

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, FRED 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

MEMORANDUM OF JUDGMENT

[1] The respondent Miltenberger seeks costs on a solicitor-and-client scale. The intervenor Chief Electoral Officer (“C.E.O.”) is prepared to pay costs on a party-and-party basis. The petitioners seek to avoid any costs award being made against them and also seek some costs from the C.E.O.

[2] Most of the cases presented to me reveal facts and circumstances peculiar to each case. Hence there is little guidance from precedent other than to say that costs are in the discretion of the court. That discretion is to be exercised judiciously and judicially. With respect to solicitor-and-client costs, however, I believe the guiding principle, absent special considerations, is that enunciated in *Reform Party of Canada v Canada*, [1993]

3 W.W.R. 764 (Alta. Q.B.), affirmed at [1995] 10 W.W.R. 764 (Alta. C.A.), at page 173:

While the Court clearly has a discretion to award costs on a solicitor-client basis, such discretion is exercised on relatively rare occasions and most usually in cases where there has been misconduct on the part of one of the litigants. It is more common to find in the authorities the exercise of the Court's jurisdiction to award costs on a higher party-and-party scale in appropriate circumstances.

[3] In this case I have concluded that it would be inappropriate to award solicitor-and-client costs.

[4] These proceedings were not initiated by the C.E.O. nor were they prompted or caused by some "state" action or mistake. Thus this case differs from many of those presented to me. The proceedings were instituted by the private petitioners and the respondent had no alternative but to respond to the Petition. The C.E.O. could have stayed out of the proceedings but intervened so as to address issues of public interest. There was a legitimate public interest in determining that the election was a fair and valid one. There was also a public interest in obtaining judicial interpretation of some aspects of the legislation. So the C.E.O. was not brought into these proceedings because of something the C.E.O. did nor because of some position it took. It acted so as to bring forth information so as to enable the court to address issues of a significant public interest.

[5] Having said that, and recognizing that the C.E.O. took no position as to the outcome of the proceedings, once the C.E.O. intervened he became the litigant driving the proceedings. The trial focussed almost entirely on issues raised by the C.E.O. The C.E.O.'s counsel took positions on evidentiary and interpretative issues that arose during the course of the proceedings. And, while the relationship between the C.E.O. and the respondent could not accurately be described as "adversarial", the respondent was to a great extent responding to issues raised by the C.E.O. In fact, most of the issues raised originally by the petitioners had all but evaporated by the start of the trial.

[6] So, I consider it appropriate and reasonable that the C.E.O. bear the brunt of any costs award. I do not think it appropriate, however, to award solicitor-and-client costs since the C.E.O. was acting in the public interest. Certainly there is nothing to suggest misconduct. I think as well, however, that the petitioners should bear some costs since they initiated these proceedings and they chose to stay in and participate even after it

became apparent that the points they raised originally were without substance. I do not think it appropriate to award costs to the petitioners.

[7] Respondent's counsel argued that the "public" should bear the entire cost of his client's case since the person putting himself forward for election is acting in the service of the public and should not therefore be out of pocket. I think that is a fair point but it is countered by the observations that (a) a sizeable segment of the "public" thought enough to launch this Petition, rightly or wrongly, and so why should the public at large be made to pay, (b) the respondent must have been aware that there is a mechanism whereby his election could be challenged and therefore he, as any other candidate, may be drawn into court proceedings, and (c) it was not "public" action that prompted this litigation (unlike those cases where the state of the law is challenged or where some act of a state agent prompts a challenge).

[8] I have concluded that the respondent should receive party-and-party costs but on an increased scale. Some of the factors I have considered are the length of the proceedings, the complexity of some of the issues, the public interest aspect and importance of the issues, the number of documents and witnesses, and the extensiveness of the research required. I also think that an allowance for second counsel for the trial is reasonable. Further, I think it appropriate to divide responsibility for the respondent's costs: to the petitioners for the period from commencement of the Petition to the time when the proceedings were effectively taken over by the C.E.O. and to the C.E.O. thereafter.

[9] Rule 648(7) provides that where no monetary amount is in issue the scale of costs shall be based on Column 2. Since I have concluded that a higher scale is appropriate, the costs here shall be on the basis of double Column 5.

[10] I therefore order that the respondent shall recover, from the petitioners, his party-and-party costs on the basis of double Column 5 from the commencement of these proceedings until September 10, 1996. It was then that the issues raised by the C.E.O. became the intended focus of the trial. Therefore, I also order that the respondent recover from the C.E.O. his party-and-party costs on the basis of double Column 5 for all steps from September 10, 1996, to the conclusion of these proceedings, including the taxation of costs. The costs payable by the C.E.O. will include an allowance for second counsel at trial.

[11] I point out that I have disregarded the fact that the respondent has an agreement with the Legislative Assembly for a limited indemnification for his costs. It makes no

difference to my assessment of the issues in this matter. That is something strictly between the respondent and the Assembly.

[12] Dated this 18th day of August, 1997.

J. Z. Vertes
J.S.C.

To: R. A. Philp,
Counsel for the Petitioners

J. U. Bayly, QC,
Counsel for the Respondent Miltenberger

A. C. Wright,
Counsel for the Intervenor

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**MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J. Z. VERTES**
