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IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

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BETWEEN:

FRIENDS OF DEMOCRACY, MAYOR DAVID  
R. LOVELL, ROBERT A.G. SLAVEN, J.I.  
FRASER WEIR, WILLIAM A. ENGE and  
SANDY A.M. HOLMES

Appli

- and -

THE COMMISSIONER OF THE NORTHWEST  
TERRITORIES as represented by THE  
ATTORNEY GENERAL OF THE  
NORTHWEST TERRITORIES

Respon

- and -

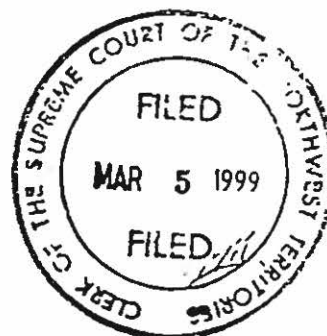
METIS NATION-NORTHWEST  
TERRITORIES, DENE NATION, NORTH  
SLAVE METIS ALLIANCE, SAHTU  
SECRETARIAT INCORPORATED and  
LUTSEL K'E DENE BAND

Interve

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REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE M.M. de WEERDT

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and SANDY A.M. HOLMES

Applicants

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TERRITORIES

Respondent

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METIS NATION-NORTHWEST TERRITORIES, DENE NATION,  
NORTH SLAVE METIS ALLIANCE, SAHTU SECRETARIAT  
INCORPORATED and LUTSEL K'E DENE BAND

Intervenors

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Application for a declaration that s. 2(1) and ss. 2 through 15 of the *Legislative Assembly and Executive Council Act* 1988, c. L-5, are void and without effect as violating s. 3 of the *Canadian Charter of Rights and Freedoms* - allowed in part subject to suspension of order.

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE M.M. de WEERDT

Heard at Yellowknife, Northwest Territories  
on March 1-2, 1999

Reasons filed: March 5, 1999

Counsel for the Applicants: Brian J. Wallace, Q.C.  
Ron A. Skolrood

Counsel for the Respondent: Earl D. Johnson, Q.C.

Counsel for the Intervenors: Charles F. McGee

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FRIENDS OF DEMOCRACY, MAYOR DAVID R.  
LOVELL, ROBERT A.G. SLAVEN, J.E. FRASER WEIR,  
WILLIAM A. ENGE and SANDY A.M. HOLMES

Applicants

- and -

THE COMMISSIONER OF THE NORTHWEST  
TERRITORIES as represented by THE ATTORNEY  
GENERAL OF THE NORTHWEST TERRITORIES

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METIS NATION-NORTHWEST TERRITORIES, DENE  
NATION, NORTH SLAVE METIS ALLIANCE, SAHTU  
SECRETARIAT INCORPORATED and LUTSEL K'E  
DENE BAND

Intervenors

REASONS FOR JUDGMENT

[1] Contrary to the unanimous recommendation of the Northwest Territories Electoral Boundaries Commission 1998, established by the Legislative Assembly of these Territories under the *Electoral Boundaries Commission Act*, S.N.W.T. 1989(1), c.2, the Assembly declined (by a vote of 7 to 6, 3 abstaining) to add two additional electoral districts to the 14 which will remain after the New Nunavut Territory comes

into being on or before April 1st this year pursuant to the *Nunavut Act*, S.C. 1993, c.28, as amended. The recommended additional districts were to have provided voters at Yellowknife with two additional members to represent them in the new legislature for the remaining Northwest Territories after Nunavut comes into being, so as to bring that legislature's membership then to a total of 16.

[2] The present application to the court was filed on November 25th 1998, some two weeks following the vote above mentioned. It is brought by several individuals claiming status as voters in elections to the Legislative Assembly, one of whom is the Mayor of Yellowknife, and a voluntary association known as Friends of Democracy (said to be in the process of incorporation as a society) whose primary objective is described as the promotion of fair and effective representation for all residents of the Northwest Territories in the Legislative Assembly.

[3] The applicants ask the court to declare that the provisions of Northwest Territories legislation, which establish the 14 electoral districts that will remain after Nunavut separates from these Territories, are in violation of the right to vote in elections to the Legislative Assembly constitutionally guaranteed by section 3 of the *Canadian Charter of Rights and Freedoms*. More specifically, the applicants challenge the constitutional validity of subsection 2(1) and items 2 to 15 inclusive of Schedule "A" of the *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, as amended, providing for the 14 districts in question. Should the applicants succeed, fresh legislation would be required to replace the impugned provisions with a constitutionally valid alternative before any future election.

[4] Opposed to the application, the respondent Commissioner of the Northwest Territories (represented by the Attorney General of these Territories) is joined by the following intervenors: Metis Nation-Northwest Territories, Dene Nation, North Slave Metis Alliance, Sahtu Secretariat Incorporated and Lutsel K'e Band, who together constitute The Aboriginal Summit. The Commissioner and The Summit, though separately represented by counsel, are at one in seeking jointly to uphold the action of the Legislative Assembly in rejecting the recommendation of the Boundaries Commission by declining to enlarge the number of electoral districts presently provided for in the existing legislation. Should the respondent and intervenors succeed, no change will be required in that legislation before the next elections to the Legislative Assembly.

[5] Section 3 of the *Canadian Charter of Rights and Freedoms* reads as follows:

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.

[6] This section is to be read and understood in its context, more particularly section 1 of the Charter:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[7] That these provisions apply to the Northwest Territories and their legislative assembly is plain from sections 30 and 32 of the Charter:

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[8] Section 3 has received judicial consideration in a number of cases, notably *Re: Reference re Electoral Boundaries Commission Act* (1991) 81 D.L.R. (4th) 16 on appeal to the Supreme Court of Canada from the opinion of the Court of Appeal of Saskatchewan; in which reference is made to *Dixon v. British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247, (1989) 4 W.W.R. 393, 35 B.C.L.R. (2d) 273, 15 A.C.W.S. (3d) 121 (S.C.) and a number of other authorities.

[9] McLachlin J., writing for the majority of the Supreme Court of Canada in the above-mentioned *Reference* case, had this to say, in part, beginning at D.L.R. p.35:

C. *The meaning of the right to vote*

It is my conclusion that the purpose of the right to vote enshrined in s.3 of the Charter is not equality of voting power *per se*, but the right to “effective representation”. Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative ..., elected representatives function in two roles — legislative and what has been termed the “ombudsman role”.

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen’s vote unduly as compared with another citizen’s vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

\* \* \*

Notwithstanding the fact that the citizen’s vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary 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.

It emerges therefore that deviations from absolute voter parity may be justified on grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen’s vote as compared with another’s should not be countenanced. I adhere to the proposition asserted in *Dixon, supra*, at p.267, that “only those deviations should be admitted which 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”.

[10] It follows that the right to vote guaranteed by section 3 of the Charter is more than merely the right to be registered as a voter and to cast a ballot on election day. In times past, there were residents of the Northwest Territories who were denied all right to vote in elections to the House of Commons and in elections to the legislature of the Northwest Territories. These denials of right have long since been corrected by legislation. Canadians through Parliament and their provincial and territorial legislatures, have chosen to tolerate a measure of over-representation from thinly populated and relatively remote regions in preference to any such complete denial of legislative representation from those regions. Nor is the present application directed at the removal or reduction of such over-representation within the Northwest Territories.

[11] Instead, the question before the court in the present application is whether the under-representation of voters at Yellowknife, in elections to the Legislative Assembly, is in violation of section 3 of the Charter. Should additional electoral districts there be created so as to correct this under-representation and meet the standard set by that important and over-riding requirement of the Constitution of Canada?

[12] The following table, taken from the report of the Northwest Territories Electoral Boundaries Commission 1998, which all parties agree to be accurate and complete, sets out the current electoral districts which will remain in existence after the division of the Territories by creation of the new Nunavut Territory, subject to any legislative change before the next elections to the Legislative Assembly. The figures in the table are derived from the 1996 census, as indicated; and the percentage variance for each district has been calculated on the basis of the average per district of the voter population.

<u>Present Electoral Districts</u>	<u>1996 Census Figure</u>	<u>Percentage Variance</u>
Nunakput	1,778	-37%
Inuvik	3,296	+17%
MacKenzie Delta	1,767	-37%
Sahtu	2,598	-8%
Nahendeh	2,132	-25%
Deh Cho	1,037	-63%
North Slave	2,471	-13%
Hay River	3,697	+31%
Thebacha	2,452	-13%
Tu Nedhe	842	-70%
Yellowknife North	4,207	+49%
Yellowknife Centre	3,369	+19%
Yellowknife South	7,105	+152%
Yellowknife Frame Lake	2,784	-1%
	Total	39,535
	Average	2,824

[13] The boundaries of these electoral districts are described in items 2 to 15 of Schedule "A" to the *Legislative Assembly and Executive Council Act*. And they are illustrated in maps included with the report of the Electoral Boundaries Commission 1998. Section 2 of the Act reads as follows:

2. (1) There shall be twenty-four electoral districts as named and described in Schedule "A".
- (2) Each electoral district is entitled to return one member to the Legislative Assembly.

[14] By section 17 of *An Act to amend the Nunavut Act and the Constitution Act, 1867*, S.C. 1997-98, c.15, the *Northwest Territories Act*, R.S.C. 1985, c.N-27, has been amended to the effect that, following the coming into being of the new Nunavut Territory, the Legislative Assembly of the Northwest Territories is to consist of 14 members, unless another number not less than 14 or more than 25 is fixed by it with the assent of the Commissioner of these Territories. This in effect also amends subsection 2(1) of the *Legislative Assembly and Executive Council Act* so as to substitute



“fourteen” for “twenty-four” and insert “items 2 to 15 of” before “Schedule” in the text of that subsection.

[15] Emphasis is placed by the applicants on the gross discrepancy between the percentage variations from the average for Yellowknife South (+152%) and Tu Nedhe (-70%). They submit that a vote in the larger of these electoral districts is worth only a small fraction of one in the other district. The same may be said upon comparison of the figures and averages for Yellowknife South and Yellowknife Frame Lake, though in that instance the discrepancy is less severe. It is not in dispute that, purely on a comparative population basis, the electoral district of Yellowknife South is under-represented in the Legislative Assembly.

[16] It is the applicants' submission that, given the current populations of the existing electoral districts in the Northwest Territories, the seven least populous of these districts can elect a majority of the members of the Legislative Assembly with no more than approximately 32% of the entire population. On doing the arithmetic, I reach a similar result while making all due allowance for exclusion of the Speaker from the calculation of a majority vote in a 14-member Assembly. By my calculation, the percentage of the total population which could elect such a majority of 7 members is 31.5% and thus a clear numerical minority.

[17] On the basis of the population figures set out in the report of the Northwest Territories Electoral Boundaries Commission 1998, it appears that 44% of the total territorial population after the creation of Nunavut will reside at Yellowknife, with no more than 29% of the seats in the Legislative Assembly. If two seats were to be added at Yellowknife, as recommended by the Commission, Yellowknife would have 38% of the seats for 44% of the population, leaving it still less than fully represented on a population basis but closer to what its residents may claim as an entitlement.

[18] Considering the factors of geography, community history and interests, language differences, difficulties in communication with remote communities and minority representation, not to mention the normal difficulties and expenses of travel between the seat of government at Yellowknife and the various communities outside Yellowknife, I am satisfied that there probably is justification within the ambit of section 3 of the Charter for the present over-representation of the electoral districts whose percentage variations in population are below the average. On the other hand, I am unable to find similar justification for the gross under-representation of those other

districts where the variations are markedly (25% or more) above the average. This gross under-representation must constitute a clear violation of section 3 of the Charter in the absence of due justification.

[19] As mentioned by the Alberta Court of Appeal (whose judges also sit as members of the Northwest Territories Court of Appeal) in *Reference re Electoral Boundaries Commission Act* (1992) 1 W.W.R. 481 at p.491:

We close with the comment that the real issue may be not about adequate representation for the less populated areas but under representation of more populated areas. No argument for effective representation of one group legitimizes under representation of another group. Arguments about the minimal size for ridings in lightly populated areas inevitably lead to the question why the Legislature cannot accommodate both those requests and the demand for parity by enlarging the Legislature. No doubt the Legislature can be too large. But it can also be too small. And, in light of the rule in *Reference re Provincial Electoral Boundaries, supra*, the overall size of the Legislature will, in the future, inevitably come under Charter scrutiny.

[20] The respondent Commissioner of the Northwest Territories, through her counsel at the hearing of this application, does not dispute the application of the *Canadian Charter of Rights and Freedoms* to the Northwest Territories, their Legislative Assembly and its legislation. She likewise agrees that the over-representation of the various numerically smaller electoral populations is not in issue; and, indeed, that voters resident at Yellowknife are numerically under-represented in the Assembly. It is her submission that this is a situation which has existed since the 1970s, the level of under-representation during this period having consistently rested at between 6% and 9%. The point being undisputed, I accept that it reflects a factual reality in the electoral history of the Northwest Territories.

[21] The respondent's position is that nothing should be done to affect the *status quo* in the distribution of seats in the Legislative Assembly, especially at this critical stage in the emergence of the new Northwest Territories from the old, following the division to be brought about by creation of Nunavut under federal legislation, supported by the government and Legislative Assembly of the existing ("old" after April 1st 1999) Northwest Territories. This position is supported fully by the Intervenors, who urge that section 3 of the Charter must be read together with, and subject to, section 25:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[22] In their submission regarding section 25 of the Charter, the Intervenors rely also upon section 35 of the *Constitution Act, 1982*:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[23] As I understand the position of the Intervenors, nothing should be done to affect the *status quo* in the distribution of seats in the Legislative Assembly until such time in the future as shall see the resolution of their on-going aboriginal land claims and aboriginal self-government negotiations with the governments of Canada and of the Northwest Territories. The Intervenors do not suggest that there is any existing aboriginal or treaty right on which they can rely in making this submission, other than the process rights implicit in section 25 of the Charter and section 35 of the *Constitution Act, 1982* as well as in existing aboriginal land claims agreements and related negotiations.

[24] Given that the Charter section 3 right to vote is a right of citizenship exercisable by all duly qualified individuals, it is clear that neither the existence nor the due exercise of that right should depend upon the leave, licence or say-so of any government or other executive authority, be it in relation to the negotiation or

enjoyment of any aboriginal land claim or other aboriginal or treaty right. And to the extent that voting rights are dependent upon or are exercisable only subject to legislation, that legislation must not violate the supreme law known as the Constitution of Canada, as defined by section 52 of the *Constitution Act, 1982*:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes:

- (a) the Canada Act, 1982, including this Act;
- (b) the Acts and orders referred to in the Schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[25] As the foregoing is intended to show, I remain unpersuaded that section 3 of the Charter is in any sense to be understood as qualified by section 25 of the *Charter* or section 35 of the *Constitution Act, 1982*, at least in the present instance, given the evidence before the court in this application. It is entirely unacceptable that such a fundamental right of citizenship as that recognized and guaranteed in section 3 of the Charter (and thus in the Constitution of Canada) should be held in suspense, and thus be withheld, during government negotiations over the future self-government of aboriginal or other groups which might yet take decades to bring to a conclusion.

[26] As mentioned during the hearing, one may well sympathise with the apparent understanding of the Intervenors, from their dealings with certain members of the Legislative Assembly, that there would be no change in the distribution of seats in the Assembly until all aboriginal claims and negotiations in relation to aboriginal self-government in the Northwest Territories have been brought to a final conclusion. Whatever the basis for any such understanding, it requires only a mention of the appointment by the Assembly of the Northwest Territories Electoral Boundary Commission 1998, in that year, to show that the Assembly did not see itself as bound by any such commitment. The Commission, of which the majority were aboriginal

members from outside Yellowknife with considerable experience in public affairs, proceeded with its mandate, as directed by the Assembly, notwithstanding the objections voiced by the Intervenors based on their above-mentioned understanding.

[27] Be that as it may, it is to be noticed that the various documents relied upon by the Intervenors in support of their position are couched in terms which make plain that the aboriginal self-government issues under negotiation are all "subject to the Constitution of Canada" and are not intended in any way to depart from it. It also deserves to be mentioned that the materials filed on this application reveal that a substantial element (20%) of the voting population at Yellowknife consists of aboriginals, whose right to effective representation in the Legislative Assembly is affected, equally with that of the non-aboriginal population, by the existing maldistribution of seats in the Assembly. For that matter, it is not disputed that aboriginals comprise a majority of the population in a majority of the existing electoral districts, being all except Hay River and the present four Yellowknife districts; and, if the recommended additional two districts were to be added for Yellowknife voters, the majority of electoral districts would continue to represent a majority of aboriginal people.

[28] To the extent that the underlying issue is, as suggested by the Respondent and Intervenors, one of where the political power in the Legislative Assembly is or should be, so that the court should respond to the present application only with the greatest restraint (and preferably by declining to grant any remedy at all to the applicants), it therefore appears that removing the basis for the existing gross numerical underrepresentation in the Assembly of citizens at Yellowknife need not in any really significant way alter the existing balance of political power in the Assembly as it directly concerns the Intervenors and the aboriginal population of the Northwest Territories.

[29] Among the submissions of the Intervenors, I heard the suggestion that when an average of the voting populations of the electoral districts at Yellowknife is struck, it reveals a general level of underrepresentation (+50%) much less than that of the district Yellowknife South (+152%) taken alone. The submission was that no additional seats would be required if only the population was redistributed more equally within the four existing Yellowknife ridings. The difficulty with this submission, as to which I heard no solution, is that it would create a separate enclave at Yellowknife where all citizens, including aboriginals, would be treated according to a markedly

different standard of effective representation in the Legislative Assembly than all citizens elsewhere in the Northwest Territories. In effect, this would create a second class or level of representation. Upon reflection, I am confident that the Intervenors and those whom they represent will have no difficulty recognizing the unfairness and fundamental error of this suggestion. I note that it was put forward on motion in the Legislative Assembly, at the time that the Northwest Territories Electoral Boundary Commission 1998 report was before it; but that the motion was also defeated.

[30] Much was made by counsel for the Respondent and Intervenors of the apparently dominant position of Yellowknife within the Northwest Territories, being as it is the seat of government for these Territories and the pre-eminent territorial centre of private commercial and public government business. As I understand the submissions made in that connection, the historical voter under-representation in the Legislative Assembly from Yellowknife is the result of deliberate policy designed to compensate the regions outside Yellowknife for their comparatively less favoured positions. The submission is that nothing should be done which might lead to dominance over the Legislative Assembly by elected representatives from Yellowknife. However, any such outcome seems unlikely, given the limited scope of the recommendations made by the Boundaries Commission, not to mention the distribution of votes across these Territories already mentioned.

[31] There is no real room for doubt as to the much greater access to their elected representatives in the Legislative Assembly by voters at Yellowknife than elsewhere in the Northwest Territories. Nor is there any question but that access to officials in the government at many levels is generally less of a problem at Yellowknife than elsewhere in these Territories. The "ombudsman role" of elected representatives for districts at Yellowknife is consequently likely to be more effective and less onerous than for representatives of outlying districts across the Territories. But the general over-representation of these outlying districts already goes some way to compensate for this state of affairs, in part by lightening the relative burden of representation with the lower populations represented. It is surely not either necessary or appropriate to ensure that the "ombudsman role" of Yellowknife representatives is made more burdensome.

[32] It must be obvious that enlarging the Legislative Assembly (constructed to accommodate 25 members as it is) would lower the average of the population per electoral district and thus reduce to some degree the levels of numerical over-representation in many of the outlying districts while at the same time reducing quite markedly the levels of under-representation in the larger centres at Yellowknife. This can readily be seen by comparing the percentage variations from average (and the population figures giving rise to them) for the existing and proposed electoral districts recommended by the Boundaries Commission in 1998:

**(a) Majority Recommendation**

<u>Proposed Electoral Districts</u> <u>Districts</u>	<u>1996 Census</u> <u>Population Figure</u>	<u>Percentage Variance</u> <u>from Average</u>
Nunakput	1,778	-28%
Inuvik	3,296	+33%
MacKenzie Delta	1,767	-28%
Sahtu	2,598	+5%
Nahendeh	2,132	-14%
Deh Cho	1,123	-55%
North Slave	2,471	0%
Hay River	3,611	+46%
Thebacha	2,452	-1%
Tu Nedhe	842	-66%
Range Lake North*	2,928	+18%
Range Lake South*	3,321	+34%
Kam Lake*	3,368	+36%
Frame Lake*	3,369	+36%
Yellowknife Bay*	3,417	+38%
Weledeh*	1,062	-57%
	Total	39,535
	Average	2,471

\*Electoral districts at Yellowknife.

**(b) Minority Recommendation**

<u>Proposed Electoral Districts</u> <u>Districts</u>	<u>1996 Census</u> <u>Population Figure</u>	<u>Percentage Variance</u> <u>from Average</u>
Nunakput	1,778	-28%
Inuvik	3,296	+33%
MacKenzie Delta	1,767	-28%
Sahtu	2,598	+5%
Nahendeh	2,132	-14%
Deh Cho	1,123	-55%
North Slave	2,471	0%
Hay River	3,611	+46%
Thebacha	2,452	-1%
Tu Nedhe	842	-66%
Range Lake*	2,928	+18%
Kam Lake*	2,724	+10%
Great Slave*	2,722	+10%
Yellowknife Bay*	3,017	+22%
Frame Lake*	3,072	+24%
Weledah*	3,002	+21%
	<b>Total</b>	<b>39,535</b>
	<b>Average</b>	<b>2,471</b>

\*Electoral districts at Yellowknife.

[33] The only difference in these proposals, as between the Commission's majority and minority reports, is as to the recommended new electoral districts for Yellowknife. And, as the figures show, the minority recommendation gives much more weight to relative voter parity between those districts than does that of the majority, while at the same time giving due consideration to geography, community history and interests, and minority representation. Regrettably, it still appears that both Inuvik and Hay River would remain markedly under-represented on a comparative numerical basis under either of these proposals.



[34] In the course of the hearing, some mention was made of the absence of recognized political parties in the Legislative Assembly of the Northwest Territories, members instead acting independently without being subject to party allegiances or discipline so as to form temporary alliances, at most, on issues of concern to them, in what has come to be known as “consensus government”. The business of the Assembly is still subject to majority votes. Nothing emerged from the discussion to suggest that this is a factor to be taken into consideration in relation to section 3 of the Charter or the present application. Likewise, the possibility that the Legislative Assembly or its Executive Council might conduct their business in a community other than Yellowknife, on a temporary basis (as has occurred at times in the past), does not appear to warrant consideration as such a factor. Nothing in evidence or in the submissions made at the hearing suggests that the Legislative Assembly or its Executive Council has ever been dominated by members elected from Yellowknife; rather it would appear that representatives from outside Yellowknife have held most of the leadership and senior positions in the Assembly and the Council, over the years.

[35] Much as can be said for the evidently careful and comprehensive work performed by the Northwest Territories Electoral Boundaries Commission 1998 and for its report to the Speaker of the Legislative Assembly, and particularly for the restraint demonstrated in both its majority and minority recommendations in view of the crucial division of the existing Territories which is presently impending, I refrain from expressing any view as to what the Legislative Assembly should yet do about it, believing that the Commission’s report speaks for itself and requires no endorsement by the court. Although divided as to the details of their recommendation, both the majority and the minority of the Commission have advised the Assembly:

... that the population of Yellowknife and the principle of effective representation require additional seats for the city and therefore a redrawing of electoral boundaries. We recommend that two electoral districts be added to the City of Yellowknife as follows: ...

[36] On the evidence before the court, two additional seats at Yellowknife will not alter the historical imbalance in representation favouring voters outside Yellowknife. As already noticed, such an addition would leave the city with 44% of the population and 38% of the seats in the Legislative Assembly following the separation of Nunavut from the remaining Northwest Territories, restoring the historical imbalance to 6%. Absent such an addition, the imbalance would grow to 15%, with 44% of the

population being represented by only 29% of the seats in the Assembly. The addition would, at the same time, eliminate the present gross violation of Charter section 3 in respect of Yellowknife South. And it would leave a majority in the Assembly representing a minority of only 38% of the entire voting population, much the same population minority as before.

[37] The argument that the historical imbalance above mentioned is to be preserved at all costs, and would be lost if the report of the Commission were acted upon by the Assembly, by creation of two new seats at Yellowknife, is therefore not persuasive in my respectful view. On the contrary, that imbalance would continue, at the historical level of not less than 6% overall in the ratio of seats to voting population. Creation of these additional seats would do no more than prevent an enlargement of the imbalance to 15%.

[38] As counsel for the Respondent has reminded me, this court in *Morin v. Northwest Territories (Conflict of Interest Commissioner)* (1999) N.W.T.J. No. 5 (Docket CV 07975) has held that the Legislative Assembly of the Northwest Territories is a legislature in the full sense of the word though not competent as yet to amend its own constitution except as permitted by the *Northwest Territories Act*. That being so, it is plain that the Charter section 3 voting right extends to voting in elections to that legislature equally with the provincial legislatures across Canada. Conditions in the Northwest Territories are different in certain respects from those in the provinces but the same constitutional principles apply. Canadian citizens in these Territories have the same Charter section 3 rights as do Canadian citizens in the various provinces.

[39] Given that the right to vote is at the core of the very essence of "a free and democratic society", it is difficult to imagine that undue dilution of that right by legislative action (or inaction) can be demonstrably justified in a free and democratic society, though prescribed by law. The evidence before the court establishes that such undue dilution has occurred in the electoral district of Yellowknife South and in the other electoral districts of the Northwest Territories in which the percentage variance from the average district population is greater than +25% as shown in the table contained in the report of the Northwest Territories Electoral Boundaries Commission 1998. Nothing in evidence has been shown to justify the undue dilution in those instances, whether within the ambit of section 3 or section 1 of the Charter. That being so, the applicants are entitled to a remedy.

[40] Section 24 of the *Canadian Charter of Rights and Freedoms* reads in part as follows:

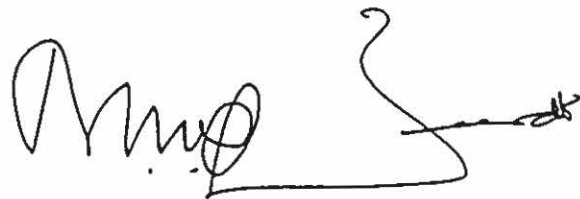
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[41] The remedy sought is a judicial declaration that subsection 2(1) of the *Legislative Assembly and Executive Council Act* R.S.N.W.T. 1988, c. L-5 (the "Act") and sections 2 through 15 of Schedule A of the said Act are invalid and of no force or effect as contrary to section 3 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (the "Charter"); together with an order in effect suspending that declaration until March 31st 1999 to allow the Legislative Assembly to amend the mentioned provisions to comply with section 3 of the Charter, but not for any other purpose; and an order for costs.

[42] There being no issue regarding the numerically over-represented districts having a percentage variance below the average district population based on the 1996 census figures, it is not open to the court to make a sweeping declaration which would include those districts. The remedy sought is therefore granted only in part, that is to say with reference only to the under-represented districts in which the right to vote is unduly diluted without due justification.

[43] Subject to the suspension order which follows, the court hereby declares that the existing provisions of subsection 2(1) as they relate to items 8 (Hay River), 12 (Yellowknife North) and 14 (Yellowknife South) of Schedule "A", all of the *Legislative Assembly and Executive Council Act* R.S.N.W.T. 1988, c. L-5, together with those three items, are invalid and without force or effect in law, being wholly inconsistent with section 3 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, all pursuant to subsections 24(1) and 52(1) of the last-mentioned Act. And it is ordered and declared that the foregoing declaration is suspended until (and shall come into force as law on) April 1st 1999, for the purpose of enabling the Legislative Assembly to replace or amend the invalid provisions to comply with section 3 of the Charter but for no other purpose.

[44] Costs may be addressed, if necessary, by appointment with the court.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', with a long horizontal flourish extending to the right.

M.M. de Weerd  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 5th day of March, 1999

Counsel for the Applicants: Brian J. Wallace, Q.C.  
Ron A. Skolrood

Counsel for the Respondent: Earl D. Johnson, Q.C.

Counsel for the Intervenors: Charles F. McGee

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IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

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BETWEEN:

FRIENDS OF DEMOCRACY, MAYOR DAV  
R. LOVELL, ROBERT A.G. SLAVEN, J  
FRASER WEIR, WILLIAM A. ENGE a  
SANDY A.M. HOLMES

App

- and -

THE COMMISSIONER OF THE NORTHWEST  
TERRITORIES as represented by THE  
ATTORNEY GENERAL OF THE  
NORTHWEST TERRITORIES

Respo

- and -

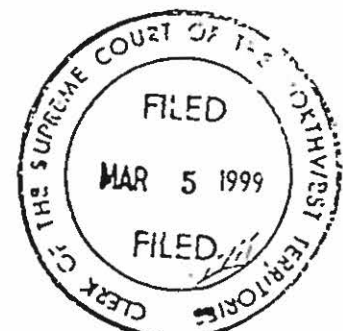
METIS NATION-NORTHWEST  
TERRITORIES, DENE NATION, NORTH  
SLAVE METIS ALLIANCE, SAHT  
SECRETARIAT INCORPORATED an  
LUTSEL K'E DENE BAND

Interv

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REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE M.M. de WEERDT

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FRIENDS OF DEMOCRACY, MAYOR DAVID R. LOVELL,  
ROBERT A.G. SLAVEN, J.E. FRASER WEIR, WILLIAM A. ENGE  
and SANDY A.M. HOLMES

Applicants

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as  
represented by THE ATTORNEY GENERAL OF THE NORTHWEST  
TERRITORIES

Respondent

- and -

METIS NATION-NORTHWEST TERRITORIES, DENE NATION,  
NORTH SLAVE METIS ALLIANCE, SAHTU SECRETARIAT  
INCORPORATED and LUTSEL K'E DENE BAND

Intervenors

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Application for a declaration that s. 2(1) and ss. 2 through 15 of the *Legislative Assembly and Executive Council Act* 1988, c. L-5, are void and without effect as violating s. 3 of the *Canadian Charter of Rights and Freedoms* - allowed in part subject to suspension of order.

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE M.M. de WEERDT

Heard at Yellowknife, Northwest Territories  
on March 1-2, 1999

Reasons filed: March 5, 1999

Counsel for the Applicants: Brian J. Wallace, Q.C.  
Ron A. Skolrood

Counsel for the Respondent: Earl D. Johnson, Q.C.

Counsel for the Intervenors: Charles F. McGee

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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FRIENDS OF DEMOCRACY, MAYOR DAVID R. LOVELL, ROBERT A.G. SLAVEN, J.E. FRASER WEIR, WILLIAM A. ENGE and SANDY A.M. HOLMES

Applicants

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Respondent

- and -

METIS NATION-NORTHWEST TERRITORIES, DENE NATION, NORTH SLAVE METIS ALLIANCE, SAHTU SECRETARIAT INCORPORATED and LUTSEL K'E DENE BAND

Intervenors

REASONS FOR JUDGMENT

[1] Contrary to the unanimous recommendation of the Northwest Territories Electoral Boundaries Commission 1998, established by the Legislative Assembly of these Territories under the *Electoral Boundaries Commission Act*, S.N.W.T. 1989(1), c.2, the Assembly declined (by a vote of 7 to 6, 3 abstaining) to add two additional electoral districts to the 14 which will remain after the New Nunavut Territory comes

into being on or before April 1st this year pursuant to the *Nunavut Act*, S.C. 1993, c.28, as amended. The recommended additional districts were to have provided voters at Yellowknife with two additional members to represent them in the new legislature for the remaining Northwest Territories after Nunavut comes into being, so as to bring that legislature's membership then to a total of 16.

[2] The present application to the court was filed on November 25th 1998, some two weeks following the vote above mentioned. It is brought by several individuals claiming status as voters in elections to the Legislative Assembly, one of whom is the Mayor of Yellowknife, and a voluntary association known as Friends of Democracy (said to be in the process of incorporation as a society) whose primary objective is described as the promotion of fair and effective representation for all residents of the Northwest Territories in the Legislative Assembly.

[3] The applicants ask the court to declare that the provisions of Northwest Territories legislation, which establish the 14 electoral districts that will remain after Nunavut separates from these Territories, are in violation of the right to vote in elections to the Legislative Assembly constitutionally guaranteed by section 3 of the *Canadian Charter of Rights and Freedoms*. More specifically, the applicants challenge the constitutional validity of subsection 2(1) and items 2 to 15 inclusive of Schedule "A" of the *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c. L-5, as amended, providing for the 14 districts in question. Should the applicants succeed, fresh legislation would be required to replace the impugned provisions with a constitutionally valid alternative before any future election.

[4] Opposed to the application, the respondent Commissioner of the Northwest Territories (represented by the Attorney General of these Territories) is joined by the following intervenors: Metis Nation-Northwest Territories, Dene Nation, North Slave Metis Alliance, Sahtu Secretariat Incorporated and Lutsel K'e Band, who together constitute The Aboriginal Summit. The Commissioner and The Summit, though separately represented by counsel, are at one in seeking jointly to uphold the action of the Legislative Assembly in rejecting the recommendation of the Boundaries Commission by declining to enlarge the number of electoral districts presently provided for in the existing legislation. Should the respondent and intervenors succeed, no change will be required in that legislation before the next elections to the Legislative Assembly.



[5] Section 3 of the *Canadian Charter of Rights and Freedoms* reads as follows:

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.

[6] This section is to be read and understood in its context, more particularly section 1 of the Charter:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[7] That these provisions apply to the Northwest Territories and their legislative assembly is plain from sections 30 and 32 of the Charter:

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[8] Section 3 has received judicial consideration in a number of cases, notably *Re: Reference re Electoral Boundaries Commission Act* (1991) 81 D.L.R. (4th) 16 on appeal to the Supreme Court of Canada from the opinion of the Court of Appeal of Saskatchewan; in which reference is made to *Dixon v. British Columbia (Attorney General)* (1989), 59 D.L.R. (4th) 247, (1989) 4 W.W.R. 393, 35 B.C.L.R. (2d) 273, 15 A.C.W.S. (3d) 121 (S.C.) and a number of other authorities.

[9] McLachlin J., writing for the majority of the Supreme Court of Canada in the above-mentioned *Reference* case, had this to say, in part, beginning at D.L.R. p.35:

C. *The meaning of the right to vote*

It is my conclusion that the purpose of the right to vote enshrined in s.3 of the Charter is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative ..., elected representatives function in two roles — legislative and what has been termed the "ombudsman role".

What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

\* \* \*

Notwithstanding the fact that the citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary 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.

It emerges therefore that deviations from absolute voter parity may be justified on grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in *Dixon, supra*, at p.267, that "only those deviations should be admitted which 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”.

[10] It follows that the right to vote guaranteed by section 3 of the Charter is more than merely the right to be registered as a voter and to cast a ballot on election day. In times past, there were residents of the Northwest Territories who were denied all right to vote in elections to the House of Commons and in elections to the legislature of the Northwest Territories. These denials of right have long since been corrected by legislation. Canadians through Parliament and their provincial and territorial legislatures, have chosen to tolerate a measure of over-representation from thinly populated and relatively remote regions in preference to any such complete denial of legislative representation from those regions. Nor is the present application directed at the removal or reduction of such over-representation within the Northwest Territories.

[11] Instead, the question before the court in the present application is whether the under-representation of voters at Yellowknife, in elections to the Legislative Assembly, is in violation of section 3 of the Charter. Should additional electoral districts there be created so as to correct this under-representation and meet the standard set by that important and over-riding requirement of the Constitution of Canada?

[12] The following table, taken from the report of the Northwest Territories Electoral Boundaries Commission 1998, which all parties agree to be accurate and complete, sets out the current electoral districts which will remain in existence after the division of the Territories by creation of the new Nunavut Territory, subject to any legislative change before the next elections to the Legislative Assembly. The figures in the table are derived from the 1996 census, as indicated; and the percentage variance for each district has been calculated on the basis of the average per district of the voter population.

<u>Present Electoral Districts</u>	<u>1996 Census Figure</u>	<u>Percentage Variance</u>
Nunakput	1,778	-37%
Inuvik	3,296	+17%
MacKenzie Delta	1,767	-37%
Sahtu	2,598	-8%
Nahendeh	2,132	-25%
Deh Cho	1,037	-63%
North Slave	2,471	-13%
Hay River	3,697	+31%
Thebacha	2,452	-13%
Tu Nedhe	842	-70%
Yellowknife North	4,207	+49%
Yellowknife Centre	3,369	+19%
Yellowknife South	7,105	+152%
Yellowknife Frame Lake	2,784	-1%
Total	39,535	
Average	2,824	

[13] The boundaries of these electoral districts are described in items 2 to 15 of Schedule "A" to the *Legislative Assembly and Executive Council Act*. And they are illustrated in maps included with the report of the Electoral Boundaries Commission 1998. Section 2 of the Act reads as follows:

2. (1) There shall be twenty-four electoral districts as named and described in Schedule "A".
- (2) Each electoral district is entitled to return one member to the Legislative Assembly.

[14] By section 17 of *An Act to amend the Nunavut Act and the Constitution Act, 1867*, S.C. 1997-98, c.15, the *Northwest Territories Act*, R.S.C. 1985, c.N-27, has been amended to the effect that, following the coming into being of the new Nunavut Territory, the Legislative Assembly of the Northwest Territories is to consist of 14 members, unless another number not less than 14 or more than 25 is fixed by it with the assent of the Commissioner of these Territories. This in effect also amends subsection 2(1) of the *Legislative Assembly and Executive Council Act* so as to substitute

“fourteen” for “twenty-four” and insert “items 2 to 15 of” before “Schedule” in the text of that subsection.

[15] Emphasis is placed by the applicants on the gross discrepancy between the percentage variations from the average for Yellowknife South (+152%) and Tu Nedhe (-70%). They submit that a vote in the larger of these electoral districts is worth only a small fraction of one in the other district. The same may be said upon comparison of the figures and averages for Yellowknife South and Yellowknife Frame Lake, though in that instance the discrepancy is less severe. It is not in dispute that, purely on a comparative population basis, the electoral district of Yellowknife South is under-represented in the Legislative Assembly.

[16] It is the applicants' submission that, given the current populations of the existing electoral districts in the Northwest Territories, the seven least populous of these districts can elect a majority of the members of the Legislative Assembly with no more than approximately 32% of the entire population. On doing the arithmetic, I reach a similar result while making all due allowance for exclusion of the Speaker from the calculation of a majority vote in a 14-member Assembly. By my calculation, the percentage of the total population which could elect such a majority of 7 members is 31.5% and thus a clear numerical minority.

[17] On the basis of the population figures set out in the report of the Northwest Territories Electoral Boundaries Commission 1998, it appears that 44% of the total territorial population after the creation of Nunavut will reside at Yellowknife, with no more than 29% of the seats in the Legislative Assembly. If two seats were to be added at Yellowknife, as recommended by the Commission, Yellowknife would have 38% of the seats for 44% of the population, leaving it still less than fully represented on a population basis but closer to what its residents may claim as an entitlement.

[18] Considering the factors of geography, community history and interests, language differences, difficulties in communication with remote communities and minority representation, not to mention the normal difficulties and expenses of travel between the seat of government at Yellowknife and the various communities outside Yellowknife, I am satisfied that there probably is justification within the ambit of section 3 of the Charter for the present over-representation of the electoral districts whose percentage variations in population are below the average. On the other hand, I am unable to find similar justification for the gross under-representation of those other

districts where the variations are markedly (25% or more) above the average. This gross under-representation must constitute a clear violation of section 3 of the Charter in the absence of due justification.

[19] As mentioned by the Alberta Court of Appeal (whose judges also sit as members of the Northwest Territories Court of Appeal) in *Reference re Electoral Boundaries Commission Act* (1992) 1 W.W.R. 481 at p.491:

We close with the comment that the real issue may be not about adequate representation for the less populated areas but under representation of more populated areas. No argument for effective representation of one group legitimizes under representation of another group. Arguments about the minimal size for ridings in lightly populated areas inevitably lead to the question why the Legislature cannot accommodate both those requests and the demand for parity by enlarging the Legislature. No doubt the Legislature can be too large. But it can also be too small. And, in light of the rule in *Reference re Provincial Electoral Boundaries, supra*, the overall size of the Legislature will, in the future, inevitably come under Charter scrutiny.

[20] The respondent Commissioner of the Northwest Territories, through her counsel at the hearing of this application, does not dispute the application of the *Canadian Charter of Rights and Freedoms* to the Northwest Territories, their Legislative Assembly and its legislation. She likewise agrees that the over-representation of the various numerically smaller electoral populations is not in issue; and, indeed, that voters resident at Yellowknife are numerically under-represented in the Assembly. It is her submission that this is a situation which has existed since the 1970s, the level of under-representation during this period having consistently rested at between 6% and 9%. The point being undisputed, I accept that it reflects a factual reality in the electoral history of the Northwest Territories.

[21] The respondent's position is that nothing should be done to affect the *status quo* in the distribution of seats in the Legislative Assembly, especially at this critical stage in the emergence of the new Northwest Territories from the old, following the division to be brought about by creation of Nunavut under federal legislation, supported by the government and Legislative Assembly of the existing ("old" after April 1st 1999) Northwest Territories. This position is supported fully by the Intervenor, who urge that section 3 of the Charter must be read together with, and subject to, section 25:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[22] In their submission regarding section 25 of the Charter, the Intervenors rely also upon section 35 of the *Constitution Act, 1982*:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[23] As I understand the position of the Intervenors, nothing should be done to affect the *status quo* in the distribution of seats in the Legislative Assembly until such time in the future as shall see the resolution of their on-going aboriginal land claims and aboriginal self-government negotiations with the governments of Canada and of the Northwest Territories. The Intervenors do not suggest that there is any existing aboriginal or treaty right on which they can rely in making this submission, other than the process rights implicit in section 25 of the Charter and section 35 of the *Constitution Act, 1982* as well as in existing aboriginal land claims agreements and related negotiations.

[24] Given that the Charter section 3 right to vote is a right of citizenship exercisable by all duly qualified individuals, it is clear that neither the existence nor the due exercise of that right should depend upon the leave, licence or say-so of any government or other executive authority, be it in relation to the negotiation or

enjoyment of any aboriginal land claim or other aboriginal or treaty right. And to the extent that voting rights are dependent upon or are exercisable only subject to legislation, that legislation must not violate the supreme law known as the Constitution of Canada, as defined by section 52 of the *Constitution Act, 1982*:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes:

(a) the Canada Act, 1982, including this Act;

(b) the Acts and orders referred to in the Schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[25] As the foregoing is intended to show, I remain unpersuaded that section 3 of the Charter is in any sense to be understood as qualified by section 25 of the *Charter* or section 35 of the *Constitution Act, 1982*, at least in the present instance, given the evidence before the court in this application. It is entirely unacceptable that such a fundamental right of citizenship as that recognized and guaranteed in section 3 of the Charter (and thus in the Constitution of Canada) should be held in suspense, and thus be withheld, during government negotiations over the future self-government of aboriginal or other groups which might yet take decades to bring to a conclusion.

[26] As mentioned during the hearing, one may well sympathise with the apparent understanding of the Intervenor, from their dealings with certain members of the Legislative Assembly, that there would be no change in the distribution of seats in the Assembly until all aboriginal claims and negotiations in relation to aboriginal self-government in the Northwest Territories have been brought to a final conclusion. Whatever the basis for any such understanding, it requires only a mention of the appointment by the Assembly of the Northwest Territories Electoral Boundary Commission 1998, in that year, to show that the Assembly did not see itself as bound by any such commitment. The Commission, of which the majority were aboriginal



members from outside Yellowknife with considerable experience in public affairs, proceeded with its mandate, as directed by the Assembly, notwithstanding the objections voiced by the Intervenors based on their above-mentioned understanding.

[27] Be that as it may, it is to be noticed that the various documents relied upon by the Intervenors in support of their position are couched in terms which make plain that the aboriginal self-government issues under negotiation are all "subject to the Constitution of Canada" and are not intended in any way to depart from it. It also deserves to be mentioned that the materials filed on this application reveal that a substantial element (20%) of the voting population at Yellowknife consists of aboriginals, whose right to effective representation in the Legislative Assembly is affected, equally with that of the non-aboriginal population, by the existing mal-distribution of seats in the Assembly. For that matter, it is not disputed that aboriginals comprise a majority of the population in a majority of the existing electoral districts, being all except Hay River and the present four Yellowknife districts; and, if the recommended additional two districts were to be added for Yellowknife voters, the majority of electoral districts would continue to represent a majority of aboriginal people.

[28] To the extent that the underlying issue is, as suggested by the Respondent and Intervenors, one of where the political power in the Legislative Assembly is or should be, so that the court should respond to the present application only with the greatest restraint (and preferably by declining to grant any remedy at all to the applicants), it therefore appears that removing the basis for the existing gross numerical under-representation in the Assembly of citizens at Yellowknife need not in any really significant way alter the existing balance of political power in the Assembly as it directly concerns the Intervenors and the aboriginal population of the Northwest Territories.

[29] Among the submissions of the Intervenors, I heard the suggestion that when an average of the voting populations of the electoral districts at Yellowknife is struck, it reveals a general level of under-representation (+50%) much less than that of the district Yellowknife South (+152%) taken alone. The submission was that no additional seats would be required if only the population was redistributed more equally within the four existing Yellowknife ridings. The difficulty with this submission, as to which I heard no solution, is that it would create a separate enclave at Yellowknife where all citizens, including aboriginals, would be treated according to a markedly

different standard of effective representation in the Legislative Assembly than all citizens elsewhere in the Northwest Territories. In effect, this would create a second class or level of representation. Upon reflection, I am confident that the Intervenor and those whom they represent will have no difficulty recognizing the unfairness and fundamental error of this suggestion. I note that it was put forward on motion in the Legislative Assembly, at the time that the Northwest Territories Electoral Boundary Commission 1998 report was before it; but that the motion was also defeated.

[30] Much was made by counsel for the Respondent and Intervenor of the apparently dominant position of Yellowknife within the Northwest Territories, being as it is the seat of government for these Territories and the pre-eminent territorial centre of private commercial and public government business. As I understand the submissions made in that connection, the historical voter under-representation in the Legislative Assembly from Yellowknife is the result of deliberate policy designed to compensate the regions outside Yellowknife for their comparatively less favoured positions. The submission is that nothing should be done which might lead to dominance over the Legislative Assembly by elected representatives from Yellowknife. However, any such outcome seems unlikely, given the limited scope of the recommendations made by the Boundaries Commission, not to mention the distribution of votes across these Territories already mentioned.

[31] There is no real room for doubt as to the much greater access to their elected representatives in the Legislative Assembly by voters at Yellowknife than elsewhere in the Northwest Territories. Nor is there any question but that access to officials in the government at many levels is generally less of a problem at Yellowknife than elsewhere in these Territories. The "ombudsman role" of elected representatives for districts at Yellowknife is consequently likely to be more effective and less onerous than for representatives of outlying districts across the Territories. But the general over-representation of these outlying districts already goes some way to compensate for this state of affairs, in part by lightening the relative burden of representation with the lower populations represented. It is surely not either necessary or appropriate to ensure that the "ombudsman role" of Yellowknife representatives is made more burdensome.

[32] It must be obvious that enlarging the Legislative Assembly (constructed to accommodate 25 members as it is) would lower the average of the population per electoral district and thus reduce to some degree the levels of numerical over-representation in many of the outlying districts while at the same time reducing quite markedly the levels of under-representation in the larger centres at Yellowknife. This can readily be seen by comparing the percentage variations from average (and the population figures giving rise to them) for the existing and proposed electoral districts recommended by the Boundaries Commission in 1998:

(a) Majority Recommendation

<u>Proposed Electoral Districts</u> <u>Districts</u>	<u>1996 Census</u> <u>Population Figure</u>	<u>Percentage Variance</u> <u>from Average</u>
Nunakput	1,778	-28%
Inuvik	3,296	+33%
MacKenzie Delta	1,767	-28%
Sahtu	2,598	+5%
Nahendeh	2,132	-14%
Deh Cho	1,123	-55%
North Slave	2,471	0%
Hay River	3,611	+46%
Thebacha	2,452	-1%
Tu Nedhe	842	-66%
Range Lake North*	2,928	+18%
Range Lake South*	3,321	+34%
Kam Lake*	3,368	+36%
Frame Lake*	3,369	+36%
Yellowknife Bay*	3,417	+38%
Weledeh*	1,062	-57%
	Total	39,535
	Average	2,471

\*Electoral districts at Yellowknife.

**(b) Minority Recommendation**

<u>Proposed Electoral Districts</u> <u>Districts</u>	<u>1996 Census</u> <u>Population Figure</u>	<u>Percentage Variance</u> <u>from Average</u>
Nunakput	1,778	-28%
Inuvik	3,296	+33%
MacKenzie Delta	1,767	-28%
Sahtu	2,598	+5%
Nahendeh	2,132	-14%
Deh Cho	1,123	-55%
North Slave	2,471	0%
Hay River	3,611	+46%
Thebacha	2,452	-1%
Tu Nedhe	842	-66%
Range Lake*	2,928	+18%
Kam Lake*	2,724	+10%
Great Slave*	2,722	+10%
Yellowknife Bay*	3,017	+22%
Frame Lake*	3,072	+24%
Weledeh*	3,002	+21%
	Total	39,535
	Average	2,471

\*Electoral districts at Yellowknife.

[33] The only difference in these proposals, as between the Commission's majority and minority reports, is as to the recommended new electoral districts for Yellowknife. And, as the figures show, the minority recommendation gives much more weight to relative voter parity between those districts than does that of the majority, while at the same time giving due consideration to geography, community history and interests, and minority representation. Regrettably, it still appears that both Inuvik and Hay River would remain markedly under-represented on a comparative numerical basis under either of these proposals.

[34] In the course of the hearing, some mention was made of the absence of recognized political parties in the Legislative Assembly of the Northwest Territories, members instead acting independently without being subject to party allegiances or discipline so as to form temporary alliances, at most, on issues of concern to them, in what has come to be known as “consensus government”. The business of the Assembly is still subject to majority votes. Nothing emerged from the discussion to suggest that this is a factor to be taken into consideration in relation to section 3 of the Charter or the present application. Likewise, the possibility that the Legislative Assembly or its Executive Council might conduct their business in a community other than Yellowknife, on a temporary basis (as has occurred at times in the past), does not appear to warrant consideration as such a factor. Nothing in evidence or in the submissions made at the hearing suggests that the Legislative Assembly or its Executive Council has ever been dominated by members elected from Yellowknife; rather it would appear that representatives from outside Yellowknife have held most of the leadership and senior positions in the Assembly and the Council, over the years.

[35] Much as can be said for the evidently careful and comprehensive work performed by the Northwest Territories Electoral Boundaries Commission 1998 and for its report to the Speaker of the Legislative Assembly, and particularly for the restraint demonstrated in both its majority and minority recommendations in view of the crucial division of the existing Territories which is presently impending, I refrain from expressing any view as to what the Legislative Assembly should yet do about it, believing that the Commission’s report speaks for itself and requires no endorsement by the court. Although divided as to the details of their recommendation, both the majority and the minority of the Commission have advised the Assembly:

... that the population of Yellowknife and the principle of effective representation require additional seats for the city and therefore a redrawing of electoral boundaries. We recommend that two electoral districts be added to the City of Yellowknife as follows: ...

[36] On the evidence before the court, two additional seats at Yellowknife will not alter the historical imbalance in representation favouring voters outside Yellowknife. As already noticed, such an addition would leave the city with 44% of the population and 38% of the seats in the Legislative Assembly following the separation of Nunavut from the remaining Northwest Territories, restoring the historical imbalance to 6%. Absent such an addition, the imbalance would grow to 15%, with 44% of the

population being represented by only 29% of the seats in the Assembly. The addition would, at the same time, eliminate the present gross violation of Charter section 3 in respect of Yellowknife South. And it would leave a majority in the Assembly representing a minority of only 38% of the entire voting population, much the same population minority as before.

[37] The argument that the historical imbalance above mentioned is to be preserved at all costs, and would be lost if the report of the Commission were acted upon by the Assembly, by creation of two new seats at Yellowknife, is therefore not persuasive in my respectful view. On the contrary, that imbalance would continue, at the historical level of not less than 6% overall in the ratio of seats to voting population. Creation of these additional seats would do no more than prevent an enlargement of the imbalance to 15%.

[38] As counsel for the Respondent has reminded me, this court in *Morin v. Northwest Territories (Conflict of Interest Commissioner)* (1999) N.W.T.J. No. 5 (Docket CV 07975) has held that the Legislative Assembly of the Northwest Territories is a legislature in the full sense of the word though not competent as yet to amend its own constitution except as permitted by the *Northwest Territories Act*. That being so, it is plain that the Charter section 3 voting right extends to voting in elections to that legislature equally with the provincial legislatures across Canada. Conditions in the Northwest Territories are different in certain respects from those in the provinces but the same constitutional principles apply. Canadian citizens in these Territories have the same Charter section 3 rights as do Canadian citizens in the various provinces.

[39] Given that the right to vote is at the core of the very essence of "a free and democratic society", it is difficult to imagine that undue dilution of that right by legislative action (or inaction) can be demonstrably justified in a free and democratic society, though prescribed by law. The evidence before the court establishes that such undue dilution has occurred in the electoral district of Yellowknife South and in the other electoral districts of the Northwest Territories in which the percentage variance from the average district population is greater than +25% as shown in the table contained in the report of the Northwest Territories Electoral Boundaries Commission 1998. Nothing in evidence has been shown to justify the undue dilution in those instances, whether within the ambit of section 3 or section 1 of the Charter. That being so, the applicants are entitled to a remedy.

[40] Section 24 of the *Canadian Charter of Rights and Freedoms* reads in part as follows:

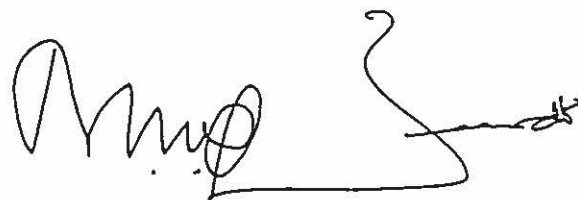
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[41] The remedy sought is a judicial declaration that subsection 2(1) of the *Legislative Assembly and Executive Council Act* R.S.N.W.T. 1988, c. L-5 (the "Act") and sections 2 through 15 of Schedule A of the said Act are invalid and of no force or effect as contrary to section 3 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (the "Charter"); together with an order in effect suspending that declaration until March 31st 1999 to allow the Legislative Assembly to amend the mentioned provisions to comply with section 3 of the Charter, but not for any other purpose; and an order for costs.

[42] There being no issue regarding the numerically over-represented districts having a percentage variance below the average district population based on the 1996 census figures, it is not open to the court to make a sweeping declaration which would include those districts. The remedy sought is therefore granted only in part, that is to say with reference only to the under-represented districts in which the right to vote is unduly diluted without due justification.

[43] Subject to the suspension order which follows, the court hereby declares that the existing provisions of subsection 2(1) as they relate to items 8 (Hay River), 12 (Yellowknife North) and 14 (Yellowknife South) of Schedule "A", all of the *Legislative Assembly and Executive Council Act* R.S.N.W.T. 1988, c. L-5, together with those three items, are invalid and without force or effect in law, being wholly inconsistent with section 3 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, all pursuant to subsections 24(1) and 52(1) of the last-mentioned Act. And it is ordered and declared that the foregoing declaration is suspended until (and shall come into force as law on) April 1st 1999, for the purpose of enabling the Legislative Assembly to replace or amend the invalid provisions to comply with section 3 of the Charter but for no other purpose.

[44] Costs may be addressed, if necessary, by appointment with the court.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', with a long horizontal stroke extending to the right.

M.M. de Weerd  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 5th day of March, 1999

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