

COPY

2011 01G 7277

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)**

BETWEEN:

JULIE MITCHELL

APPLICANT

AND:

CLYDE JACKMAN

FIRST RESPONDENT

AND:

JACQUELINE MULLETT

SECOND RESPONDENT

AND:

MARY FRANCIS

THIRD RESPONDENT

AND:

MARY HODDER

FOURTH RESPONDENT

AND:

VICTOR POWERS

FIFTH RESPONDENT

SUMMARY OF CURRENT DOCUMENT	
Court File Numbers	2011 01G _____
Date of Filing of Document	November __, 2011
Name of Filing Party or Person	Julie Mitchell
Application to which Document being filed relates:	Originating Application
Statement of purpose in filing	To have the election results for the district of Burin - Placentia West from the October 11, 2011 Provincial General Election declared void and a new election called for the district on a finding that the Special Ballot provisions of the Elections Act violate the <i>Canadian Charter of Rights and Freedoms</i> .
Court Sub-File Number, if any	N/A

ORIGINATING APPLICATION
(Inter Partes)

To the Supreme Court of Newfoundland and Labrador, or one of the Honourable Judges thereof, the Applicant says that:

Nature of the Application

1. The Applicant seeks to have the election results for the district of Burin – Placentia West from the October 11, 2011 Provincial General Election declared void and a new election called for the district on, *inter alia*, a finding that the Special Ballot provisions of the Elections Act 1991, SNL 1992 Chapter E-3.1, as amended, (hereinafter referred to as “the Elections Act, 1991”) violate the Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982 (hereinafter referred to as “the Charter” or “the Canadian Charter of Rights and Freedoms”) and that as a result the First Respondent was improperly elected as a member of the House of Assembly. This Honourable Court has the authority to grant the requested relief pursuant to the “Controverted Elections” section of the Elections Act 1991, most particularly ss. 227 – 268, and more particularly your within Applicant relies on s. 228 (1)(a) to found her complaint of an improper return of an election or an improper election of a member and pleads that this Honourable Court certify a determination that the election in the district of Burin – Placentia West shall be void, as provided for in s. 253 (1) thereof;

2. She is a resident of the Town of Marystown, in the Province of Newfoundland and Labrador. She was the Candidate for the New Democratic Party of Newfoundland and Labrador in the electoral district of Burin- Placentia West in the 2011 Newfoundland and Labrador Provincial General Election which was held on October 11, 2011.

3. The First Respondent is a resident of Baine Harbour, in the Province of Newfoundland and Labrador. He was the Candidate for the Progressive Conservative Party of Newfoundland and Labrador in the electoral district of Burin - Placentia West in the 2011 Newfoundland and Labrador Provincial General Election which was held on October 11, 2011. He was returned as the Member of the House of Assembly for Burin - Placentia West in the October 11, 2011 Provincial General Election.
4. The Second Respondent is a resident of Burin, in the Province of Newfoundland and Labrador. She was the Candidate for the Liberal Party of Newfoundland and Labrador in the electoral district of Burin- Placentia West in the 2011 Newfoundland and Labrador Provincial General Election which was held on October 11, 2011.
5. The Third Respondent is a resident of Burin, in the Province of Newfoundland and Labrador. She was the returning officer in the electoral district of Burin- Placentia West in the 2011 Newfoundland and Labrador Provincial General Election which was held on October 11, 2011.
6. The Fourth Respondent is a resident of Marystown, in the Province of Newfoundland and Labrador. She was the election clerk in the electoral district of Burin- Placentia West in the 2011 Newfoundland and Labrador Provincial General Election which was held on October 11, 2011.
7. The Fifth Respondent is a resident of the City of St. John's, in the Province of Newfoundland and Labrador. He was the Chief Electoral Officer at all times material to the 2011 Newfoundland and Labrador Provincial General Election which was held on October 11, 2011, and still holds that position and title.

8. Following the count of the ballots cast in the district on October 11, 2011, the official vote totals for Burin-Placentia West in the 2011 Newfoundland and Labrador Provincial General Election as released on October 14, 2011 were 202 (3.86%) for Jacqueline Mullett, the Second Respondent, of the Liberal Party of Newfoundland and Labrador, 2498 (47.69%) for Julie Mitchell, the Applicant, of the New Democratic Party of Newfoundland and Labrador, and 2538 (48.45%) for Clyde Jackman, the First Respondent, of the Progressive Conservative Party of Newfoundland and Labrador.

9. There were 334 special ballots cast in the district of Burin - Placentia West in the aforementioned October 2011 General Election. The official Elections Newfoundland and Labrador website describes special ballots, in part, as:

“Special Ballot voting is an alternative voting method available to electors who feel they will be unable to vote in person at the advance or regular polls. According to the Elections Act, 1991, this method of voting can be available to electors up to four weeks prior to the election or by-election being called.

Interested electors must apply to vote by Special Ballot and, once an application is approved, a Special Ballot kit is issued. This kit consists of a blank ballot and a series of envelopes designed to protect the secrecy of the elector's vote.

Special Ballots are blank because Special Ballot voting is open prior to Official Nomination day on the election calendar. Therefore, electors must print either the party name, the potential candidate's name (if they know it) or both.”

10. At least 25 special ballots were cast and received by election officials before the Writ of Election was dropped on September 19, 2011 and, further, additional special ballots of a presently unknown number were cast and posted before the Writ of Election was issued, but were not received by election officials until on or shortly after September 19, 2011, and the total number of ballots which were cast before the official beginning of the election on September 19, 2011 thus appears to equal or exceed 40 (that being the margin of victory of the First Respondent

over the Applicant in the district of Burin - Placentia West in the above noted October 2011 General Provincial Election).

11. Further specific concerns became apparent after a review by the Applicant of the special ballots cast in the election. In particular, each of a Mr. Andrew Smith and a Ms. Gwendolyn Smith cast special ballots in poll 1 in Burin-Placentia West, but their residences are identified as being the Blue Crest Nursing Home, in the Town of Grand Bank, which is not, your Applicant states, in the district of Burin - Placentia West. Further, a Mr. Wayne William Breen was allowed to cast a special ballot in poll two (2) in the district of Burin - Placentia West, despite listing his residence as St. George's Court, in the City of St. John's, also not, your Applicant states, in the electoral district of Burin-Placentia West. The listed residences appear on their face to be the ordinary residences of the three voters aforementioned under the Rules of Residency as defined by s. 26 of the Elections Act, 1991, and therefore they should not have been eligible to vote in the district of Burin - Placentia West. The Applicant may, at the hearing of this Application, have further evidence to adduce with respect to wrongful individuals having voted.
12. More generally, the Applicant takes issue with the Special Ballot provisions of the Elections Act, 1991, contained in ss. 86 - 86.10. Specifically, the Applicant states that the provisions of the Special Ballot provisions of the Elections Act, 1991, and s. 86(4) particularly, which allow for not only the application for and receipt of a special ballot up to 4 weeks before the calling of an election, but also the casting of said special ballot up to 4 weeks before the election has been called, are a violation of democratic and constitutional norms of Canada and the Commonwealth.
13. The Applicant repeats the foregoing, and further states that the casting of votes before the legislature has been dissolved and the Writ of Election issued, and/or before the close of candidate nominations on Nomination Day, create

circumstances inconsistent with the democratic processes of a Commonwealth and Common Law jurisdiction, and provide powers and advantages to still sitting members of the legislature, who are also candidates in particular electoral districts, and that said advantages are detrimental to the proper functioning of the democratic process.

14. The Applicant repeats the foregoing, and further states that the said Special Ballot provisions by themselves and in conjuncture with the other provisions of the Elections Act, 1991 are contrary to the Canadian Charter of Rights and Freedoms, specifically s.3 which reads "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" and which has been interpreted and is to be read with a broad and purposive approach.
15. The Applicant repeats the foregoing, and further states that s. 3 of the Canadian Charter of Rights and Freedoms protects the interrelated rights of voters and Candidates. The rights are interrelated in that limiting the ability of citizens to stand for elected office will deny voters of their full and necessary range of electoral options and thereby make less meaningful their right to vote and in the process compromise their right to meaningful representation. Likewise, limiting the ability of voters to be engaged in the election process and the debates which form the heart of a citizen's ability to properly exercise their franchise makes less meaningful the right of a citizen to stand for election to the legislature. It is only in concert that the substance of these rights can be realized.
16. The Applicant repeats the foregoing, and further states that allowing the casting of ballots four (4) weeks before an election is called is unconstitutional in its own right, but that this provision is an even greater violation of the rights of potential voters and candidates when considered in the context of s. 68(1)(b) of the Elections Act, 1991 which states that a person cannot be nominated as a candidate before the writ is dropped, and s. 282(3) which states that only an

officially nominated candidate (or a political party) may solicit, collect or accept contributions. This means that potential candidates are precluded from financing effective campaigns before the Writ of Election is dropped, and yet voting can have been happening for a full four (4) weeks.

17. The Applicant repeats the foregoing, most particularly paragraph 16, and further states that the same contribution limits as set out in s. 282(3) of the Elections Act, 1991 apply equally to those candidates who are not registered before Nomination Day, and that the same violations of the Charter result from the casting of ballots before Nomination Day as occurs when ballots are cast before the Writ of Election is dropped.
18. The Applicant repeats the foregoing, and further states that it should also be noted that until the Writ of Election is dropped those current Members of the House of Assembly still have publicly funded, but politically appointed, staff at their disposal and that most of the spending rules and restrictions contained in the Elections Act do not come into full force and effect until the Writ of Election is issued, officially beginning the election campaign.
19. The Applicant repeats the foregoing and states, in the alternative, that the same violations of The Charter apply to all votes cast before Nomination Day, that being defined by s. 59 of the Elections Act, 1991 as "the 10th day before the day of polling", and that there were significantly in excess of 40 special ballots cast in advance of Nomination Day in the district of Burin - Placentia West during the aforementioned October 2011 Provincial General Election. Nomination Day fell on October 1, 2011 during the October 2011 General Provincial Election.
20. The Applicant repeats the foregoing, and further states that the above mentioned sections of the Elections Act, 1991 breach the electorate's right to effective

representation, and further that this right is violated in that they are not able to make a fully informed decision about the options available to them in the election at the time that they are able to vote. Said electorate are asked to vote before there are any officially nominated candidates and also before the full societal debates and policy discussions ignited by a general election, which are crucial to ensuring effective representation, have taken place or, in many cases, even properly begun.

21. The Applicant repeats the foregoing, and further states that even if these sections of the Elections Act, 1991 do not violate the Charter protections of the citizens' voting rights, it is a violation of their right to stand for election in the legislature as also protected by s.3 of the Charter. Not only must a potential candidate attempt to garner votes while not officially a candidate for election, and before they are allowed to accept contributions towards their campaign, and while they may have to run against an MHA who is still sitting in an undissolved House of Assembly, but also in circumstances where the election may already have been significantly, or even completely, decided before the Writ of Election is issued and the normal, and Constitutional, election process commences.
22. The Applicant repeats the foregoing, and further states that s. 33 of the Canadian Charter of Rights and Freedoms cannot be used to save legislation which violates s.3 of the Charter and, further, that these particular violations of s. 3 of the Charter by the Elections Act, 1991 are not saved by s. 1 of the Charter.
23. The Applicant repeats the foregoing, and further states that she believes she has provided the foundation needed to meet the requirements for a controverted election as set out in s. 228(1)(a) of the Elections Act, 1991, SNL 1992, Chapter E-3.1.
24. The Applicant pleads and relies on the Elections Act, 1991, SNL 1992, Chapter E-3.1, most particularly s. 228(1)(a), and also pleads and relies on the Canadian

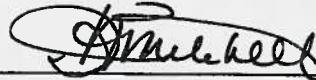
Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, specifically s. 3 of the Charter.

25. The Applicant repeats the foregoing and states that the Applicant has, with this her Application, deposited the sum of \$500.00 with the Registrar of the Supreme Court as security for the payment of all costs, charges and expenses that become payable by the applicant, in accordance with s. 240(1) of the Elections Act 1991, SNL 1992 chap. E-3.1.
26. That annexed hereto as Schedule "A" is the Affidavit of Julie Mitchell, former Deputy Mayor of Marystown, the within Applicant, in support of the Application.
27. The Applicant repeats the foregoing and therefore seeks of this Honourable Court an Order:
 - (a) that the Special Ballot provision of the Elections Act 1991, SNL 1992 Chapter E-3.1, most particularly ss. 86-86.10, be declared unconstitutional and in breach of s.3 of the Canadian Charter of Rights and Freedoms, and that said breach of the Applicant's and others' Charter rights are not saved by s. 1 of the Canadian Charter of Rights and Freedoms;
 - (b) that this Honourable Court, in accordance with the powers granted this Honourable Court under s. 253 (1) of the Elections Act 1991, SNL 1992 Chapter E-3.1, as amended, declare that the First Respondent was improperly elected as a member of the House of Assembly and that the election in the district of Burin - Placentia West is void;
 - (c) that this Honourable Court order or recommend that a new election take place in the district of Burin - Placentia West as soon as practical for the selection of a Member of the House of Assembly so as to provide effective

representation to the people of Burin - Placentia West in the provincial legislature; and

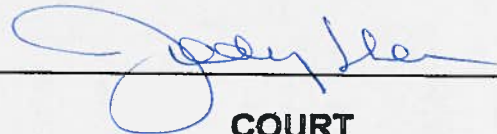
- (e) such other relief as this cause may require, as counsel may plead, and this Honourable Court may deem to be mete and just.

DATED at the Town of Burin, in the Province of Newfoundland and Labrador, this 25th day of November, 2011.



JULIE MITCHELL
Whose address for service is:
BUDDEN, MORRIS
Solicitors for the Applicant
184 Park Avenue
Mount Pearl, NL A1N 1K8
Attention: Mr. Geoffrey E. Budden

Issued at the City of St. John's, in the Province of Newfoundland and Labrador, this 28 day of November, 2011.



**COURT
OFFICER**

2011 01G 7277

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

BETWEEN: JULIE MITCHELL
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AND: CLYDE JACKMAN
FIRST RESPONDENT
AND: JACQUELINE MULLETT
SECOND RESPONDENT
AND: MARY FRANCIS
THIRD RESPONDENT
AND: MARY HODDER
FOURTH RESPONDENT
AND: VICTOR POWERS
FIFTH RESPONDENT

NOTICE TO THE RESPONDENT(S)

You are hereby notified that the foregoing application will be heard by the judge presiding in the chambers at the Court House at Duckworth Street, Newfoundland and Labrador on Tuesday the 13 day of December, 2011 at the hour of 10:00 o'clock in the fore noon or so soon thereafter as the application can be heard.

AND FURTHER TAKE NOTICE that on the hearing of the application, the judge may make an order in favour of the plaintiff in your absence and without further notice unless you or your solicitor:

(a) cause to be delivered to the plaintiff or the plaintiff's solicitor at the address named herein for service, not later than two clear days before hearing of the application, a true copy of any affidavit or other material that you or your solicitor intend to read on the hearing of the application, and

(b) appear on the hearing of the application at the time and place appointed for the hearing.

TO: The First Respondent
Mr. Clyde Jackman

**AND TO: The Second Respondent
Ms. Jacqueline Mullett**

**AND TO: The Third Respondent
Ms. Mary Francis**

**AND TO: The Fourth Respondent
Ms. Mary Hodder**

**AND TO: The Fifth Respondent
Mr. Victor Powers**

Endorsements

RECEIVED on _____ the _____ day of _____, 2011.

This statement of claim and attached notice to defendant(s) was served by me on the defendant(s), at _____, on _____ the _____ day of _____, 2011, before the hour of _____ in the _____ noon.

Endorsed on _____ the _____ day of _____, 2011.

Affidavit of Service

I, _____ of _____, Newfoundland and Labrador, _____ make oath (or affirm) and say that I did on _____, the _____ day of _____, 2011, at approximately _____m. serve _____, with the within statement of claim by leaving a true copy of the same with _____ personally at _____, and that I endorsed the date of service thereon on _____, the _____ day of _____, 2011.

SWORN (OR AFFIRMED) to at _____ in the Province of _____ this _____ day of _____, 2011, before me:

Endorsements

RECEIVED on _____ the _____ day of _____,
2011.

This statement of claim and attached notice to defendant(s) was served by me on
the defendant(s), at _____, on _____ the _____ day of
_____, 2011, before the hour of _____ in the _____ noon.

Endorsed on _____ the _____ day of _____, 2011.

Affidavit of Service

I, _____ of _____,
_____, Newfoundland and Labrador, _____ make oath
(or affirm) and say that I did on _____, the _____ day of _____,
2011, at approximately _____m. serve _____, with the
within statement of claim by leaving a true copy of the same with
_____ personally at _____, and that I
endorsed the date of service thereon on _____, the _____ day of
_____, 2011.

SWORN (OR AFFIRMED) to at _____ in the Province of
_____ this _____ day of _____, 2011,
before me

Endorsements

RECEIVED on _____ the _____ day of _____, 2011.

This statement of claim and attached notice to defendant(s) was served by me on the defendant(s), at _____, on _____ the _____ day of _____, 2011, before the hour of _____ in the _____ noon.

Endorsed on _____ the _____ day of _____, 2011.

Affidavit of Service

I, _____ of _____, Newfoundland and Labrador, _____ make oath (or affirm) and say that I did on _____, the _____ day of _____, 2011, at approximately _____m. serve _____, with the within statement of claim by leaving a true copy of the same with _____ personally at _____, and that I endorsed the date of service thereon on _____, the _____ day of _____, 2011.

SWORN (OR AFFIRMED) to at _____ in the Province of _____ this _____ day of _____, 2011, before me

Endorsements

RECEIVED on _____ the _____ day of _____, 2011.

This statement of claim and attached notice to defendant(s) was served by me on the defendant(s), at _____, on _____ the _____ day of _____, 2011, before the hour of _____ in the _____ noon.

Endorsed on _____ the _____ day of _____, 2011.

Affidavit of Service

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SWORN (OR AFFIRMED) to at _____ in the Province of _____ this _____ day of _____, 2011, before me

Endorsements

RECEIVED on _____ the _____ day of _____, 2011.

This statement of claim and attached notice to defendant(s) was served by me on the defendant(s), at _____, on _____ the _____ day of _____, 2011, before the hour of _____ in the _____ noon.

Endorsed on _____ the _____ day of _____, 2011.

Affidavit of Service

I, _____ of _____, Newfoundland and Labrador, _____ make oath (or affirm) and say that I did on _____, the _____ day of _____, 2011, at approximately _____ .m. serve _____, with the within statement of claim by leaving a true copy of the same with _____ personally at _____, and that I endorsed the date of service thereon on _____, the _____ day of _____, 2011.

SWORN (OR AFFIRMED) to at _____ in the Province of _____ this _____ day of _____, 2011, before me
