Date: 2015 10 20
Docket: S 1 CV 2015 000111

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CITY OF YELLOWKNIFE, DAVID W. WIND, ROBERT GORDON DOHERTY, WILLIAM AHO, ROLLY COMEAU, ERIC SPUTEK, DAVID CONNELLY, AND ALBERT C. EGGENBERGER

Applicants

-and-

THE COMMISSIONER OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE ATTORNEY GENERAL (MINISTER OF JUSTICE) OF THE NORTHWEST TERRITORIES

Respondents

Application to have electoral boundaries declared invalid.

Heard at Yellowknife, NT, on August 12, 2015

Reasons filed: October, 20, 2015

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicants:	Paul A. Hildebrand Lidstone & Company
Counsel for the Respondents:	Sarah A.E. Kay, Karen E. Lajoie & Christopher D. Buchanan Department of Justice, GNWT

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REASONS FOR JUDGMENT

A) **INTRODUCTION**

[1] In this Application, the City of Yellowknife and seven of its residents ask this Court to issue a Declaration that the electoral boundaries set out in the most recent amendments to the *Legislative Assembly and Executive Council Act*, S.N.W.T. 1999, c. 22, contravene the *Canadian Charter of Rights and Freedoms*, and are of no force and effect.

[2] The next general election in the Northwest Territories will take place on November 23, 2015. The relief sought in the Applicants' Originating Notice filed June 29, 2015 contemplated that if the electoral boundaries were found to contravene the *Charter*, the boundaries would have to be redrawn before that election.

[3] At the hearing, however, in light of the evidence adduced by the Respondents, the Applicants conceded that any declaration of invalidity granted by this Court should be suspended for a period of time, and that the outcome of this Application should not have any bearing on the 2015 election.

B) **BACKGROUND**

[4] In the Northwest Territories, the *Electoral Boundaries Commission Act*, S.N.W.T. 2003, c.4 (the *EBCA*) requires that electoral boundaries be reviewed before every second election. This review is done through the establishment of an Electoral Boundaries Commission tasked with reviewing the existing electoral districts and preparing a report putting forward recommendations to the Legislative Assembly regarding the area, boundaries, name and representation of the electoral districts for the next election. *Electoral Boundaries Commission Act*, *supra*, section 8.

[5] In accordance with the *EBCA*, an Electoral Boundaries Commission (the Commission) was established on October 22, 2012. The Legislative Assembly provided a number of guidelines to the Commission, as contemplated by the *EBCA*. Some of those guidelines were concerned with logistical and administrative aspects of the Commission's work.

[6] Other guidelines pertained to the Commission's substantive work and are the ones most relevant to this Application:

> 1. The Commission shall review the existing electoral districts using the most recent and accurate census and other population data available;
>
> 2. In keeping with Canadian constitutional conventions and the notion of effective representation, the Commission shall make recommendations to achieve relative parity between electoral districts while balancing community of interest considerations;
>
> 3. For greater certainty relative parity means that the percentage variation between the number of persons in a riding and the average mean should be within plus or minus 25 per cent, except where special circumstances warrant exceptional deviation;
>
> 4. The Commission shall recommend how electoral boundaries should be drawn if the Legislative Assembly comprises (a) eighteen members, or (b) nineteen members, or (c) twenty-one members;

> 5. The Commission shall prepare an interim report with proposed electoral district boundaries for review by the public and discussion at public hearings;
> (...)

Affidavit of Tim Mercer sworn July 17, 2015, Exhibit "B"

[7] The Commission released its Interim Report on February 4, 2013. The Interim Report set out proposals for boundaries for scenarios contemplating 18, 19 or 21 electoral districts. For each option, the Interim Report proposed significant changes to several districts. In the scenario contemplating 19 electoral districts, the Interim Report proposed the addition of one district within the City of Yellowknife. In the scenario contemplating 21 electoral districts, the Interim Report proposed the addition of two districts within the City.

[8] The Commission then conducted its public consultation process. It held public hearings in several communities. It also received a number of submissions in writing. *Affidavit of David Brock sworn July 30, 2015*, Paragraphs 6-7, Exhibits "C" and "D".

[9] The Commission considered this input and produced its Final Report. That report was tabled in the Legislative Assembly in May 2013. The Final Report includes revised proposals for electoral boundaries for scenarios contemplating 18, 19 and 21 districts. It no longer recommends adding an electoral district within the City of Yellowknife in the scenario that contemplates there being 19 electoral districts. It recommends adding one district within the City in the scenario that contemplates there being 21 electoral districts.

[10] The Final Report was debated extensively in Committee of the Whole of the Legislative Assembly on November 5, 2013. Some MLAs expressed support for some of the options proposed. Others expressed dissatisfaction with all three options. *Affidavit of Mark Heyck sworn June 1, 2015*, Exhibit "E", pages 3348-3379.

[11] At the conclusion of the debate, a motion was presented to accept the recommendation of the Commission for the scenario contemplating 19 electoral districts, with a minor adjustment of the boundary between two of the Yellowknife districts. The motion was carried. *Ibid.*, p.3379.

[12] On March 6, 2014, Bill 18 was introduced in the Legislative Assembly. Bill 18 amends the *Legislative Assembly and Executive Council Act* and draws electoral

boundaries in accordance with the motion adopted on November 5, 2013. The new boundaries have the following effect:

- there are no changes to seven electoral districts (Deh Cho, Mackenzie Delta, Monfwi, Nahendeh, Nunakput, Sahtu, and Thebacha);
- the population is redistributed within the two districts within the Town of Inuvik (Inuvik Boot Lake and Inuvik Twin Lakes);
- the population is redistributed within the two districts within the Town of Hay River (Hay River North and Hay River South);
- the areas of Ndilo and Dettah are removed from the district of Weledeh, which is one of the Yellowknife districts, and are added what previously formed the district of Tu Nedhe;
- the population is redistributed within the other Yellowknife districts.

[13] Bill 18 was examined in Committee of the Whole March 12, 2014. A motion to amend it to add two electoral districts was defeated. The Bill was debated further on May 28, 2014 when it reached Third Reading. *Affidavit of Tim Mercer sworn July 17, 2015*, Exhibit "H", pages 4463-4466.

[14] The Bill was adopted at Third Reading. It comes into force at the dissolution of the current Legislative Assembly.

[15] The Applicants argue that Bill 18 contravenes the *Charter* because with the electoral boundaries it creates, the people who reside in the seven Yellowknife electoral districts are under-represented, and there is no justification for this under-representation. This, the Applicants argue, constitutes an infringement of those residents' right to vote, as protected by section 3 of the *Charter*.

C) LEGAL FRAMEWORK

1. Scope of the right to vote

[16] In Canada, the right to vote is guaranteed by section 3 of the *Charter*:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Canadian Charter of Rights and Freedoms, section 3.

[17] The leading case that explains what this right encompasses is *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158. A number of key principles emerge from that case.

[18] The purpose of the right to vote is not to protect equality of voting power, but rather, to protect the right to effective representation. Effective representation includes having a voice in the deliberations of government, and also having the right to bring one's grievances to the attention of one's government representative. *Reference Re Prov. Electoral Boundaries (Sask.)*, *supra,* p.183.

[19] Relative parity of voting power is one of conditions of effective representation, and is of prime importance, but it is not the only factor to consider. This is because whatever relative parity may be achieved, it may, in some cases, actually detract from the goal of effective representation:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

Reference Re Prov. Electoral Boundaries (Sask.), *supra,* p. 184.

[20] Beyond deviations from absolute voter parity that can be justified on the grounds of practical impossibility or the provision of more effective representation, however, there can be no dilution of a citizen's voting power as compared with another's. *Reference Re Prov. Electoral Boundaries (Sask.)*, *supra*, p.185.

[21] Given this, the governing principle is that deviations from voter parity will survive *Charter* scrutiny only if they "can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed". *Reference Re Prov. Electoral Boundaries (Sask.)*, *supra,* p. 185.

2. Standard of Review

[22] In deciding whether electoral boundaries created by a legislature are contrary to section 3 of the *Charter*, courts must be mindful of their role in our democratic system of government.

[23] Generally speaking, courts must be cautious in interfering unduly in decisions that involve balancing of conflicting policy considerations. There is little doubt that setting electoral boundaries is an exercise that very much involves that type of balancing. Accordingly, courts must exercise considerable restraint when reviewing electoral boundaries set by a legislature:

> (...) courts ought not to interfere with the legislature's electoral map under section 3 of the Charter unless it appears that reasonable persons applying the appropriate principles ... could not have set the electoral boundaries as they exist.

Reference Re Prov. Electoral Boundaries (Sask.), supra, p. 189 (citing with approval *Dixon* v. *B.C. (A.G.)* (1986), 7 B.C.L.R. (2d) 174). See also *Charlottetown (City of) v. Prince Edward Island* , 1998 CanLii 6192 (PEISCAD); *Raîche* v. *Canada (Attorney General)*, 2004 FC 679.

D) **ANALYSIS**

1. Factors to be considered on the review

[24] It is important to identify, at the outset, what this Court should take into account in examining whether Bill 18 contravenes the *Charter*.

[25] The Applicants' submissions rest almost exclusively on the assertion that the Final Report does not provide sufficient justification for recommending boundaries that result in the under-representation of the voters in the Yellowknife districts. The Applicants argue that absent explicit justification within the Report itself, Bill 18 cannot possibly withstand *Charter* scrutiny, because the justification cannot be found anywhere else.

[26] The approach advocated by the Applicants is very similar to the approach that would apply to the review of an administrative tribunal's decision, or a court's decision, on a challenge based on insufficiency of reasons. I find that approach, in the present context, would be overly restrictive and is not compatible with the standard of review that this Court must apply.

[27] As noted above, the electoral boundaries set by the legislature should only be disturbed if they "could not have been set by reasonable persons applying the appropriate principles". To decide whether reasonable persons applying the correct principles could have set the boundaries, the Final Report is, obviously, an important consideration. That Report, however, should not, in my view, be read as

a stand-alone document. It must be considered in light of the context within which it was developed.

[28] More specifically, the Final Report must be read in conjunction with the factors that the Commission was statutorily required to consider; the guidelines the Commission was given; the Interim Report, which formed the basis for the public consultation process; and the input received during that public consultation process. That context is important in understanding the recommendations made by the Commission in the Final Report, and is also relevant to the assessment of the reasonableness of the decision subsequently made by the Legislative Assembly.

[29] I find that the debates that took place in the Legislative Assembly when the Final Report was examined also provide important context. This is because the purpose of the Final Report was not to decide what the electoral boundaries would be or even recommend how many electoral districts there should be. The Commission was asked to provide recommendations to the Legislative Assembly about how the boundaries should be drawn in scenarios contemplating various numbers of districts. Those recommendations were made, and were then debated in the Legislative Assembly. While I acknowledge that generally speaking, caution must be exercised in the weight that is attributed to legislative debates, in this case, they do provide additional and useful context that helps better understand the issues raised in the Final Report, and the choices the Legislative Assembly made in relation to those issues.

[30] Ultimately, the issue for this Court is whether, based on the overall context, there is a justification for the under-representation of the Yellowknife districts under the boundaries set by Bill 18. The issue is not simply whether that justification was sufficiently articulated in the Final Report, in the debates in the Legislative Assembly, or in the legislation itself. The issue is whether on the whole of the evidence, this Court concludes the justification actually exists.

2. The degree of under-representation of the Yellowknife districts

[31] The degree of under-representation or over-representation for any given district is measured through straightforward mathematical calculations. In this case, the calculations are based on population information gathered in the 2012 census. This was the most recent information available about the population of the various communities in the Northwest Territories, and it was the information that the Commission used.

[32] According to the 2012 census, the total population in the Northwest Territories is 43,349 people. The "territorial mean" - the number of voters that would be in each electoral district if there were absolute parity - depends on the number of electoral districts in the Legislative Assembly. In the scenario contemplating 19 electoral districts, which was the one that was ultimately chosen, the territorial mean is 2,282 voters.

[33] The level of variance from the territorial mean is expressed in a percentage, calculated using the total number of voters for each district in comparison with the territorial mean. A higher percentage indicates a more significant difference between the number of voters in the district and the territorial mean.

[34] The electoral boundaries set by Bill 18 result in under-representation of some districts, including the seven Yellowknife districts, and in over-representation of other districts. The population and percentage of variance, for the Yellowknife districts, is as follows:

District	Population	Variance
NWT 2:	2,800	22.7%
Range Lake:	2,826	23.8%
Yellowknife Center:	2,832	24.1%
NWT 3:	2,836	24.3%
NWT 4:	2,767	21.3%
Kam Lake:	2,668	23.1%
Yellowknife South:	2,926	22.0%

[35] Other districts are also under-represented. The district of Monfwi is under-represented by 39.5 %; the district of Sahtu is under-represented by 17.4%; the district of Thebacha is under-represented by 7.4%. There are also districts that are over-represented to varying degrees. The most over-represented districts are Deh Cho (40.1%) and NWT 1 (38.1%).

3. The significance of the 25% variance threshold

[36] As noted above at Paragraph 6, the guidelines given by the Legislative Assembly required the Commission to make recommendations that would achieve relative parity between electoral districts. The guidelines defined "relative parity" as meaning that the percentage variation between the number of persons in a riding and the territorial mean should be within plus or minus 25%, except where special circumstances warranted exceptional deviation.

[37] The reference to "special circumstances warranting exceptional deviation" suggests that the Commission was expected to provide more explicit justification for variances above the 25% threshold than for variances within that threshold. This is consistent with the approach that prevails in many jurisdictions in Canada, where legislation dealing with electoral boundaries makes reference to the 25% variance threshold. The language used in the different statutes varies, but the end result, generally speaking, is that variances in excess of 25% can only occur in exceptional circumstances. Some jurisdictions use a lower variance threshold, but as was noted in *Charlottetown (City of) v. Prince Edward Island*, there is wide acceptance for the 25% variance threshold. *Charlottetown (City of) v. Prince Edward Island*, *supra*, para 56.

[38] This is noteworthy because the seven Yellowknife districts, while under-represented, are all within the 25% variance range. The Applicants point out that for all the districts, the variances are close to the 25% threshold. Be that as it may, the fact is that they are within that threshold.

[39] The Supreme Court of Canada recognized in *Reference Re Prov. Electoral Boundaries (Sask.)* that absolute parity is not possible. With that in mind, while it makes sense to expect that the greater the variance, the greater the need for a justification, it must be recognized that it would be somewhat artificial to suggest that *any* variation requires justification. It is all a question of degree.

[40] I accept the general proposition that deviations from parity must be justified, but I also find that variances that are within the 25% range do not call for the same level of justification as do variances that are in excess of that range. I would not go so far as to say that electoral boundaries that result in variances within the 25% range will necessarily withstand *Charter* scrutiny. But in my view, the need for explicit justification is much greater where there is under-representation with a percentage of variance that is greater than 25%.

4. Justification for under-representation of Yellowknife districts

[41] The issue related to the representation of the Yellowknife voters is not new, and has always been thorny. This is not the first time this Court has been called upon to examine it. *Friends of Democracy* v. *Northwest Territories (Attorney General)*, [1999] N.W.T.J. No. 28. The Commission was well aware of this issue and its history, and referred to it several times in the Final Report.

[42] The Commission referred to the Yellowknife issue in the "Considerations" section of the report:

> The Commission noted that many of the issues and concerns that were before previous commissions are still present. As with previous commissions, ensuring the representation of the people in Yellowknife as well as in smaller communities continues to be a concern and a challenge.
> (...)

Affidavit of Mark Heyck sworn June 1, 2015, Exhibit "A", page 5.

[43] The Commission referred to this Court's decision in *Friends of Democracy* v. *Northwest Territories (Attorney General)*, and quoted from it, in the "Legal Framework" section of the report. *Ibid.*, p.7.

[44] In summarizing the public input it received, the Commission included a section dealing specifically with the Yellowknife issue:

> There were two themes to comments regarding Yellowknife.
>
> The first, heard at both hearings held in Yellowknife, was that Yellowknife is under-represented and should be allowed additional electoral districts on the basis of territorial population distribution. The percentage of the population of Yellowknife in comparison to the rest of the Northwest Territories was frequently cited as justification for an increase. For example, one speaker noted that Yellowknife has 47% of the population of the Northwest Territories but only has 36% of the seats in the Legislative Assembly. Other factors such as historical under-representation, devolution and future growth were also cited as justifying an increase.
>
> The second theme, heard in many communities was that Yellowknife does not need more electoral districts. The perception which continues to be prevalent in smaller communities is that people in Yellowknife have ready access to the elected members and government resources. The barriers that some members of the Legislative Assembly face in terms of the costs of travel to and from and even within electoral districts were also cited.

Ibid., p. 12

[45] The boundaries proposed in the Interim Report reduced the variance from the territorial mean for most of the districts. *Affidavit of David Brock sworn July 20, 2015*, Exhibit "A". Clearly, the Commission placed considerable emphasis on population numbers and attempted to draw boundaries that achieved as much

parity as possible, mathematically speaking, between the various districts. As already noted, the proposed boundaries arising from this exercise would result in one electoral district being added within the City of Yellowknife in one of the scenarios, and two districts being added in another.

[46] But during the public consultation process, the Commission heard concerns expressed about the draft recommendations resulting from that approach. The Commission took this input into consideration, as it was required to, in developing its recommendations for the Final Report.

[47] The Final Report is quite blunt about the challenges the Commission faced in attempting to achieve relative parity while also addressing other legitimate considerations, and the concerns that had been expressed:

> It is apparent that absolute voter parity between electoral districts is impossible to achieve. Moreover, it is extremely difficult to make any recommendation which would result in all electoral districts being within the plus or minus 25% variance. To do so would result in drastic changes to electoral districts that would not sufficiently take into account the historic configuration of electoral districts, language, culture, geography, land claims or self-government agreements.
>
> We are also of the view that the status quo is not acceptable and changes need to be considered. Some inequities between electoral districts are significant and have increased over time. The concept of effective representation requires that we attempt to reduce those inequities as much as possible.
>
> It seems clear that the issue of the number of electoral districts within Yellowknife versus elsewhere in the Northwest Territories cannot be resolved in a way that accommodates everyone's concerns. We do not think that effective representation requires that the number of electoral districts in Yellowknife be in perfect accord with Yellowknife's proportion of the territorial population. At the same time, the situation in Yellowknife cannot be ignored and if additional electoral districts are to be considered, one should be allocated to Yellowknife.

Ibid., page 15.

[48] The Applicants argue that although the issue of under-representation of the Yellowknife districts was acknowledged, nothing in the Final Report explains why this problem could not be mitigated. I disagree. The Report refers to the other considerations that were factored into the analysis. In the excerpt quoted above at Paragraph 47, the Commission refers directly to the challenges it faced, and to the

need to take into account factors such as the historic configuration of electoral districts, language, culture, geography, land claims and self-government agreements.

[49] These concerns are very much in line with the realities cited by the Supreme Court of Canada in *Reference Re Prov. Electoral Boundaries (Sask.)* when it alluded to situations where a focus on voter parity may detract from the goal of effective representation:

> (...) effective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than voter parity, such as geography and community interests. The problem of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter population in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective vote in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one of a number of factors which may necessitate deviation from the "one person - one vote" rule in the interests of effective representation.

Reference Re Prov. Electoral Boundaries (Sask.), supra, p. 188.

[50] It is difficult to imagine a jurisdiction where these considerations would resonate more than they do in the Northwest Territories. This jurisdiction spans over a widespread geographic area. Many of its communities do not have year-round road access. Air travel is very expensive. The Territory has eleven official languages, including nine aboriginal languages. *Official Languages Act*, R.S.N.W.T. 1988, c. O-1. Some aboriginal groups have settled land claims with beneficiaries who are spread out in several communities. Others do not have settled land claims, but have a community of interests. These are all factors that have a bearing on how the citizens of this territory can have effective representation in the Legislative Assembly.

[51] The Commission was well aware of the challenges that this presented for drawing electoral boundaries. The Final Report demonstrates an awareness of these challenges and an attempt to balance the various considerations to arrive at an acceptable compromise. These same concerns, challenges and search for an acceptable compromise are reflected in the debates that took place in the Legislative Assembly.

[52] When considering the Final Report and Bill 18, the Legislative Assembly had two fundamental decisions to make: the first was how many electoral districts

would compose the next Assembly, and the second was how the electoral boundaries for each district should be drawn.

[53] Having more electoral districts was one way to reduce the level of under-representation of the voters in Yellowknife, but it would create issues in other districts. It would also increase the overall costs of government. The pros and the cons of this option were discussed when the Final Report and Bill 18 were debated.

[54] Drawing electoral boundaries is always a complex exercise but in the context of this jurisdiction, it is especially challenging. The districts here are not divided along the lines of "urban districts" and "rural districts". As noted above, there are a myriad of variables that must be taken into account in order to achieve effective representation.

[55] It bears repeating that courts must exercise restraint when reviewing the choices made by a legislature in drawing electoral boundaries. As already noted, such decisions should only be disturbed if the boundaries could not have been drawn by reasonable persons aware of the applicable principles. Having regard to the full context that led to the enactment of Bill 18, I am unable to agree with the Applicants that this threshold is met.

[56] In *Friends of Democracy* v. *Northwest Territories (Attorney General)*, *supra*, the electoral boundaries were also challenged on the basis of the under-representation of Yellowknife voters, and this Court concluded that its intervention was warranted. But the situation was dramatically different then: the electoral boundaries that were being challenged in that case would have resulted in the under-representation of one of the Yellowknife districts by 152%, and of another by 49%. Two of the electoral districts outside of Yellowknife were over-represented by 63% and 70%.

[57] Bill 18 creates electoral boundaries that result in the under-representation for the Yellowknife districts, but not to the same degree. On the whole of the evidence, I conclude that there exists a justification for this level of under-representation, all things considered, keeping in mind the overarching principle that the ultimate goal is overall effective representation.

[58] As noted above, the Northwest Territories has unique features, and this makes the drawing of electoral boundaries particularly challenging. Reasonable people may disagree as to how those challenges should be resolved. Weighing the many factors that had to be considered, including numbers, the Legislative Assembly could well have made a different decision about how best to address

these difficult issues, and drawn the electoral boundaries in a different way. But saying that a different decision could have been made is a far cry from saying that the decision that was made could not have been made by reasonable persons, having regard to all the circumstances.

[59] For these reasons, the Application is dismissed. If parties wish to present submissions as to costs, they should write to the Registry within 14 days of the filing of these Reasons and indicate whether they want that issue dealt with by way of written submissions, or have a costs hearing. If necessary, I will issue further directions in due course.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
20th day of October 2015

Counsel for the Applicants:	Paul A. Hildebrand Lidstone & Company
Counsel for the Respondents:	Sarah A.E. Kay, Karen E. Lajoie & Christopher D. Buchanan Department of Justice, GNWT

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