Date: 2007 05 23
Docket: CV 20060000187

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Local Authorities Elections Act,* R.S.N.W.T. 1988, c. L-10, the *Education Act,* S.N.W.T. 1995, c.28 and the *Northwest Territories Act,* R.S.C. 1985, c. N-27, s. 16(n); and

IN THE MATTER OF a decision of Debbie Euchner, the returning officer for Yellowknife Public Denominational District Education Authority, that Amy Hacala and Debora Simpson, persons not of the Catholic faith nominated as candidates for election to the Board of Trustees of the Yellowknife Public Denominational District Education Authority, are eligible to stand as candidates for election to the Board of Trustees of Yellowknife Public Denominational District Education Authority at an election to be held on October 16, 2006.

BETWEEN:

YELLOWKNIFE PUBLIC DENOMINATIONAL DISTRICT EDUCATION AUTHORITY, AND KERN VON HAGEN

Applicants

-and-

DEBBIE EUCHNER, IN HER CAPACITY UNDER THE *LOCAL AUTHORITIES ELECTIONS ACT,* R.S.N.W.T. 1988, c. L-10 AS RETURNING OFFICER OF YELLOWKNIFE PUBLIC DENOMINATIONAL DISTRICT EDUCATION AUTHORITY

Respondent

Application for judicial review of a decision of a Returning Officer.

Heard at Yellowknife, NT: February 6-7, 2007
Reasons filed: May 23, 2007

REASONS FOR JUDGEMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

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Respondent

REASONS FOR JUDGMENT

[1] This is an application for judicial review of a decision of a returningofficer who supervised the election of trustees to a Yellowknifeschool board, and, in particular,the

returning officer's decision on the eligibility of two candidates to stand for election.In addition to the proper interpretation of certain provisions of the *Education Act* S.N.W.T. 1995, c.28 and the *Local Authorities Elections Act,* R.S.N.W.T. 1988, c.L-10, this application, as presented to the court, raises larger issues, e.g., whether the rights of minority Catholic and Protestant ratepayers to establish separate schools are constitutionally entrenched in the Northwest Territories, and whether s.16(n) of the *Northwest Territories Act,* R.S.C. 1985, c.N-27 is invalidfederal legislationcontrary to the *Canadian Bill of Rights* and the *Charter of Rights and Freedoms.*

[2] The school board in question is the Catholic school board, properly called "Yellowknife Public Denominational District Education Authority". The *Education Act* does not itself contain provisions governing the election of school board trustees but rather incorporates the provisions of the *Local Authorities Elections Act.* This latter act states in s.17 who is eligible to vote in an election for school board and in s.18 who is eligible to be a candidate for election to school boards. The eligibility criteria include age, citizenship and residency. There is no reference to the religious faith of the voter or the candidate. Section 99 of the *Education Act,* however, provides that only those residents of the education district who "have chosen to support" the Catholic school board may vote for the Catholic school board trustees. On this application the Applicants seek a declaration that any person who is not of the Catholic faith is not eligible to stand as a candidate for election to the Yellowknife Catholic school board.

[3] An election was held on October 16, 2006 for the election of trustees to the Catholic school board. Prior to the close of nominations, the Catholic school board and its superintendent Mr. Von Hagen became aware that two persons (one of whom was an incumbent trustee who are not of the Catholic faith) intendedto file nomination papers. These Applicants (the Catholic school board, and Mr. Von Hagen) wrote to the returning officer requesting that she disqualify the two persons from being candidates because they are not of the Catholic faith. The returning officer declinedto do so, stating that "being of the Catholic faith" is not an eligibility requirement in the statute. The nomination papers of the two individuals were accepted by the returning officer. One of the individuals was elected at the October 16, 2006 election.

[4] In seeking to have this Court declare that a candidate for election to the Catholic school board must be of the Catholic faith, the Applicants submit that the Court ought

to interpret the word "resident" in s.18 of the *Local Authorities Elections Act* as requiring residence both geographically and denominationally.

[5] Counsel for the Attorney General of the Northwest Territories respondedto this application on behalf of the returning officer. The Attorney General takes the position that the returning officer has properly interpreted the territorial legislation (the *Local Authorities Elections Act*, and the *Education Act)* and that the within applicationought to be dismissed.

[6] Because the Applicants' position on this application is founded in constitutional principles and indeed in the historical context of the Canadian constitution, it is necessary to review a number of constitutional documents including the *Constitution Act, 1867, the Rupert's Land and North-Western Territory Order* of June 23, 1870, *Alberta Act, Saskatchewan Act,* and *Constitution Act, 1982.*

[7] It is a well known aspect of the history of our country that certain education rights have been entrenched in the Constitution of Canada. At the time of Confederation in 1867 there was an historic compromise reached regarding education in Canada. It has been described as "a solemn pact resulting from the bargaining which made Confederation possible". *Reference Re Bill 30, an Act to Amend the Education Act (Ont.)* [1987] 1 S.C.R. 1149 at 1173. There was a concernat the time of Confederation about protecting the rights of religious minorities in relation to education, particularly that the rights of the Catholic minority in Canada West (Ontario) and the Protestant minority in Canada East (Quebec) be not left at the mercy of the large majority population in each of those provinces. While legislativeauthority for classes of subject-matter were divided between the Parliament of Canada and the provincial legislatures in s.91 and s.92 respectively, of the *Constitution Act*, 1867, special provision was made for education in s.93. In that section basic legislative power over education was granted to the provinces, subject to certain rights and privileges then enjoyed by the religious minorities in Ontario and Quebec.

[8] The wording of s.93 is important:

> s.93. In and for each Province the Legislature may exclusivelymake Laws in relation to Education, subject and according to the following Provisions: --

> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.
>
> (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec ... (emphasis added)

[9] At this juncture I pause to note that the Northwest Territories is not a province, has never been a province.

[10] The *Constitution Act,* 1867 was enacted by the Parliament of the United Kingdom in March 1867. At that time it was anticipated that there would be a subsequent request from the Parliament of Canada to admit Rupert's Land and the North-Western Territory into the Dominion being created. See s.146 of *Constitution Act,* 1867. It was also anticipated that upon Rupert's Land and the North-Western Territory being admitted into the Union or Dominion of Canada that a province (Manitoba) would be formed out of part of that territory.

[11] On June 23, 1870 the Privy Council, upon receiving an address from the Parliament of Canada, by the *Rupert's Land and North-Western Territory Order* admitted the North-Western Territory into the Dominion of Canada, effective July 15, 1870. The operative part of the Order stated, in part:

> It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory. (emphasis added)

[12] No fuller description of the legislative power granted to the Parliament of Canada was made in the Order — simply "to legislate for the future welfare and good government of the Territory".

[13] The Address of the Parliament of Canada referenced in the foregoing excerpt was appended as Schedule A to the *Rupert'sLand and North-WesternTerritory Order*. As the Applicants on this application point out, that Address included the following prayer:

> That the welfare of a sparse and widely-scattered population of British subjects of European origin, already inhabiting these remote and unorganized territories, would be materially enhanced by the formation therein of political institutions bearing analogy, as far as circumstances will admit, to those which exist in the several provinces of this Dominion.

[It is interesting that it was the welfare of "British subjects of European origin" which was of concern; no mention of the welfare of other immigrants who would arrive later, or of First Nations people who were already there.]

[14] I pause here to observe that neither the Order, nor the Address which preceded it, made any specific reference to the legislative power over education.

[15] The Parliament of Canada had authority to establish new provinces in any territories forming part of the Dominion of Canada, and to make provision for the constitution of any new province. See *Constitution Act*, 1871, s-2.

[16] By the *Manitoba Act*, 1870, Parliament created the province of Manitoba, and established, *inter alia*, a provincial legislature with legislative powers. Section 22 of the *Act* dealt specifically with legislative power with respect to the subject-matter of education:

> s.22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions: –
>
> (1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province of the Union: –
>
> (2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education ...

[17] Similarly, in 1905, the Parliament of Canada created the provinces of Alberta and Saskatchewan, respectively, from parts of the NorthwestTerritories. In each of the *Alberta Act* and the *Saskatchewan Act*, Parliament established, *inter alia*, a provincial legislature with legislative powers. In s. 17 of the *Alberta Act* (which is the constitution of that province) the province's legislative power in relation to education was confirmed, referencing the legislative power grantedto the four originalprovinces at Confederation in 1867:

> s.17(1). Section 93 of the *Constitution Act*, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph: –
>
> "(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances. " ...

[18] There is identical wording in s.17 of the *Saskatchewan Act*.

[19] The *Manitoba Act*, 1870, the *Alberta Act*, the *Saskatchewan Act*, and the *Rupert's Land and North-Western Territory Order* are all part of the Constitution of Canada. See. s52 of the *Canada Act* 1982. The first three documents contain specific references to legislative power in relation to education, the last mentioned document does not.

[20] Back in 1871, the Parliament of the United Kingdom confirmed the authorityof the Parliament of Canada to establish new provinces from within any territories forming part of the Dominion of Canada. See *Constitution Act*, 1871, at s.2:

> s.2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament. (emphasis added)

[21] As for the remaining part of any such territory, e.g. the Northwest Territories, the United Kingdom Parliament confirmed in s.4 of *Constitution Act*, 1871 what had

been stated by the Privy Council the previous year in the *Rupert's Land and North-Western Territory Order* regarding the legislative power of the Parliament of Canada:

> s.4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

[22] This latter provision is the source of authority for the Parliament of Canada to enact legislation for government in this jurisdiction. Parliament has done so, principally by the *Northwest Territories Act* and its many predecessor Acts. In the *Northwest Territories Act* and its predecessor Acts, Parliament, *inter alia*, established a legislative body and devolved to it a range of legislative powers similar to provincial legislative powers. The *Northwest Territories Act* could be described as the "constitution" of the Northwest Territories; however, it is not entrenched. It is a federal statute and is subject to amendment, repeal, etc. at any time by the Parliament of Canada.

[23] The various *Northwest Territories Acts* from 1875 to the present day have described the legislative body createdtherein by variousterms – Lieutenant-Governor in Council, Legislative Assembly, Council, Commissioner in Council, and has devolved to that body the authority to legislate enactments, termed ordinances, in relation to certain classes of subject-matter. From 1875 those subject-matters have included education. In the *North-West Territories Act*, S.C. 1875, ch. 49, it was provided:

> 11. When, and so soon as any system of taxation shall be adopted in any district or portion of the North-West Territories, the Lieutenant-Governor, by and with the consent of the Council or Assembly, as the case may be, shall pass all necessary ordinances in respect to education; but it shall therein be always provided, that a majority of the ratepayers of any district or portion of the North-West Territories or any lesser portion or sub-division thereof, by whatever name the same may be known, may establish such schools therein as they may think fit, and make the necessary assessment and collection of rates therefore; and <u>further, that the minority of the rate-payers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and that, in such later case, the rate-payersestablishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they may impose upon themselves in respect thereof.</u> (emphasisadded)

[24] In the current *Northwest Territories Act* R.S.C. 1985, ch. N-27, the legislative powers of the present legislative body are enumerated in s.16, and include the subject matter of education:

> s.16. The Commissioner in Council may, subject to this Act and any other Act of Parliament, make ordinances for the government of the Territories in relation to the following classes of subjects:
>
> ...
>
> (n) education in the Territories, subject to the conditions that any ordinance respecting education shall always provide that:
>
> > (i) a majority of the ratepayers of any district or portion of the Territories, or of any less portion or subdivision thereof, by whatevername it is known, may establish such schools therein as they think fit, and make the necessary assessment and collection rates therefore, and
> >
> > (ii) the minority of the ratepayers in the area referred to in sub-paragraph (i), whether Protestant or Roman Catholic, may establish separate schools therein, in which case the ratepayers establishing Protestant or Roman Catholic separate schools are liable only to assessments of such rates that they impose on themselves in respect thereof. (emphasis added)

[25] I reiterate here that any such education ordinance is subject to the *Northwest Territories Act* (a federal statute), to other federal statutes(such as the *CanadianBill of Rights*) and to the *Charter of Rights and Freedoms*.

[26] The legislative body created in the Northwest Territories, by varying nomenclature, over the years did indeed enact ordinances or statutes in relation to education – variously termed *School Ordinance, Education Ordinance,Education Act* – and did indeed provide in those enactments for the establishment of "separate schools".

[27] The *School Ordinance* in force from time to time between 1884 and 1887 provided that the ratepayers of the minoritydenomination faith (Catholicor Protestant) in a district could establish a separate school. Candidates for school trustee, and those

who voted for them, were to come from the same class of persons, i.e. ratepayersof the minority denominational faith.

[28] The Ordinances in force from time to time between 1887 and 1952 made no specific provision regarding eligibility to be a candidate for the separate school board, or to vote in such an election, other than a general provision of the Ordinance dealing with election of trustees both public and separate, which provided that "trustees shall be resident ratepayers". It is within this time period that the *School Ordinance* O.N.W.T. 1901, ch. 29 was enacted, and, as mentioned earlier in these reasons at paragraph 17, its provisions with respect to separate schools located in Alberta and Saskatchewan were "constitutionalized" in the *Alberta Act* and *Saskatchewan Act* in 1905.

[29] The provisions of the 1901 Ordinance remained unchanged in the consolidation of the Northwest Territories Ordinances in 1905. See *School Ordinance* O.N.W.T. 1905, ch. 75. It was the 1905 Ordinance which was in force at the time of the establishment of a Catholic separate school district in Yellowknife on July 11, 1951 under the name "Yellowknife Roman Catholic Separate School District #2 of the Northwest Territories".

[30] My review of the provisions of the various ordinances in force up to and including the creation of the Yellowknife Catholic Schools in 1951 satisfies me that in 1951 the persons eligible to be a candidate for trustee on the separate school board were resident ratepayers of the Catholic faith.

[31] After 1951 the legislative body in the Northwest Territories continued to enact, amend and vary legislation in relation to education from time to time. It must be remembered that the source of this legislative power continued to be

a) firstly, the authority granted to the Parliament of Canada in s.4 of the *Constitution Act*, 1871 to "make provision for the administration, peace, order and good government of any territory not for the time being included in any Province";

b) and secondly, the provisions in a federal statute (i.e., the *Northwest Territories Act* from time to time) devolving legislative power to the NWT legislature (in particular the "education" provisions which are now

seen in s.16(n) of the *Northwest Territories Act* and which are set forth earlier in these reasons at paragraph 24.

[32] In the 1952 Ordinance a change occurs when it is provided that a candidate for trustee must be resident in the district, i.e., as opposed to being a resident ratepayer.

[33] In the 1956 Ordinance the eligibility criteria for the position of trustee was described in more detail – age, citizenship, and ordinary residence in the district for a minimum of three months. No mention of religious faith.

[34] In 1960 the part of the existing School Ordinance which provided the mechanism for establishing a separate school system was amended. Whereas previously it was the minority ratepayers of the Protestant or Catholic faith who could petition the government for the establishment of a separateschool, it was now provided that the Protestant ratepayers or the Catholic ratepayers residing within the district could so petition, with no requirement that they be in a minority. See O.N.W.T. 1960 (2nd session) ch. 8.

[35] In 1976 the existing School Ordinance was repealed and an entirely new statute was enacted, the *Education Ordinance*, O.N.W.T. 1976, 3rd session,ch. 2. By s.24 any existing separate school district was continued as an education district under the new Ordinance, and the existing Board of Trustees was continued as a Separate Board of Education under the new Ordinance.

[36] By s.47 of the 1976 Ordinance Protestant ratepayersor Catholicratepayers of an education district could petition the government to establish a separate education district in the municipality. Again, no reference to a "minority" requirement. By s.48 only those ratepayers of the same religious faith as the petitioners could vote on the question of the petition. By this point in time, of course, the Yellowknife Roman Catholic Board of Education had been in existence for more than 25 years, and did not have to resort to the provisions of s.47-48.

[37] In the 1976 Ordinance the legislature introduced for the first time the conceptof "supporters" of the separate educationdistrict as opposedto ratepayersof the particular religious faith of the separate education district. By s.51, in those municipalities where a separate education district has been established, every ratepayer is required to record with the municipality a declaration whether he/she supports the public education

district, the separate education district, or both districts in the ratio indicated. Also, every voter who is not a ratepayer is required to record with the returning officer a declaration stating whether he/she supports the public educationdistrict or the separate education district.

[38] By s.53 of the 1976 Ordinance, a person who is a supporter of the separate education district is deemed to be a "resident" of the separate education district, a person who is a supporter of the public education district is deemed to be a "resident" of that education district. Also, the public Board of Education is required to admit to its schools any child whose parent is a resident (supporter) of the public education district, and the Separate Board of Education is required to admit to its schools any child whose parent is a resident (supporter) of the separate education district.

[39] Section 27 of the 1976 Ordinance sets forth the eligibility criteria to be electeda member of a public Board of Education or a Separate Board of Education – age, citizenship, and ordinary residence in the education district for one year. No mention of religious faith.

[40] Section 29 of the 1976 Ordinance applies the provisions of the then *Municipal Ordinance* respecting the qualifications of voters to any election of members of a public Board of Education or Separate Board of Education. These criteriawere similar – age, citizenship and ordinary residence in the municipality(education district)for six months. See *Municipal Ordinance* R.O.N.W.T. 1974, ch. M-15, s.15.

[41] A complete re-write of the legislation occurred again in 1995. The existing *Education Ordinance* was repealed. New terminology was introduced – education district, public denominational education district, District Education Authority,public denominational District Education Authority. *Education Act* S.N.W.T. 1995, ch. 28 (which remains in force today).

[42] By s.80 of the 1995 Act, any existing separate school district was continuedas a public denominational education district under the new Act, and by s.88, any existing Separate Board of Education was continued as a public denominational District Education Authority under the new Act. Hence, the current name of one of the Applicants herein – Yellowknife Public DenominationalDistrict EducationAuthority.

[43] By s.97 of the present Act, ratepayers who belong to a religious minority, Protestant or Catholic, may petition the government to establish a public denominational education district (thus re-instating the "minority" requirement which had been removed in 1976). By s.98 only those ratepayers of the same religious faith as the petitioners can vote on the question in the petition. Again, as the Yellowknife Catholic school board entity has been in existence since 1951, there is no need for it to resort to the provisions of s.97-98 of the Act.

[44] The concept of ratepayers and voters being "supporters" of the separate school system (as opposed to being of the particular religious faith), first introduced in 1976, continues in the present legislation.

[45] Only ratepayers (assessed owners of taxable property in a municipality) may vote on the expenditure of money by a District Education Authority or by a public denominational District Education Authority. In a municipality where a public denominational education district has been established, each ratepayer must file with the government a statement indicating whether he/she supports the education district, or the public denominational education district, or both in the ratio indicated.

[46] Similarly, any voter who is not a ratepayer must file a statement with the returning officer indicating whether he/she is a supporter of the education district or the public denominational education district. See s.149 of the Act.

[47] Sub-section 99(2) of the Act states who may vote in an election of the members of the public denominational District Education Authority:

> 99(2) The residents of the education district who have chosen to support the public denominational education district are the persons qualifiedto vote for the members of the public denominational District Education Authority. (emphasis added)

[48] By the combined effect of subsections 99(1) and 89(1) of the Act, the provisions of the *Local Authorities Elections Act* apply to an electionof the membersof the public denominational District Education Authority:

> s.99(1) Subject to subsection (2), the provisions of this Act and the regulations respecting the election of members of a District Education Authority apply to the election of members of a public denominational District Education Authority.

> s.89(1) The *Local Authorities Elections Act* applies to all matters respecting the election of the members of a District Education Authority.

[49] The *Local Authorities Elections Act*, as the name suggests, sets forth the statutory procedures for the conduct of elections of members of municipal councils, settlement councils and district education authorities. In that part of the Act dealing with the enumeration of voters, it provides that a list of voters be prepared in advance of any election, and:

> 24(1). The list of voters must contain the names of all voters in alphabetical order and, where required by the local authority, the class of each voter, including those voters who are
>
> (a) ratepayers;
>
> (b) public education district supporters; and
>
> (c) public denominational education district supporters.

[50] Sections 17 and 18 of the Act concern the eligibility of voters and candidates:

> s.17 A person is eligible to vote at an election if the person
>
> (a) is a Canadian citizen;
>
> (b) has attained the age of 18 years;
>
> (c) has, for at least twelve consecutive months immediately precedingthe day on which the person votes, been a resident of
>
> (i) the electoral district, or
>
> (ii) an area that has, during the twelve months preceding the day on which he votes become part of the electoral district as a result of a variance of the boundaries of the electoral district; and
>
> (d) is a resident of the electoral district on the day on which he or she votes.
>
> s.18(1) A person is eligible to be nominated and stand as a candidate if the person

(a) is a Canadian citizen;

(b) has attained the age of 18 years;

(c) has, for at least twelve consecutive months immediately precedingthe day nominations close, been a resident of

(i) the electoral district, or

(ii) an area that has, during the twelve months preceding the day nominations close, become a part of the electoral district as a result of a variance of the boundaries of the electoral district;

(d) is a resident of the electoral district; and

(e) is not disqualified by subsection (2) and sections 19 and 20.

[51] Subsection 18(2) and section 20 are not applicable here. Section 19 states:

s.19 A person is not eligible to be nominated or to stand as a candidate as a member of a District Education Authority if that person is

(a) a member of the school staff, as defined in the Education Act, in a school in the area within the jurisdiction of the District Education Authority;

(b) a person hired for the delivery of adult education programs; or

(c) an employee of the District Education Authority.

[52] The term “electoral district” used in s.17 and s.18 is defined in the Act:

“electoral district” means in respect of an election for

...

(c) a member of a District Education Authority, the relevant district as defined in the *Education Act.*

[53] Upon considering all of these quoted excerpts from, and other provisionsof, the present *Education Act* and the present *Local Authorities Elections Act*, I make the following observations in particular:

(1) there is a specific reference to the requirement of a declaration of religious faith of a ratepayer at the time that a petition for the establishment of a separate school system is presented, and again when there is a vote conducted with respect to that petition;

(2) although there is considerable detail in the legislation concerning the eligibility of who may vote in an election for members of the public denominational District Education Authority , and who may be a candidate in such an election, there is no specific requirement of a declaration of religious faith of a voter or candidate.

[54] Given the history of the legislation as it evolved from 1875 to the present day, including the introduction 30 years ago of the concept of "supporters" of the separate school system, I conclude that the decision to remove any requirement that a voter or candidate be of the same religious faith as those who established the separate school system was intentional. The absence of such a requirement in the statute is by design, not omission.

[55] Accordingly, I find that it was the clear intention of the legislature that a candidate for election to the public denominational District Education Authority need not be of any particular religious faith.

[56] The decision of the returning officer under review in these legal proceedings, thus, is correct and in compliance with the express language of relevant legislation in force in this jurisdiction.

[57] That finding would end this judicial review of the returning officer's decision, but for the constitutional argument raised by the Applicants. Although it is probably unwise to put such a learned and complex argument in brief terms, I would summarize that argument, as I understand it, as follows:

a) in the *Rupert's Land and North-Western Territory Order* of June 1870, by which constitutional document these territories originallybecame part of Canada, our admission into the Dominion of Canada was upon certain terms and conditions, including that the Parliament of Canada would form within these territories "political institutions bearing analogy,as far as circumstances will admit, to those which exist in the several provinces of this Dominion";

b) these "political institutions"included, *inter alia*, those contemplated three years earlier by s.93 of the *Constitution Act*, 1867, i.e., denominational schools for the religious minorities in Ontario and Quebec;

c) the Parliament of Canada thus exercised its plenary power to legislatefor the "administration, peace, order and good government" of these territories in 1875 by passing the *North-West Territories Act* which, by the wording of s.11 thereof (see paragraph 23 of these reasons) carried into these territories the entrenched minority religious education rights contemplated by s.93 of the *Constitution Act*, 1867, and that these entrenched rights continued to be protected and preserved by the enactment of successive versions of the *Northwest Territories Act*, up to and including s.16(n) of the present *Act* (see paragraph 24 of these reasons);

d) the territorial *EducationAct* and the territorial *Local AuthoritiesElections Act*, being legislation subordinate to the federal *Northwest Territories Act*, must be interpreted so as to be consistent with the provisions of the *Northwest Territories Act*, in particular s.16(n) thereof;

e) the entrenched minority Catholic education rights include not only the right to establish separate schools but also the right to manageand control those schools, i.e., to have trustees of the Catholic faith only.

[58] Indeed, the Applicants, at the beginning of their written Brief filed with the Court, pose the question before the Court as follows:

> Does Section 16(n) of the *Northwest Territories Act* which stipulates that any law passed by the Legislative Assembly of the Northwest Territories must recognize the right of Roman Catholic ratepayers when they are a minority to establish separate

> schools, require this Court to conclude that a candidate for a board of a public denominational District Education Authority under s.89 of the *Education Act* and section 18 of the *Local Authorities Elections Act* must be of the Catholic faith?

With respect, I would answer "no". The rights contemplated in s.16(n) of the *Northwest Territories Act* are statutory rights — they are not constitutionally entrenched rights. Section 16(n) of the *Northwest Territories Act* can be amended or repealed by the Parliament of Canada at any time – that federal statute is not part of the Constitution of Canada.

[59] When considering the Applicant's constitutional argument, one cannot ignore – indeed, one must always be mindful of – the reality that the Northwest Territories is not a province.

[60] The origin of the Applicants' constitutional argument is s.93 of the *Constitution Act,* 1867. Section 93, together with sections 91 and 92, is a part of the negotiated pattern "of the sharing of sovereign power between the two plenary authoritiescreated at Confederation". *Reference Re Bill 30, an Act to amend the EducationAct (Ontario), supra*, at p. 1206.

[61] Section 93 does not apply uniformly throughout Canada:

> "Section 93 applies directly to Ontario, Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia. However, only Ontario had denominational education rights conferred "by law" at the relevant time, and so the guarantees provided by s.93(1) are of no importance in Nova Scotia, New Brunswick, Prince Edward Island and British Columbia". *Ontario English Catholic Teachers Assn. v. Attorney General of Ontario* [2001] 1 S.C.R. 470 at p. 480.

[62] To that I would add, respectfully, that the guarantees provided by s.93(1) are of no import in the Northwest Territories.

[63] Beetz, J. In *Greater Montreal Protestant School Board v. Quebec* [1989] 1 S.C.R. 377 at p.401-402 confirmed that the s.93(1) constitutional protection applies unevenly in Canada, and approved of the following statement of Professor Pierre Carignan:

> [Translation] In the case under consideration, the drafters in 1867 certainly did not see this as a fundamental right. If they had, it would have been given the same

> protection throughout Canada. The only effect of the provision is to prevent various legislatures from backing away from the legislation on denominational schooling in effect in 1867 in their respective territories. Accordingly, the extent of the constitutional protection varies from one province to another. By so doing, the drafters were demonstrating not so much a preference towards entrenchment as a desire to facilitate the creation of the proposedfederation by disarmingthe opposition of those who, favouring denominational schools, might fear that a political reorganization would threaten already established legislative protection in this area.

[64] When new provinces were created, such as happened in 1905 with the creation of Alberta and Saskatchewan, the sharing of legislative power as between the new provinces and the federal Parliament had to be addressed. (The s.93(1) guarantees were not automatically or necessarily applicable within the new provinces being created). A decision was made to not only confirm the new provinces' exclusive legislative authority on the subject-matter of education but also to confirmthe rights of religious minorities (Protestant or Catholic) within those new provinces to establish separate schools. These last mentioned rights are constitutionally entrenched, as the *Alberta Act* and the *Saskatchewan Act* are constitutional documents, are part of the *Constitution of Canada.* Prior to 1905, these were statutory rights only. See *Re Schmidt and Calgary Board of Education* (1976) 72 D.L.R.(3d) 330 (Alta. S.C., App. Div.) at p.331; and *Rex v. Ulmer* [1923] W.W.R. 1 (Alta S.C., App. Div.) at p.9. Similar statutory rights exist today in these Territories for ratepayers who belong to a religious minority (Protestant or Catholic), by virtue of s.97 of the territorial*Education Act* and s.16(n) of the federal *Northwest Territories Act.* In contrast to the situation in Alberta and Saskatchewan, these statutory rights have not been made permanent, or constitutionally enshrined, by any constitutional document. To repeat, the *Northwest Territories Act* is not part of the *Constitution of Canada.*

[65] The foundation of the Applicants' constitutional argument is the *Rupert's Land and North-Western Territory Order* of 1870. In that document the Privy Council admitted the vast, sparsely populated territories into the Dominion of Canada and granted to the Parliament of Canada legislative power to provide for the future welfare and good government of its inhabitants, including "the formation therein of political institutions bearing analogy, as far as circumstances will admit, to those which exist in the several provinces of the Dominion". I cannot agree with the assertion of the Applicants that with that general language this document was necessarily importing into the newly annexed territories the denominational school rights existing in the provinces of Ontario and Quebec in 1867. This is much too large a leap. There is no mention of denominational school rights in this 1870 document. There is no

reasonable or necessary inference that by reference to "political institutions existingin the several provinces", the Privy Council was importing the school system of Ontario and Quebec and not, e.g. the school systems of Nova Scotia or New Brunswick. For minority rights, such as denominational school rights, to be constitutionally entrenched explicit language is required. The general language of the *Rupert's Land and North-Western Territory Order* does not do what the Applicantssuggest. The Applicantscite no judicial authority for the proposition that the *Rupert's Land and North-Western Territory Order* constitutionally entrenches denominational school rights.

[66] Thus, in my respectful view, the foundation on which the argument rests, does not exist.

[67] There are no constitutionally-guaranteed denominational school rights in the Northwest Territories. They exist today in Canada only in Ontario, Alberta and Saskatchewan. The residents of these territories were not represented by any of the Fathers of Confederation at Charlottetown in September 1864 or in Quebec City in October 1864 and we were therefore not party to the "Confederation bargain". The residents of these territories outside of Alberta and Saskatchewan were also not party to the bargain which led to the passage of the Alberta Act and Saskatchewan Act in 1905, and therefore did not benefit from the entrenchment of minority denominational school rights which occurred at that time. Perhaps, if and when these territories become a province within the federation, political negotiations will result in a similar entrenchment of minority denominational school rights – only time will tell.

[68] However, there is a statutory right to establish a separate school system in these territories. When Yellowknife Catholic Schools was established in 1951, it occurred because it was permitted by statute, in both the then *Northwest Territories Act* and the then *School Ordinance.* The power granted to the Legislative Assembly of the Northwest Territories to pass legislation allowing the establishment of a separate school system exists apart from the Confederation bargain reflected in s.93 of the *Constitution Act,* 1867.

[69] There continues to exist today in these territories a statutory right of minority religious ratepayers – Catholic or Protestant – to petition the government to establisha separate school system in their municipality. These provisions of the present *Education Act* are consistent with the parent federal statute, the *Northwest Territories Act,* s.16(n).

[70] As discussed, the present-day *Education Act* also contains provisions for the governance of the schools established under that Act, both public schools and separate schools. In my view these provisions are not inconsistent with the parent federal statute, *Northwest Territories Act*, s.16(n). Yellowknife Catholic Schools has been "governed" since 1951 pursuant to the provisions of the existing statute in force from time to time. As discussed earlier in these reasons, the governance regimehas evolved over time:

> -in 1951 the trustees had to be resident ratepayers, or property owners;
>
> -in 1952 the trustees had to be resident, but not necessarily ratepayers or property owners;
>
> -since 1956 there has been no statutory requirement that a trustee had to be of the Catholic faith;
>
> -in 1976 the concept of "supporters" of the Catholic school system was introduced. Residents, whether of the Catholic faith or not, could choose to support the Catholic school system, could direct their municipal taxes to the Catholic school system, could send their children to the Catholic school system.

[71] Thus, the statutory framework for governanceof YellowknifeCatholic Schools, and the statutory education rights of Northwest Territories parents and children – both Catholic and non-Catholic – have evolvedo ver the years and decades,in an "inclusive" fashion, something that is not unusual in response to societal change.

[72] Quite appropriately, in my view, it is the supporters of Yellowknife Catholic Schools who have the right to manage and control the YCS system, including the right to elect trustees from amongst their number.

[73] There is a difference, in my respectful view, between (a) denominational education rights which are constitutionally entrenched and are therefore starkly and definitively delineated such as those in Alberta's *School Act* described in detail in *Re Schmidt, supra*, and (b) denominational education rights which are not constitutionally entrenched but are statutory rights and which by their nature are subject to change and will obviously evolve over time as the legislature reacts to changes in our society.

[74] On this application the Applicants ask that the Court "read in" to the *Education Act* a requirement that a candidate for election as Catholic school board trusteemust be of the Catholic faith. Previous judicialpronouncements that have authorizeda Court to "read in" provisions of a statute have invariably been in the context of an infringement of a constitutional right or Charter right. For the reasons mentioned, in my view there is no constitutional right engaged in the present Court proceedings. Accordingly, I defer to the clearly expressed intention of the legislature in fashioning a governance regime for public schools and separate schools in this jurisdiction. I reiterate that in my view the absence in the legislation of the requirement sought by the Applicants is by design not mere omission.

[75] In responding to this application, the Attorney-General of the Northwest Territories submitted, but only in the alternative, that if the *Education Act* and s.16(n) of the *Northwest Territories Act* were given the interpretation sought by the Applicants, then s.16(n) of the *Northwest Territories Act* would offend the equality guarantees in the *Charter of Rights and Freedoms* and in the *Canadian Bill of Rights*. In view of the conclusion I have reached in these reasons, I need not address this interesting alternative submission. Nor do I have to address the Applicants' challenge to the Attorney-General's standing to raise that issue.

[76] The relief sought in the Originating Notice is denied.

[77] Costs normally follow the event; however, if counsel wish to make submissions regarding costs, they may do so in writing within 30 days of the date of filing of these reasons.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 23rd day of May, 2007.

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