrote at p.37:
>
> > The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with. . . *It looks to realities, not technicalities or mere formalities*, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute.
>
> (Emphasis added.) To the same effect in *Re Lincoln Election* (1876), 2 O.A.R. 316, Blake V.C. stated (at p.323):
>
> > The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise. . .
>
> It can be seen that enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely, restrictions on that right should be narrowly interpreted and strictly limited.

42 Therefore, the statutory requirements enabling one to vote are to be liberally interpreted while those restricting one=s ability to vote should be strictly interpreted.

43 The pertinent provisions of the *Elections Act* are sections 119 and 121:

> 119. (1) Where an elector whose name appears on the official list of electors for a polling division at an election has reason to believe that he or she will be unable to vote in the polling division on the days fixed for the advance poll and on polling day, the elector may obtain an application to authorize another elector whose name appears on an official list of electors for the same electoral district to vote on his or her behalf as a proxy voter.
>
> (2) An elector who requests an application under subsection (1) must complete the application and have the proxy voter of the elector sign the application to indicate that the elector consents to act as a proxy voter.
>
> . . .
>
> 121. (1) On polling day, an elector who has been authorized as a proxy voter under section 119 shall present the proxy application referred to in subsection 119(1) to the deputy returning officer at the polling station for the polling division in which the proxy voter is qualified to vote.
>
> (2) After presenting the proxy application, the proxy voter may vote at the election on behalf of the elector who completed the application unless the proxy voter is required to take an oath under subsection 102(2) before voting.
>
> (3) The poll clerk shall enter in the poll book opposite the name of the elector, in addition to any other required entry, the notation that the elector voted by proxy, the name of the proxy voter and attach the proxy application to the poll book.

> (4) An elector who votes as a proxy voter at an election is entitled to vote in his or her own right at the election.
> (5) An elector may vote as a proxy voter three times at an election.
> (6) Every person who appoints more than one proxy voter is guilty of an offence.

44 The Act, in s.119(1), refers to an elector obtaining Aan application to authorize@ another elector to vote on his or her behalf as a proxy voter. The arguments before me as to what are the requirements for a valid proxy vote centered on what is meant by Aauthorize@. Before discussing those arguments, I wish to set out the practice of proxy voting, as revealed by the evidence, because the practice bears little resemblance to what the statute says.

45 First of all, there is no Aapplication@. There is a form, devised and distributed by Elections NWT, entitled AAppointment, Consent and Oath of Proxy Voter@. Elections NWT is a division in the office of the Clerk of the Legislative Assembly, staffed and financed as part of the Assembly operations, responsible for the administration of territorial elections. General direction and authority over the conduct of elections, however, rests with the Chief Electoral Officer who, pursuant to an agreement authorized by the *Elections Act*, is the Chief Electoral Officer for Canada.

46 The form is very official looking, with the territorial crest in one corner and a number in the other corner. I was told that the forms are sequentially numbered so as to make it look Amore official@. Elections NWT printed 5,000 forms for the 1995 election but no record was kept as to how many were distributed. The form, however, is not one contained in the Act or any regulations, it was never published in the Territorial Gazette, so it has no legal status whatsoever. A blank copy of the form is reproduced as Schedule AA@ to these reasons.

47 Many proxy forms were sent out by Elections NWT as a result of people indicating during the enumeration that they may need a proxy (students and disabled persons for example). Section 120 of the Act imposes an obligation on the returning officer to inform disabled persons about the availability of proxies.

48 The Returning Officer for the Thebacha riding, Anne Jones, testified that she handed out a large number of blank proxy forms to candidates or candidates= representatives. She kept a diary in which she recorded the numbers of the forms given out and to whom. That record reveals a total of 207 forms given out of which 30 were identified as going to representatives of the respondent Miltenberger and 120 as going to representatives of Jeannie Marie-Jewell. Essentially anyone who asked for a form, or a bundle of forms, got it.

49 Section 119(1) says that an elector may obtain an application where he or she believes that they will not be able to vote either at the advance poll or on polling day. The form, it will be noted, does not require any statement verifying this belief or the reason for the need for a proxy. The form does set out the practice that each deputy returning officer was instructed to follow, that being the taking of an oath from the proxy voter. Nowhere in the Act, however, is an oath required or referred to with reference to proxy voting.

50 The Northwest Territories appears to be one of the few jurisdictions in Canada to still use proxy voting. Federal election practice was changed some time ago to a form of Aspecial@ ballot whereby those who could not vote at the polls mail in their ballot. In his report to the legislature on both the 1991 and 1995 territorial elections, the Chief Electoral Officer has recommended the elimination of proxy voting in favour of a similar type of Aspecial@ ballot procedure. He also recommended that, in the meantime, the procedures for proxy voting be tightened.

51 I note with interest that, in his report on the 1991 election, the C.E.O. reported on concerns about proxy solicitation in a number of ridings. He made the comment then that Ainterpretation of what constitutes soliciting is difficult as there is no definition in the Act@. The same issue arose in the trial before me. The C.E.O. also reported in 1991 that Adespite attempts to simplify the proxy application form, many voters continue to have difficulty understanding how to use this form and this type of voting@. This problem was evident throughout the evidence before me.

52 The 1995 election records for Thebacha reveal that, out of a total of 1,396 votes cast, 148 were proxy votes. This represents 10.6% of the total. I do not know whether this is inordinately high (although the C.E.O. reported as a point of comparison that in the 1993 federal election only 1.7% of the votes were cast using the special absentee ballot system). What this high percentage may be indicative of is the total lack, either in the statute or in practice, of any control or supervision over whether an elector truly requires a proxy due to inability to attend at the poll in person. Certainly the evidence I heard revealed that some of the people who signed proxy forms could have gone to the poll in person but either had no intention of doing so or could not be bothered to do so. They signed a proxy form simply when a campaign worker put one in front of them.

53 Before the current *Elections Act* came into existence, the *Elections Ordinance*, O.N.W.T. 1978, c.3 (3rd), contained a far more restrictive system of proxy voting. A proxy was available only to certain specified categories of electors and the returning officer was required to issue a proxy certificate only after examining the proxy appointment and consent form signed by both the elector and the proxy voter. The returning officer had to be satisfied of the elector=s entitlement to appoint a proxy voter and the other statutory criteria before issuing a proxy certificate. In jurisdictions that had similar proxy voting requirements, a proxy vote cast without first obtaining a proxy certificate was held to be an

invalid vote that could not be saved: *Rear v Joe*, [1993] Y.J. No. 42 (S.C.). Pursuant to the Ordinance, a person could act as a proxy voter for only one elector unlike the current Act which enables a person to act as a proxy voter for up to three electors. The legislative debates from 1986 reveal that the legislators felt these requirements were too restrictive hence the present system.

54 What is required for a valid proxy vote under the Act?

55 The practice contemplated by Elections NWT can be gleaned from a memorandum (Ex.47) mailed out with the blank proxy forms to those people who indicated their need for a proxy during the enumeration:

> Use the attached form (NWT 1070: Appointment, Consent and Oath of Proxy Voter) to appoint your proxy voter.
>
> Under the section entitled AAppointment@, you must write in your Name and Address, sign the form where it says AElector@ and have your signature witnessed by someone else. You also MUST name the person who is going to be your proxy voter, so you must also fill in the Name and Address under the section entitled AConsent of Proxy Voter@.
>
> Once you have filled in these two parts of the form, you should send it to the person who is going to be your Proxy Voter. That person will sign the declaration accepting his/her appointment as your proxy voter, and will have his or her signature witnessed.
>
> The Proxy Voter keeps the form and takes it to the polling station where he or she votes on October 16. The Deputy Returning Officer will ask the Proxy Voter to take the AOath of Proxy Voter@ and then will give a ballot to your proxy voter to mark on your behalf.

56 The requirement for the elector to name the person who will be the proxy voter, and to actually fill in the name on the form when the elector signs it, is also noted in The Returning Officer=s Manual (Ex.11) prepared by Elections NWT:

> The appointment and consent form - NWT 1070 must be properly filled in by the voter who is appointing the proxy voter. The voter who is appointing a proxy voter to vote on his/her behalf must write in the name and address of the person who is voting on his/her behalf, and both voters must sign the form before a witness.

It is not acceptable for a voter to fill in only his/her own name and not name the person he wants to cast his vote on his behalf.

57 There was no evidence that these requirements were communicated to the people who picked up blank proxy forms directly from the returning officer in Thebacha. Interestingly the returning officer, Ms. Jones, testified that this procedure was not followed even in her own son=s case. She said that her husband completed the AConsent of Proxy Voter@ portion of the form first and then faxed it to her son who then signed the AAppointment@ portion and then faxed the whole form back.

58 The parties are in agreement that, since the particular form has not been prescribed by legislation, the actual sequence in which the form is filled out is not the critical issue. The issue is what is meant by the term Aauthorize@ in s.119(1) where it states that Athe elector may obtain an application *to authorize* another elector. . .to vote on his or her behalf@.

59 The petitioners submit that the term Aauthorize@ implies more than merely filling in a name on the form. They say that the Act requires that the elector designate a specific person to be the proxy voter and that the elector instruct that proxy voter on how to vote. Counsel relies on the definition given to Aauthorize@ in Black=s Law Dictionary where it is defined, in part, as Ato empower, to give a right or authority to act. . .implying a direction to act.@ He submits that the appointment of a proxy voter creates an agency-type of relationship based on trust.

60 The C.E.O.=s position is similar to that of the petitioners. His counsel submits that one of the fundamental features of the right to vote is its inalienability. Each voter is given one vote, equal to all other votes. One cannot sell or give away one=s vote. Hence, the proxy vote, even though it is cast by a proxy, is still the vote of the elector. The proxy voter is merely the Avehicle@ for the exercise

of the elector=s right to vote. For these reasons, it is argued, there must be a direct designation of the proxy voter by the elector and the elector must specifically instruct the proxy voter on how to vote. In this scenario, the consent of the proxy voter can be regarded as the implicit agreement by the proxy voter to carry out the elector=s instructions.

61 The petitioners and the C.E.O. concur in the submission that an elector cannot delegate the designation of a proxy voter to another (in other words an elector cannot simply sign a blank form and let someone else choose who is to be named as the proxy voter), that there can be no implied authorization (by giving a signed form to someone in the expectation that it would be used in a certain way), and that an elector cannot appoint a proxy voter indirectly through a third party (by telling someone else who should be the proxy voter and how that person should vote).

62 The respondent Miltenberger submits that Aauthorize@ cannot be interpreted to mean Aauthorize to vote in a certain way@. To do so would require one to read an additional requirement into the Act. The only requirement is for the elector to authorize another elector to vote on his or her behalf. An additional instruction on how to vote is not only not necessary but meaningless because there is no way to control *how* the proxy voter votes or even *if* the proxy voter votes. If for some reason the proxy voter does not vote then the elector=s vote is not counted and, as the respondent=s counsel points out, it is not an offence not to vote. All that is required, in the respondent=s submission, is the designation of the proxy voter. That may be done directly or indirectly through some other person. It may even be a designation of any one of a known group of people (for example, a son or daughter may say to the parents that either the mother or father should act as the proxy voter).

63 There is very little assistance to be found in the case law on this issue. The one relevant case that was provided to me is that of *Arnold v Harris*, [1993] O.J. No. 91 (Gen. Div.), in which the court was asked to interpret s.67(2) of the *Ontario Municipal Elections Act*:

> (2) any person who is entitled to vote by proxy under subsection (1) may appoint in writing in the prescribed form as his voting proxy any other person who is eligible as an elector in the municipality.

64 The court considered whether an elector may delegate the choice of who is to be the proxy voter to some other person by signing the proxy form in blank. Morin J. held that, since the statute did not expressly provide for the right of delegation, the name of the proxy voter must be filled in at the time that the elector signs the form. The situation, however, is somewhat different in that the Ontario statute specifically prescribes the form to be used.

That form requires the proxy voter to sign a declaration as follows:

> AI, the undersigned, a qualified elector in the above municipality, affirm that I have been appointed to vote in good faith on behalf of the person named above who made the appointment and, that I have not been previously appointed a voting proxy for any other non-related person@. (underlining mine)

In my view this express declaration clearly contemplates that the appointment was made in writing by the elector, as required by the statute, when the elector signed the form.

65 I agree with all counsel that the form used to appoint the proxy voter and the sequence in which the form is filled out are not significant (because neither of these things are stipulated by legislation). What is required by s.119 is that (a) the appointment be in writing; (b) the appointment be of Aanother elector whose name appears on an official list of electors for the same electoral district@, hence it must be of a specific individual; and, (c) both the elector and the proxy voter sign the form. Because the form and the sequence of filling it out are not stipulated, it makes no difference if the elector signs the form before the proxy voter=s name is filled in so long as the elector clearly makes known somehow who that person is to be. The requirement for the elector to Acomplete@ the application, and to Ahave@ the proxy voter sign it, are requirements to have these done. They can be done directly by the elector or they can be done by someone else at the elector=s request. For example, a student in Edmonton could sign the form as the elector and then send it to the father with the request that the mother be the proxy voter. So long as the mother is the person whose name is filled in and signs the form then that is a good and sufficient authorization. For another example, the elector may be disabled so that someone else Acompletes@ the form at his or her instruction.

66 To require that the elector actually fill out the entire form or be present when the proxy voter signs the consent would seem to me to defeat one of the purposes of having proxy voting, that being to enable an absentee elector, such as a student who is residing elsewhere temporarily, to designate someone

in the riding to vote on their behalf. By its very nature proxy voting implies that the elector and the proxy voter are unlikely to be in the same place at the same time.

67 What the elector cannot do is sign the form in blank and leave it up to someone else to designate who will be the proxy voter. That is an improper delegation of the power to Aauthorize@ another elector to vote on their behalf. Section 119(1) clearly requires that the authorization be that of the elector.

68 The other requirement of s.119(1) is that the decision to appoint a proxy voter be the deliberate decision of the elector due to the elector=s belief that he or she will be unable to vote personally for some reason. It could be any reason but there must be a conscious belief to that effect on the part of the elector. The belief may be formed instantaneously and it may be formed on election day. But it would not be good enough to say, for example, AI do not intend to vote but I will sign a proxy form anyway@.

69 Is there a further requirement that the elector instruct the proxy voter how to vote? I have concluded that there is not and, on this point, I prefer the submissions made on behalf of the respondent.

70 I cannot imagine that the legislature intended to impose a requirement for instruction as a precondition to a valid proxy vote without also including either a requirement for some acknowledgment on the part of the proxy voter as to receipt of instructions or as to compliance with those instructions and some way to enforce it. There is, in the field of statutory interpretation, a presumption of straightforward expression: see R. Sullivan, Driedger on the Construction of Statutes (3rd ed., 1994), at page 158. If the legislature had intended to impose a requirement for express instructions it could very easily have done so in simple and comprehensible language.

71 The authorization of a proxy voter is to be presumed from the completed and signed proxy form. There is nothing that suggests to me the need for instructions as well. How are those instructions to be given, verbally or in writing? How can one know if the proxy voter follows those instructions? It would be impossible without violating the secrecy of the ballot.

72 The authorization is for the proxy voter to vote on the elector=s Abehalf@, to cast a vote, not to necessarily vote as the elector would have voted. The proxy voter, in the privacy of the ballot box, can vote the proxy any way he or she desires. There is no statutory enforcement power and no enforceable contract created as between the elector and the proxy voter. And, as respondent=s counsel pointed out, the proxy voter could decide not to vote at all and nothing could be done about that.

73 I agree that there is a certain degree of trust implicit when one asks another to vote as a proxy. The elector, I am sure, expects the proxy voter to vote a certain way. No doubt the choice of who is to act as the proxy voter is predicated to a great extent on the elector=s assumption that that particular person will vote a certain way. But those expectations and assumptions do not create a binding legal relationship. Nor are they recognized by the statute as prerequisites to a valid proxy vote. If they were, because of the secrecy of the ballot, one could never invalidate a proxy vote on the basis of failure to follow instructions on how to vote. It would be a meaningless requirement without enforceability or a remedy for its breach.

74 If the legislature wishes to ensure that an absentee elector=s vote is cast absolutely in the manner which the elector wants, there are ways to accomplish that. The legislature could adopt the mail-in Aspecial@ ballot procedure now used in federal elections (as recommended by the C.E.O.). Procedures could be created whereby, for example, the absentee elector places the ballot with his

or her vote marked thereon in a sealed envelope and then the sealed envelope is mailed or delivered to the returning officer. These are but examples. The point is that any number of procedures could be created to enable the absentee elector=s actual vote to be counted if that is the aim.

75 Under the present system of proxy voting, however, when one appoints a proxy voter then one=s vote is literally in the proxy voter=s hands. If it is then there is no point to imposing a requirement that the elector instruct the proxy voter on how to vote. An elector can do so, and may wish to do so, but proof of such instruction is not necessary for a proxy vote to be valid.

76 Furthermore, to impose a requirement that is neither referred to in the statute nor enforceable in any manner whatsoever seems to me to go against the spirit of broad and liberal interpretation of enfranchising statutes that the law requires me to apply.

77 I therefore conclude that the requirements for a valid proxy vote are (1) a bona fide intention by the elector to vote; (2) a belief by the elector that he or she will be unable to vote in person; (3) a designation by the elector of a specific individual to act as the proxy voter; and, (4) a completed form signed by both the elector and the proxy voter.

Evidence:

78 As I noted previously, the petitioners submit that 43 proxy votes should be declared invalid. The respondent submits that only 14 proxy votes may be invalid. By the nature of this case I am forced to recount in some detail the evidence with respect to each of these 43 proxies. I will do so in the order in which they were presented at the trial.

1. Proxy No. 2935:

79 The elector was Anthony Vermillion. He testified that on election day he had no intention of voting. He said he did not even know if he was on the voters= list. Late in the day on election day two people whom he recognized, Ernie Tourangeau and Linda Bourke, came to the house where he was staying and asked him if he wanted to vote by proxy. Mr. Tourangeau was identified by other evidence as a supporter of Jeannie Marie– Jewell. He was asked who he wanted to vote for and he gave the name of a preferred candidate. Mr. Vermillion testified that, to the best of his recollection, he just signed the form in blank and the others said they would fill the rest in. The proxy voter shown on the form is Betty Tourangeau (one of the original Petitioners in these proceedings). Mr. Vermillion, at trial, had no memory of Ms. Tourangeau=s name being on the form but it may have been. He did say that he was indifferent as to who actually cast his proxy vote.

80 The petitioners argue that this vote is invalid because there was no proper authorization by the elector of the proxy voter. The respondent submits that the petitioners failed to prove that this proxy is invalid. The submission is that to do so it was essential to call Ms. Tourangeau or the others to testify. None of them testified at the trial.

81 I have concluded that, based on the criteria for a valid proxy that I identified previously, proxy number 2935 is invalid. There was no bona fide intention to vote; there was no basis to think that the elector could not vote in person; and, there was no designation, at least not a deliberate voluntary one, of the proxy voter by the elector.

2. <u>Proxy No. 2904:</u>

82 The elector was Judy Bourke who testified that she intended to vote but, because she had no one to care for her small children, she could not go personally to the poll. So the first two criteria are satisfied.

83 Ms. Bourke testified that sometime during the week before election day she spoke to Jeannie Marie–Jewell and told her she may have difficulty going to vote. She expected someone to come around to her house on election day. That day, Victor Marie, Ms. Marie–Jewell's brother and campaign worker, and one of the original petitioners in this proceeding, came to her home with a proxy form. She read it and signed it. Ms. Bourke knew who she wanted to vote for and assumed, by giving the form to Mr. Marie, that it would be voted that way.

84 The designated proxy voter is Gordon Mercredi. Ms. Bourke knew who Mr. Mercredi was but she had no knowledge that he would be the proxy voter. She said, and I accept her evidence on this point, that the form was blank when she signed it. She testified that she left it up to Mr. Marie to make sure that her vote was voted although she did tell him who was her preferred candidate. She had no contact with Mr. Mercredi. There was no evidence as to how or when Mr. Mercredi signed the form although his signature is dated the same day (election day) and witnessed by Jeannie Marie–Jewell.

85 I have concluded that this proxy is invalid. There was no direct designation by the elector of the proxy voter. Therefore, there was no valid authorization.

3. <u>Proxy No. 2928:</u>

86 The elector, Paul Clarke, testified that he intended to vote but was extremely busy at work. In the evening, three people (including Ernie Tourangeau) came to see him to encourage him to go vote.

When he said he was too busy they provided him with a proxy form. He signed it. The name of the proxy voter (Betty Tourangeau) was not filled in on the form when he signed it.

87 Mr. Clarke testified that when he asked Mr. Tourangeau who would be the actual proxy voter, he was told there were people in place to do that for him. Mr. Clarke agreed because he knew they represented Jeannie Marie–Jewell and that was the candidate whom he supported. He had no communication with Betty Tourangeau and he did not know she would be the proxy voter.

88 I have concluded that this proxy is invalid due to a failure on the part of the elector to designate his proxy voter. Leaving that choice up to others is not a valid authorization as contemplated by the legislation.

4. <u>Proxy No. 2900:</u>

89 The elector, Don Desjarlais, testified that in the evening of election day Ernie Tourangeau came to his home asking if he was going to vote. Mr. Desjarlais had no intention of going to the poll to vote because he was tired after work. He agreed, however, to sign a proxy form. He had no understanding as to how proxy voting worked and thought that it was just like casting a ballot.

90 Victor Marie brought the form for Mr. Desjarlais to sign. There was no mention of who would be the proxy voter and that information was blank when Mr. Desjarlais signed the form. As it turned out, the proxy voter was Gordon Mercredi. Again, on the form, his signature is witnessed by Jeannie Marie–Jewell. [It should be noted that there is no prohibition in the Act against a candidate being a witness to these signatures or even being a proxy voter.]

91 Mr. Desjarlais knew that Mr. Marie and Mr. Tourangeau were supporters of Ms. Marie–Jewell. He wanted his vote to go to her and he was confident it would. It made no difference to him who cast his vote.

92 Again, I have concluded that this proxy vote is invalid. There was no bona fide intention to vote; there was no bona fide reason why the elector could not vote in person; and there was no designation by the elector of his proxy voter.

5. <u>Proxy No. 2907:</u>

93 The elector, Alberta Vermillion, acknowledged that she did not understand what proxy voting was but agreed to sign a form when Regan Beaver came to her door and asked her. Ms. Vermillion told Regan Beaver that she wanted to vote for Jeannie Marie–Jewell. She said she was confident that Regan Beaver would do what she wanted. Ms. Vermillion did not know who was the proxy voter and made no inquiries. The eventual proxy voter, Susan McDonald, another one of the original petitioners herein and identified as a campaign worker for Ms. Marie–Jewell, was unknown to Ms. Vermillion.

94 I have concluded that this proxy vote is invalid due to the lack of designation by the elector of her proxy voter. There is no authorization as required by the Act.

95 There is a further reason to invalidate this proxy. Ms. Vermillion testified that she had no intention of voting. She also said that, when she agreed nevertheless to sign the form, she asked Regan Beaver who she should vote for and was told she should vote for Ms. Marie–Jewell. This is hardly the exercise of a voluntary, conscious decision to authorize a specific person to vote on her behalf.

6. <u>Proxy No. 2870:</u>

96 The elector, Louise Bourke, testified that she could not go to vote because she was babysitting her grandchildren. She wanted to vote. She told this to Ernie Tourangeau who obtained a proxy form for her. She signed the form but the name of the proxy voter was blank. She testified that she thought she was actually voting when she signed the form
(but she also told Mr. Tourangeau for whom she wanted to vote). She trusted Mr. Tourangeau (who is related to her) to do what had to be done to accomplish her wish. It did not matter to her how that was done.

97 The proxy voter eventually designated on the form was Nora Beaver. Ms. Beaver is one of the original petitioners herein and was identified as a campaign worker for Jeannie Marie–Jewell. There was no communication between Ms. Bourke and Ms. Beaver. Ms. Bourke had no knowledge that Ms. Beaver was to cast her proxy vote.

98 I have concluded that this proxy vote is invalid due to a lack of direct designation of the proxy voter by the elector.

7. <u>Proxy 2927:</u>

99 The elector, David Arbeau, testified that he had no intention of voting personally at any time. There was no evidence as to any reason why he could not, if he wanted to, go to vote in person on election day.

100 Mr. Arbeau testified that a few days before the election a co–worker, knowing that he had no plan to vote personally, came to him and asked him if he wanted to vote by proxy. He said, as

recorded in his own words in the transcript, ASure, why not.@ Mr. Arbeau testified that on election day another friend, Gerald Poitras, brought another form for him to sign. Mr. Arbeau did not know what happened to the first form. He further testified that he did not directly ask Mr. Poitras to vote for him but he assumed that was what Mr. Poitras was going to do. He expected as well that the vote would go to Ms. Marie–Jewell.

101 I have concluded that this proxy vote is invalid. While Mr. Arbeau may have consciously designated, first, the co–worker who came to him with a proxy form initially and, second, Mr. Poitras who came to him on election day, as his proxies, the evidence is clear that he had no intention whatsoever of voting and did not qualify under the statutory prerequisite for proxy voting. That prerequisite is, as stated in s.119(1) of the Act, that an elector Ahas reason to believe that he or she will be unable to vote@. The term Aunable@ does not mean the same thing as Aunwilling@, Auncaring@, or Auninterested@.

102 I do not wish to place blame for this directly on Mr. Arbeau or some of the other electors. It is clear to me that, even though s.119 is reproduced on the back of the proxy form, no one paid attention to it or took any effort to understand what it meant. Some effort should have been made by those arranging these proxies that they at least understood the prerequisites to their use.

8. Proxy No. 1878:

103 Armand Delorme testified that on election day he was taking care of some children so he could not go to vote personally. Ernie Tourangeau and Linda Bourke, both of whom he knew, brought a proxy form to his home. He did not understand it and thought that he was voting by signing the form. He acknowledged he could not read so he paid no attention to what parts of the form were filled in.

104 As it turned out, the designated proxy voter was Linda Bourke. Mr. Delorme testified at one point:

> Q So, you wanted these people to take your vote to the voting station, however that was done?
> A That was done. *(Transcript, Vol. I, pg.119)*

He also said he was confident his vote would be cast the way he wanted.

105 It seems to me that a strict approach would result in a disenfranchisement of Mr. Delorme. But, he was designating Athese people@, Ernie Tourangeau and Linda Bourke, to vote for him. Neither of these people were called to testify. Mr. Delorme was unsure what parts of the form were filled in when he signed it and what exactly he was told. Taking the liberal approach that I referred to earlier, and considering the fact that Ms. Bourke did in fact vote for him, I have concluded that the petitioners have failed to prove that this proxy vote is invalid. Hence I uphold the validity of this vote.

9. <u>Proxy No. 2926:</u>

106 The elector, Ms. Lorna Heron-Arbeau, is the wife of David Arbeau. She also signed two proxy forms as described above (see under AProxy No. 2927"). She could not recall if the name of the proxy voter had been filled in. As she testified, AI didn=t really look at it. I just signed it, and that was that.@ She did not know who actually was going to cast her vote but she was confident it would be cast for Ms. Marie-Jewell (the way she would have voted).

107 In this situation, as was the case with Mr. Arbeau, the significant evidence to me was Ms. Heron-Arbeau=s acknowledgment that she had no intention of voting. She decided to sign a proxy form simply because her husband was doing it. Hence, this vote is invalid due to failure to satisfy the statutory prerequisites.

10. <u>Proxy No. 2865:</u>

108 Reginald Evans testified that on election day he could not go to the polling station because of work obligations. He had intentions to vote and wanted to exercise his right to vote. So, on the morning of election day, he went to a breakfast organized by the Marie–Jewell campaign to arrange for a proxy vote. He signed the proxy form there. He testified he was Apretty sure@ that the proxy voter=s name, Gordon Masson, was already printed on the form when he signed it. He said Mr. Masson was there at the campaign breakfast when he was there.

109 Mr. Masson also testified. He knew Mr. Evans but did not have any communication with him. He could not recollect the sequence of events. He was given three proxies to vote by Marie–Jewell workers.

110 There was no direct communication as between the elector and the proxy voter but I am satisfied that the elector knew that someone else would cast his vote for him. Mr. Evans= evidence that Mr. Masson=s name was likely on the form when he signed it satisfies me that it is a valid authorization. At least I conclude that the petitioners have failed to prove invalidity. Hence I uphold the validity of this vote.

11. <u>Proxy No. 2898:</u>

111 The elector, George Gladue, could not go to the poll for legitimate reasons. A woman came to his home asking him if he was going to vote. She had with her a bundle of proxy forms. She asked him which candidate he wanted to vote for. When he responded she filled out the form for him and had him sign it. She explained proxy voting to him.

112 Mr. Gladue testified that the proxy voter=s name, Susan McDonald, was already filled in on the form or he thinks it was. He did not know the proxy voter and never talked to her.

113 Even though the elector may not have spoken to or even known the proxy voter, the evidence establishes that the system was explained to him and by that I can only conclude that he knew that the person named in the form would cast his vote for him. I have therefore concluded that this vote is valid.

12. <u>Proxy No. 2868:</u>

114 The elector, Brad Tuckey, intended to vote but had to go out of town on election day. So, he and his father went to the home of Jeannie Marie–Jewell to make arrangements for a proxy vote. Mr. Tuckey wanted to vote for Ms. Marie–Jewell and told her so.

115 Ms. Marie–Jewell produced a form which Mr. Tuckey signed with his father as the witness. The signature spaces for the elector and witness had been gone over with white–out (obviously because something had been written in them already) and they signed over the white–out. There is nothing in the Act to prevent this re–use of the form. In any event there are no controls over the form (notwithstanding the official sequential numbers in the corner).

116 Mr. Tuckey testified that the proxy=s name, Gordon Masson, was not filled in on the form. He did not know Mr. Masson. He said that he did not know who would cast his vote for him and it did not matter.

117 Mr. Masson testified that he knew Mr. Tuckey only by sight. He never talked to him. He was given this proxy form along with two others by a worker at Jeannie Marie–Jewell=s campaign headquarters and asked to vote them.

118 I have concluded that this is an invalid proxy vote. There was no designation of the proxy voter by the elector. Leaving it up to someone else to designate the proxy voter is an unauthorized delegation by the elector.

13. <u>Proxy No. 2862:</u>

119 This proxy form was signed by Helen Daniels as elector and by the candidate, Jeannie Marie–Jewell, as the proxy voter. It was voted by Ms. Marie–Jewell. As I noted before, there is no restriction in the Act on candidates acting as proxy voters.

120 Ms. Daniels testified that she voted by proxy because she was sick. Her aunt brought her a proxy form to sign. She was not sure if the proxy voter=s name was already filled in. She wanted her vote to go to Ms. Marie–Jewell and left it up to her aunt to carry out her wishes.

121 The respondent submits that the petitioners have failed to meet the burden of proving the invalidity of this proxy vote. I agree. Neither the aunt nor Ms. Marie–Jewell were called as witnesses. The vote was intended to go to Ms. Marie–Jewell and the evidence has failed to satisfy me that Ms. Marie–Jewell=s name was not filled in on the form when it was signed by Ms. Daniels. Therefore this vote is valid.

14. <u>Proxy No. 2897:</u>

122 Sarah Boulet testified that she could not go to vote because she had to care for her children. On election day someone phoned to see if she was going to vote or needed a ride. When she told them she could not go they offered to bring a proxy form for her to sign. Matthew Fraser, the proxy voter on the form, arrived. She signed the form. The form was blank except perhaps for her name. She did not expressly ask Mr. Fraser to vote for her and she did not tell him who to vote for. Mr. Fraser testified but he could not recall the details surrounding the execution of this form. Mr. Fraser was a campaign worker for Ms. Marie–Jewell and is one of the original petitioners in these proceedings.

123 The petitioners submit that this proxy vote is invalid because there was no express authorization by Ms. Boulet for Mr. Fraser to be her proxy. I do not view the evidence that way. During her testimony Ms. Boulet and counsel for the C.E.O. had the following exchange:

> Q So as a result of those telephone calls, did someone come to your house with a form for you to sign?
> A Yes.
> Q Who was that?
> A Matthew Fraser.
> Q Was that person known to you at the time?
> A Yes.
> Q What did you do when he came to your house?
> A He just asked me to sign the form, and he would take it down and put my vote in for me. *(Transcript, Vol. 2, pg. 180)*

124 This shows me that Ms. Boulet knew what she was signing and knew that Mr. Fraser would be her proxy. I do not think anything more is required to make this a valid vote. By signing she authorized Mr. Fraser to vote for her.

15. <u>Proxy No. 2913:</u>

125 The elector, Lester Dempsey, is an invalid. When he signed the proxy form the proxy voter=s name, Matthew Fraser, was already written in. He was satisfied that Mr. Fraser would vote the way he wanted him to.

126 The petitioners= only argument for invalidating this proxy is that Mr. Dempsey gave no direct instructions to Mr. Fraser on how to vote. I have ruled that this is not a requirement of the legislation either expressly or impliedly. Therefore this proxy vote is valid.

16. <u>Proxy No. 1791:</u>

127 This form shows David Beamish as the elector and Shannon Coleman, one of the original petitioners herein and a campaign worker for Ms. Marie-Jewell, as the proxy voter.

128 Mr. Beamish was going to be out of town on election day. A week before the election he contacted one of the workers at Ms. Marie-Jewell=s campaign headquarters to sign a proxy form. He went to the headquarters and signed the form. He had no contact with Ms. Coleman and did not appoint her as his proxy. Mr. Beamish was satisfied that by signing the form he was effectively giving his vote to Ms. Marie-Jewell and he paid no attention to the question of who would cast his vote. Ms. Coleman testified that when she got the proxy form (and two others) the lower portion was blank.

129 I have concluded that this proxy vote is invalid. There was no designation of the proxy voter by the elector. Therefore there was no authorization as required by the legislation.

17. <u>Proxy No. 2781:</u>

130 Dwayne Gladue testified that he was out all night prior to election day playing cards so, on his way home in the morning, he went to Jeannie Marie-Jewell=s campaign office to sign a proxy form because otherwise, as he said, AI figured if I went home I wouldn=t vote@. I do not think this is the type of situation the legislators had in mind when they enacted s.119(1) of the Act. Nevertheless I will assume that Mr. Gladue had a bona fide intention to vote and a bona fide belief that he would be Aunable@ to vote personally.

131 At the campaign office he signed a form. Ms. Marie-Jewell witnessed his signature. He did not know who was going to cast his vote and he did not care. He wanted his vote cast for Ms. Marie-Jewell and assumed it would be done. The proxy voter, John Vogt, acknowledged in his testimony that he was

a supporter of Ms. Marie-Jewell; he received the signed proxy form from one of her workers at her campaign office with a request to vote it; and, he never spoke directly with Mr. Gladue.

132 In this case there was no designation of the proxy voter by the elector. There was no authorization as required by the Act. Therefore this proxy vote is invalid.

18. <u>Proxy No. 0524:</u>

133 The elector, Eileen Tourangeau, is also one of the original petitioners in these proceedings. She testified that, since she was going to be out of town on election day, she went to the Jeannie Marie-Jewell campaign office ahead of time to fill out a proxy vote. She went to that office because she wanted to commit her vote to that candidate. She filled in her name and address and signed the form. The name of the proxy voter was blank. She was told simply that Asomeone@ will take care of it for her. She did not communicate with the person who eventually cast the vote pursuant to this proxy.

134 This proxy vote is invalid due to the unauthorized delegation of the choice of proxy voter.

19. Proxy No. 2797:

135 The elector, Charles Bourque, testified that, since he was going to be out of town on election day, he went to the Jeannie Marie-Jewell campaign office on October 13, 1995, to sign a proxy form. Ms. Marie-Jewell filled out the form, he signed it, and she witnessed his signature. He could not recall if the name of the proxy voter was filled in but he gave no thought to it. His concern was not over who would cast his vote but that his vote was cast for Ms. Marie-Jewell.

136 The proxy voter, Shannon Coleman, who also voted proxy number 2791 discussed previously, testified that on election day, when she received the form from one of Ms. Marie-Jewell=s campaign workers, the name of the proxy voter was blank. She completed the form by filling in her name and address and signing it. She had no communication with Mr. Bourque.

137 I have concluded that this proxy vote is invalid due to the lack of a designation by the elector of his proxy voter.

20. Proxy No. 2785:

138 The only witness with respect to this proxy was Shannon Coleman. She was the designated proxy voter on this form as well. The elector is Donna Bourque. The form reveals that Ms. Bourque signed it on October 3, 1995. Ms. Coleman testified that she received this form, along with proxy forms 2791 and 2797, on election day from a campaign worker and she filled it in and signed it that day. Again she had no communication with the elector.

139 For the same reason as I outlined for the previous proxy, this proxy vote is also invalid.

21. Proxy Nos. 2853 & 2854:

140 The electors named on these proxies are Helen Daniels (not the same Helen Daniels as on proxy number 2862) and Hector Daniels. They did not testify. The sole witness was Gloria Villebrun who was named the proxy voter on both forms.

141 Ms. Villebrun is one of the original petitioners in these proceedings. During the election she was a campaign worker for Jeannie Marie–Jewell. She is also Ms. Marie–Jewell=s sister. Ms. Villebrun testified that she was given these proxies on election day. Everything had been filled in and all she had to do was sign them. She did not know who filled them out. She knew both electors but had no communication with them.

142 During Ms. Villebrun=s cross–examination by respondent=s counsel, the following exchange took place:

> Q And you don=t know whether these people, Mr. and Mrs. Daniels or Miss Abraham or Desiree Loutitt designated you as their proxy?
> A No.
> Q You just don=t know?
> A No.
> Q If the paper indicates that they had, would you agree?
> A Yes, I agree with that.
> Q You had no reason to believe that they hadn=t?
> A No, because I have been through two elections, and this is the way we did it before. Nobody ever explain anything clearly to our headquarters about any other way to do it.
>
> *(Transcript, Vol. 3, pg. 298)*

143 This witness was relying on past experience. She could not state that her appointment was not made on the express authorization of the electors. Does there have to be some direct communication between elector and proxy voter? I think not. All that is required is a designation by the elector. The electors in this case were not called to say whether they did or did not designate their proxy voter. To assume they did not is to engage in speculation and reverses the burden of proof. I must assume

the regularity of the appointment in the absence of evidence to the contrary. Therefore, I conclude that these proxy votes are valid.

22. <u>Proxy No. 2788:</u>

144 Gloria Villebrun is the proxy voter and her evidence with respect to the previous two proxies applies to this one as well. The elector, Sarah Abraham, however, also gave evidence.

145 Ms. Abraham testified that she did not know Ms. Villebrun. All she recollected clearly was that she told the person who brought her the form that she wanted to vote for Jeannie Marie-Jewell. She signed by making an AX@. Her signature was witnessed by Toni Heron, one of the petitioners herein and a Marie-Jewell campaign worker, but not a witness at this trial. It was clear that she did not understand what she was doing.

146 I have concluded that this proxy vote is invalid due to the lack of a conscious designation by the elector of her proxy voter.

23. <u>Proxy No. 2856:</u>

147 The elector, Doreen Villebrun, testified that she was sick on election day so she contacted Jeannie Marie-Jewell to see if she could vote by signing some forms. She contacted Ms. Marie-Jewell because that is who she wanted to vote for. Someone subsequently arrived at her home. She had no recollection of the details of events but she testified that she did not appoint the proxy voter, Jeanette Schaeffer, to vote on her behalf. She did not really know what she was doing. The witness to her signature was Gloria Villebrun.

148 This proxy vote is invalid due to a lack of a specific designation by the elector of her proxy voter.

24. <u>Proxy No. 2910:</u>

149 Peggy Simpson was the proxy voter for this vote. The elector was Michelle Workman. Ms. Workman did not testify. Ms. Simpson gave the only evidence with respect to this proxy form.

150 Ms. Simpson testified that she was a volunteer on the Marie-Jewell campaign. She was given this form by someone at the campaign headquarters on election day. She did not know the elector. The form lacks a date for the elector=s signature so there is no evidence as to when it was signed.

151 Respondent=s counsel argued that there was no proof that the elector did not designate the proxy voter. Therefore, the proxy should be held to be valid. I do not agree. The difference between this proxy vote and those, say, numbered 2853 and 2854, is that in those situations the proxy voter knew the electors. Here the only evidence is that the proxy voter did not know the elector. It is therefore a reasonable inference that the elector did not know the proxy voter. Accordingly it is also a reasonable probability that the elector did not authorize someone she did not even know to be her proxy voter. Hence I have concluded that this vote is invalid.

25. <u>Proxy No. 2829:</u>

152 The sole witness with respect to this proxy was Gordon Masson, the proxy voter, who has already been identified as a campaign worker for Jeannie Marie-Jewell.

153 The elector shown on this proxy is Valerie McKay, a person known to Mr. Masson. Mr. Masson received this form, along with two other forms, on election day at the Marie-Jewell campaign headquarters. He did not know how he came to be designated as the proxy voter.

154 The form shows that the elector signed it on October 14, 1995. The witness to the elector=s signature was Ms. Marie-Jewell. Neither Ms. Workman nor Ms. Marie-Jewell were called to testify. I find that the petitioners have failed to prove the invalidity of this vote. Therefore it is valid.

26. Proxy Nos. 4908 & 4913:

155 The proxy voter with respect to these forms was Laura Hval. The electors were her brother (4913) and her brother=s girlfriend (4908). Both of them were students living in Calgary at the time.

156 Ms. Hval testified that her father asked her to be the proxy for these two electors and conveyed to her their instructions how to vote. Her father, William Hval, was also a witness but he was not questioned on these points. Considering the family connection and the lack of contradictory evidence, I am satisfied that the electors designated Ms. Hval to be their proxy voter.

157 I previously stated that the requirement is for the elector to specifically designate his or her proxy voter. This could be effected through someone else and need not be by direct communication. I note, however, that there was no evidence to suggest that Ms. Hval=s name was not written in on these forms when the electors signed them. Accordingly these votes are valid.

27. Proxy Nos. 0513 & 0514:

158 The electors are Hans and Crystal Weidemann, both of whom were living out of town on election day. They did not testify. William Hval testified that he was contacted by Mr. Weidemann with a request that he be their proxy voter. Since Mr. Hval was also going to be out of town on election day he said he would arrange to have someone else be the proxy voter. The proxy voter, Michael Sinclair, testified that he received his instructions from Mr. Hval.

159 I have concluded that these proxy votes are invalid. The electors delegated the choice of proxy voter to a third party. This is not a proper authorization pursuant to the Act.

28. Proxy No. 2798:

160 The elector, Dave Rogers, was a student living out of town. Prior to election day he spoke to Jeannie Marie-Jewell requesting a proxy form. He signed it but did not fill in the name of the proxy voter. He sent it back to Ms. Marie-Jewell=s office. With respect to the appointment of a proxy voter, Mr. Rogers testified:

> Q. What was going to be done with that proxy?
> A If I recall, I was asked if there was anybody I wanted to cast my vote for me, any one person, and I answered there wasn=t and I couldn=t name a person that I would like to do it. And if I remember correctly, there was about six people were named by Jeanne Marie-Jewell and I accepted that any one of those six would be appropriate, I could accept any of those people casting my ballot for me.
>
> *(Transcript, Vol. 5, pg. 38)*

161 The proxy voter was Betty Marie, a campaign worker for Ms. Marie-Jewell. Mr. Rogers was content that she was the one who cast his vote.

162 This proxy vote is invalid. The elector delegated the choice of the specific proxy voter to another individual. This is not a valid authorization even though Mr. Rogers was content with it after the fact.

29. Proxy No. 281(?):

163 The number on this proxy form was incomplete because the form entered into evidence was a faxed copy of the original. The elector was James Morgan. He did not testify. Evidence was given by Denise Yuhas, the proxy voter.

164 The proxy voter did not know the elector. She received a phone call from him because she was an official agent for the respondent Miltenberger. In their conversation, according to Ms. Yuhas, the elector indicated that he expected she would cast his vote for him. It was after this that he was sent the proxy form.

165 The sole complaint by the petitioners here is the lack of evidence as to specific instructions from the elector to the proxy voter on how to vote (although one could safely speculate that such was implicit since the call was made to a specific candidate=s agent). In any event I have already ruled that such an instruction is unnecessary. This vote is valid.

30. Proxy No. 2833:

166 The elector, Jeannie Shae, was out of town on election day. She received a call from someone she knew asking if she wanted to vote. Another person brought the form to her and she signed it.

167 Ms. Shae could not recall if the proxy voter=s name, John Vogt, was on the form when she signed it. She did not know Mr. Vogt and she did not consciously appoint him as her proxy voter. She knew she was giving away her vote for someone else to use yet she gave no thought as to who would cast her vote or for whom. Mr. Vogt testified that he was given this proxy form, along with two others, on the morning of election day by someone at Jeannie Marie-Jewell=s campaign headquarters.

168 In this situation there was no conscious designation by the elector of her proxy voter. Therefore I find that this vote is invalid.

31. Proxy No. 2784:

169 The elector, Jerry Cheezie, was not called as a witness. The only evidence came from the proxy voter, John Vogt. Mr. Vogt testified that this was one of three forms he was given at the Marie-Jewell campaign headquarters. He had no communication with Mr. Cheezie but he knew him.

170 I find that the petitioners have failed to meet the burden of proving that the elector did not specifically authorize Mr. Vogt to be his proxy voter. I therefore hold that this proxy vote is valid.

32. Proxy Nos. 2832, 2848 & 2861:

171 The proxy voter for these three votes was Jason Lepine, a volunteer on Jeannie Marie-Jewell=s campaign and one of the original petitioners in these proceedings. He testified that in all cases, while he did not speak directly with the electors, the proxy forms went out to be signed after his name was filled in as the proxy voter. At most, he was uncertain about that. Only one elector testified and he could not recall if the proxy voter=s name was already filled in when he signed the form.

172 In my opinion, the absence of other evidence leaves the question of when, or if, the electors authorized Mr. Lepine to be the proxy voter in an equivocal position. The petitioners failed to meet the burden of proof. Therefore these proxy votes are valid.

33. Proxy No. 2831:

173 The elector, Colin Moore, was out of town on election day. He received a telephone call from a woman who was a supporter of Jeannie Marie–Jewell (his preferred candidate). A proxy form was

faxed to him and he signed it. The name of the proxy voter was not filled in. Mr. Moore gave no thought as to who would cast the vote for him. The proxy voter was Joseph Paulette. Mr. Moore had no communication with Mr. Paulette. Mr. Paulette testified that he was asked to vote this proxy by Ms. Marie–Jewell.

174 I have concluded that this proxy vote is invalid. There was no designation of the proxy voter by the elector.

34. Proxy No. 2883:

175 Matthew Fraser testified that he was given this proxy form, along with two others, by someone at Jeannie Marie–Jewell=s campaign headquarters on election day. He cast votes with them. Ms. Marie–Jewell was the witness to his signature on the form. Mr. Fraser did not know who filled in his name on the form. The elector, David Brown, did not testify.

176 This proxy vote is valid. The petitioners have failed to prove that Mr. Brown did not appoint Mr. Fraser.

35. Proxy Nos. 2849 & 2859:

177 The proxy voter, John Tourangeau, testified that he cast these two proxy votes but could not on his own recall the names of the electors (Uma Viswalingham and Vinod Viswalingham). He was a campaign worker for Jeannie Marie-Jewelll and he received these forms at her campaign headquarters on election day. The electors were not called to testify. Mr. Tourangeau said he knew who the electors are.

178 These proxy votes are valid. The petitioners failed to satisfy the burden of proof.

36. Proxy Nos. 501 & 521:

179 The proxy voter, Betty Marie, was the sole witness with regard to these two proxies. She was a campaign worker for Jeannie Marie-Jewelll. She voted three proxies (see above under proxy number 2798).

180 With respect to proxy number 521, Ms. Marie wrote in her name and address on the form. On both forms, however, the signature and date blocks for the AConsent of Proxy Voter@ are blank. Section 119(2) of the Act expressly requires the proxy voter to sign the form indicating her consent to act as the proxy. These proxy votes are therefore invalid.

Result of Analysis of Evidence:

181 Of the 43 contested proxy votes, I have found 24 to be invalid and 19 to be valid. Since the margin of victory was 36 votes, the invalid votes do not affect the result of the election. Thus the Petition is dismissed.

Affect on Result of the Election:

182 While my findings as to how many proxy votes are invalid effectively disposes of this Petition, I feel compelled to comment on the further submissions respecting how I should treat the evidence. I do this recognizing that my comments are strictly *obiter*. But, extensive submissions were made by counsel on this point and I think the issue is sufficiently important so as to warrant this further commentary.

183 Earlier in these reasons I pointed out that one of the key questions, should I conclude that there were more than 36 invalid proxy votes, was whether I could, relying on the evidence presented to me, draw any inferences or come to any conclusions as to for whom those votes would likely have been cast. After all, one of the basic propositions of law advanced by Lord Denning in the *Morgan v Simpson* case, quoted previously, was that, even though, as here, the election was conducted substantially in accordance with the applicable law, the election must still be vitiated if the non-compliance or irregularity complained of affected the result of the election. Or, as put by s.233 of the *Elections Act*, Ano election shall be declared invalid...if it appears to the court...that the election was conducted in accordance with this Act and that the non-compliance did not affect the result of the election.@

184 The Chief Electoral Officer, in a submission joined by the petitioners, advocated strongly in favour of what I will term an Aabsolutist@ approach. Because of the principle of the secrecy of the ballot, and because one cannot be compelled to disclose for whom he or she voted, the court cannot and should not draw inferences as to the specific candidate for whom the various invalid proxy votes were cast. The C.E.O. submitted that the refusal of the courts to make such inferences is essential to the secrecy of the vote. The Act specifies, in s.106, that the vote is secret and, in ss.235(2), that the evidence of anyone as to how he or she voted is not admissible in court. The C.E.O. argued that the Act therefore precludes me from making assumptions or drawing inferences as to how any ballot was cast. This holds whether the vote was cast personally by the elector or by a proxy voter. I call this position Aabsolutist@ because, if the number of invalid votes equals or is greater than the majority received by the winner, then, no matter what the evidence may tend to show, the election must be declared void. There is no room for flexibility. There must be a new election.

185 The C.E.O. has the weight of judicial authority behind him. Cases have consistently held that the law will not permit the secrecy of the ballot to be violated. Therefore, it is not necessary to show that the

invalid votes formed part of the successful candidate=s majority. If the invalid votes equal or exceed the winner=s majority, the court must declare the election void. Classic statements of this position can be found in the judgments of Isley C.J. (at page 320) and MacDonald J. (at page 351) of the Nova Scotia Supreme Court in *Blanchard v Cole*, [1950] 4 D.L.R. 316:

> . . . it would appear reasonable to hold that once the Court comes to the conclusion that votes were cast to a number equal to or greater than the majority claimed, by persons who had no right to cast them, it is the duty of the Court not only to declare the person having a minority of the properly marked ballots neither duly elected nor duly returned, but being unable in such circumstances to declare the candidate having the majority of the properly marked ballots duly elected, to declare the election void.
>
> . . .
>
> There is abundant authority for a Court declaring an election void because of the casting of ballots by unqualified persons to an extent making it impossible to determine what candidate was elected and that it is not necessary (as indeed it is impossible under the law) for it to be shown that the illegal ballots formed part of the successful candidate=s majority . . .

186 The rationale behind this approach was explained by Nemetz C.J. and Fulton J. of the British Columbia Supreme Court in the unreported case of *Neale v Lee* (February 6, 1976), at pages 18 and 19 of the joint judgment:

> The basis upon which the courts have sometimes proceeded in such cases is that where the number of unqualified votes cast exceeds the margin, it must be assumed that all those votes so cast were cast in favour of the candidate declared to be elected; on this basis, since they must be subtracted from his total to determine the number of qualified votes cast for him, it follows that the candidate declared elected did not receive a true majority. . .
>
> Justice is of course a prime consideration, but no other ground was advanced, and there was no discussion of whether such an assumption, while just to the Petitioner, may not be unjust to the Respondent, or why it is in fact just to one and not unjust to the other. However, the assumption appears to have been accepted and followed in a number, but not all, of the cases, although in our view it would be preferable to rest the decision in such a case on the grounds relied on in *Lamb v McLeod*: That since it is not known how those unqualified votes were in fact divided, it cannot be said with certainty that the candidate declared elected did receive a majority of the votes cast by electors who were in fact qualified to vote.

187 This excerpt also points out an inherent contradiction in this approach. If there are invalid or illegal votes, they are in effect counted against the successful candidate. But that is a result that may not be supported by fact. It could lead to a gross injustice. The supporters of a candidate could engage in improper practices then, if that candidate lost the election, they could challenge the result on the basis of their own improper conduct. Then, if it was established that there were invalid votes cast (by reason of this improper conduct) and the number of such votes exceeded the winner=s majority, there would be a new election. The losing candidate would thereby get the benefit of improper conduct by his or her own supporters. This cannot be the law. For this reason I reject the absolutist approach asserted by the C.E.O. and the petitioners.

188 To fully explain my reasons, I must review certain rulings I made during the course of these proceedings.

189 Early in the trial I delivered a ruling on the scope of s.235(2) of the *Elections Act*:

> (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 in relation to an election.

190 This sub-section is an exception to the general rule set forth in s.235(1) of the Act:

> (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.

191 My ruling, explained in detail in my reasons for judgment released on October 23, 1996, was that evidence of Afor whom@ an elector voted was inadmissible. My ruling was based in part on a comparison between the English and French versions of ss.235(2), there being a discrepancy

between the two, and in part on an examination of the Act which led me to conclude that the target of the privilege was evidence as to *how* the vote was cast, not *if* the vote was cast.

192 This then led to some further evidentiary rulings. Objections were raised over questions about the fact that a person signed a proxy form, about evidence as to a witness=s preferred candidate, and about instructions delivered by or to another person. In all cases I ruled the questions to be proper. My reasons for doing so were because (a) an elector who authorized someone else to vote by way of a proxy was not the person who cast the vote; (b) the person who actually voted was the proxy voter and therefore the privilege to not divulge for whom that person voted belongs to that person; (c) the privilege extends only to the question of Afor whom@ the vote was cast; and, (d) there is no protection from other questions including those that may reveal a person=s preference in candidates or the fact that a person was an active supporter of a candidate.

193 These rulings then led to frequent exchanges between witnesses who were identified as supporters of Jeannie Marie-Jewell and counsel for the respondent Miltenberger. A typical example was the following exchange between counsel and John Vogt (who was the proxy voter for proxy numbers 2781, 2784 and 2833):

> Q And as you have testified, you yourself were a supporter of Jeannie Marie-Jewell?
> A Yes.
> Q You hoped that she would be reelected that year?
> A Well, at that point in time I don=t think anybody knew who was going to be elected.
> Q I realize that, but that wasn=t my question. Maybe it wasn=t clear.
> A I would say any supporter of one or the other candidates hope to have his candidate elected.
> Q Of course they would. You were a supporter of Jeannie Marie, so at the time it was your hope that she would be reelected?
> A You could say that, yes.
> Q And you were prepared to assist in any way you could?
> A Yes.

Q And you did things on that day designed to assist Jeannie Marie to get reelected?
A Yes.
Q And let me put this question to you. Am I correct that on the 16th of October you didn=t do anything that was inconsistent with your hope that Jeannie Marie would get reelected? Am I correct?
A I would say so.

(Transcript, Vol. 5, pages 128 - 129)

194 The last question prompted objections as can be imagined but I ruled then that it is unobjectionable. I have no reason to reconsider my ruling.

195 Respondent=s counsel provided me with numerous American authorities where evidence as to for whom illegal or invalid votes were cast was accepted so as to determine if the results of the election were affected by them. Those authorities also held that circumstantial evidence was admissible to show how a person voted. I need not review these authorities in detail because my conclusions can be based on Canadian principles and an analysis of the *Elections Act*.

196 Counsel for the C.E.O. emphasized the secrecy component of the right to vote. There is no question that it is an essential aspect of that right as explained by Cory J. in *Reference re Provincial Electoral Boundaries*, [1991] 5 W.W.R.1 (S.C.C.), at page 24:

> The right to vote is synonymous with democracy. It is the most basic prerequisite of our form of government. In a democratic society based upon the right of its citizens to vote, the right must have some real significance. In Canada it is accepted that, as a minimum, each citizen must have the right to vote, to cast that vote in private and to have that vote honestly counted and recorded.

197 The right to a Afair electoral process@ has been said to be an extension of the right to vote so that it does not become a hollow and empty right devoid of meaning or substance: see *Harvey v New Brunswick*, (1996), 137 D.L.R. (4th) 142 (S.C.C.), per LaForest J. at page 159.

198 In this case I heard evidence that convinces me that most of the invalid proxy votes were likely cast for Jeannie Marie-Jewell. Of the 24 proxy votes that I invalidated, there was evidence linking supporters of Ms. Marie-Jewell to 22 of them. These votes were either cast by supporters of Ms. Marie-Jewell as the proxy voters, or in some cases by individuals who were both a supporter and a petitioner in these proceedings, or were signed away by electors who admitted supporting Ms. Marie-Jewell. In all cases the evidence was very strong, albeit circumstantial, that the votes were likely cast for Ms. Marie-Jewell. Indeed I would find it incredible to think otherwise.

199 In these circumstances, if one considers the right to bring a petition to contest the validity of an election as part and parcel of a Afair electoral process@, part of the right to vote and to have that vote honestly counted and recorded, then one should be seriously concerned about the fairness of a system that allows a candidate=s supporters to engage in activities that result in invalid votes being cast and then to argue that one is precluded from looking behind those votes to determine if in fact the election result was or even could be affected by their actions. If that were the case in all situations, even in the face of overwhelming circumstantial evidence to suggest that the election result was not affected, then we have created a very easy method for the minority to set aside close election results. That is why I cannot accept the absolutist approach. There must be a more flexible approach dependant on the circumstances.

200 Another reason specific to this case is that I am not sure what interests we would be protecting by prohibiting all inferences as to where each vote went. I refer specifically to several instances where the evidence revealed that electors simply gave their vote away having no intention of voting personally. A relatively benign example is the following extract from the evidence of one elector (who shall remain nameless for this purpose):

THE COURT: . . . I understood you to say it didn=t matter to you who cast your vote.

A Hmm hmm.
Q Is that right?
A Yeah.
Q Did it matter to you for whom your vote was cast?
A At that time I didn=t know who was running for the MLA. Like I knew from the woman phoning that it was Jeannie Marie.
Q She was the only candidate you knew of?
A Yeah.
Q Did it matter to you for whom your vote was cast?
A No.
Q So you just gave your vote away?
A Yeah.
Q Why would you do that?
A I don=t really like to vote for people, I would rather just mind my own business.
Q But somebody phones you up and asks you to give your vote away and you did that?
A Yeah.

(Transcript, Vol. 5, pages 191 - 192)

201 One of the great attributes of democracy is that a person may choose for whom to vote but may also choose not to vote at all. If a person decides not to vote, but then signs away his or her vote simply because someone is opportunistic enough to ask for it, I fail to see what principle we are protecting by not drawing inferences. The sanctity of the ballot box can hardly matter to someone who does not even care how his or her vote is cast.

202 This excerpt also brings to light some of the recurring problems with the present form of proxy voting: conduct that could possibly be considered to be Asoliciting@ of proxies, lack of knowledge as to how the electoral process works, and lack of awareness of the statutory requirements for a valid proxy (both by the person giving the proxy and the person asking for it).

203 Finally, I refer to the specific wording of s.233 of the Act. That section uses the phrase Aif it *appears* to the court. . .that the non-compliance did not affect the result of the election@.

204 The use of the term Aappears@ leads in itself to certain inferences. First, historically, the term suggests the Aopinion@ of the decision-maker, not necessarily the objective Afact@. The reference Aif it appears to the courtA means that it is the court=s opinion that matters, i.e., the court=s opinion as to whether the non-compliance affected the result, not that in fact it is proven that the results were affected. For references as to this usage of Aappears@, one may consult Stroud=s Judicial Dictionary (5th ed., 1986); *Robinson v Sunderland*, [1899] 1 Q.B. 751 (at page 757); and, *St. James=s Hall Company v London County Council*, [1901] 2 K.B. 250 (at page 255).

205 I note that in some of the cases presented to me, one example being *Pollard v Patterson*, [1975] 2 W.W.R. 211 (Man. Q.B.), aff=d [1976] 3 W.W.R. 270 (C.A.), the equivalent statutory provision used the phrase Aif it is *shown*, to the satisfaction of the tribunal. . .@ This phrase implies a greater degree of proof as opposed to the use of the term Aappears@.

206 Based on all the evidence I heard, it certainly Aappears@ to me that the election results in Thebacha riding would not have been affected by the invalid proxy votes concluding as I did that most of the questioned proxy votes would have likely gone to the losing candidate. I have arrived at this conclusion because of the overwhelming circumstantial evidence on the point. This is not to say that the cases relied on by the C.E.O. were wrongly decided, but, in almost if not all of them (cases such as *Lamb v McLeod, Blanchard v Cole, Neale v Lee,* and others referred to in argument), there was no evidence that could lead the court to draw an inference. Here there was extensive evidence on which I can base my conclusion.

207 I am also not saying that there is any justification in violating the secrecy of the ballot. No one knows exactly how each voter cast his or her vote, including the proxy votes, and they should not be

compelled to reveal that information. They were not compelled to do so in this case. It was only the combined effect of all of the evidence I heard that permits me to safely draw the conclusion I do. It is certainly apparent to me, as well, that the same conclusion would also be drawn by the citizens of the Thebacha riding.

Conclusion:

208 The Petition is dismissed. The election is upheld.

209 In closing I wish to thank all counsel for their excellent work. Fortunately, in Canada, these types of proceedings are relatively rare. That is due to the professionalism with which modern elections are conducted and the seriousness with which Canadians treat the electoral process. Unfortunately for this case, however, this meant that what precedents were available to us dated from many decades ago when elections were far more volatile and boisterous affairs. Counsel were of great assistance to me in what was an unusual case.

210 There are some matters that still need to be resolved. Two of them are the question of costs and the disposition of exhibits. I will therefore entertain submissions on these and any other remaining matters, on notice, in chambers.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 27th day of March, 1997

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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

Reasons for Judgment of the

Honourable Justice J. Z. Vertes