

SUPREME COURT OF NOVA SCOTIA

Citation: *Pictou County (Municipality) (Re)*, 2017 NSSC 13

Date: 2017-01-11

Docket: Pictou, No. 457062

Registry: Pictou

Between:

Municipality of the County of Pictou

Applicant

v.

Brian Cullen, Clerk of the Municipality of the County of Pictou,
Josephine MacDonald, Returning Officer, Peter Boyles, Candidate,
James Davidson Candidate, and Barbara Weir

Respondents

DECISION

Judge: The Honourable Justice N. M. (Nick) Scaravelli

Heard: December 22, 2016, in Pictou Nova Scotia

Counsel: Donn Fraser for the Municipality of Pictou County

Frank DeMont for James Davidson

Peter Boyles on his own behalf

[1] The Municipal Election for the Municipality of the County of Pictou (Municipality) for District 9 was held on October 15, 2016. Peter Boyles, the successful candidate received 256 votes. Candidate James Davidson received 255 votes, and candidate Barbara Weir received 155 votes. Therefore, the winning candidate won by a single vote over the second place candidate.

[2] Following the election, it was determined there was an irregularity regarding compliance with the *Municipal Elections Act*, R.S.N.S. c 300, in that a ballot box was temporarily removed from the polling station during polling hours. As a result, the Municipality has made an application in court seeking a declaration as to the validity or invalidity of the October vote.

[3] The Municipality takes no position on this application. Mr. Davidson submits the election should be declared void. Mr. Boyles and Ms. Weir favor the validity of the election results.

Law

[4] In *St. Mary's (District) (Re)* 2017 NSSC 9, this court reviewed the law:

3 The *Municipal Elections Act* provides, at s 158(1):

158 (1) Where an election or a vote of the electors for the determination of any matter that the council has directed be put before the electors has not been conducted in accordance with this Act, the Supreme Court may, upon application, declare the election or the vote to be void.

4 The court's power to void an election on the ground of an irregularity in the process is qualified by s 164:

164 No election shall be declared invalid

(a) by reason of any irregularity on the part of the clerk or the returning officer or in any of the proceedings preliminary to the poll;

(b) by reason of any want of qualification in the person signing a nomination paper received by the returning officer under the provisions of this Act;

(c) by reason of a failure to hold a poll at any place appointed for holding a poll;

(d) by reason of non-compliance with the provisions of this Act or a by-law made pursuant to this Act as to the taking of the poll, as to the counting of the votes or as to limitations of time; or

(e) by reason of any mistake in the use of the prescribed forms, if it appears to the judge that the election was conducted in accordance with the principles of this Act and that the irregularity, failure, non-compliance or mistake did not affect the result of the election.

5 The governing interpretive principles have been considered in a line of cases, including *Warrington v Lunenburg (Municipality)*, 2006 NSCA 78, *Madden v Muise*, 2013 NSSC 35, *Fells v Barrington (Municipality)*, 2013

NSSC 331, and *Opitz v Wrzesnewskyj*, 2012 SCC 55, dealing with similar provisions in the *Canada Elections Act*.

6 The Nova Scotia Court of Appeal set out the general principles governing ss 158 and 164 in *Warrington*. Fichaud JA held, first, that s 158(1) “is the affirmative authority to void the election” while s 164 “is abrogative, and directs the judge not to exercise her discretion under s. 158(1).” Secondly, he noted, s 164 “says that no election shall be voided ‘if it appears to the judge’ that the two conditions exist. The onus to satisfy the judge is on the party who relies on s. 164 to save the election...” In considering the onus, the court rejected the view that “because there is no way to establish in whose favour [the impugned votes] were cast, therefore it cannot be said, with certainty, that the result would be different if they were set aside.” It would be contrary to the principles of the *Act* and the secret ballot to require the challenger to “establish how each unqualified elector voted.” Fichaud JA continued:

20 Third: To save the election, both conditions in the concluding passage of s. 164 must exist. If the respondent fails to prove either that (1) the election was "conducted in accordance with the principles of this Act" or that (2) the irregularity "did not affect the result", then s. 164 is inapplicable...

21 Fourth: Section 158(1) permits the Court to declare an election void if the election "has not been conducted in accordance with this Act." The first saving condition of s. 164 is that the election "was conducted in accordance with the principles of this Act." The semantic distinction recognizes that the irregularities may just be technical non-compliance with procedures in an election that, overall, complied with the principles of the legislation. Section 164 aims to save that election, provided that the irregularities did not change the result... So the court must decide whether the irregularities are

serious enough to offend the governing principles in the electoral legislation... [Emphasis added.]

7 Fichaud JA went on to elaborate on the principles relevant to determining whether irregularities are serious enough to offend the principles of the *Act*:

21 (a) The recipient of the most votes of qualified electors wins the election. A serendipitous result, where nobody knows who received the most votes, is without any principled basis... This means that irregularities that could not place the result of the election at risk may not offend the principles of the Act. But irregularities of a nature or number that could have altered the result should not occur in any election that is conducted in accordance with the principles of the electoral legislation. In *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C. *in banco*) at p. 351 MacDonald, J. said:

There is abundant authority for a court declaring an election void because of the casting of ballots by unqualified persons to an extent making it impossible to determine what candidate was elected, and that it is not necessary (as indeed it is impossible under the law) for it to be shown that the illegal ballots form part of the successful candidate's majority (*Nuytten v. Strutynski*, [1939] 3 D.L.R. 311).

A typical statement of this rule is to be found in the Headnote to *Lamb v. MacLeod No. 5*, [1932] 3 W.W.R. 596, that where on a trial of an election petition:

"It is proved that unqualified persons voted and that the number thereof was more than the majority by which the successful candidate was declared elected, the election must be declared void, since the law

will not permit the secrecy of the ballot to be violated even in the case of such voters by ascertaining for which candidate they voted, and therefore it cannot be said any candidate received a majority of the qualified votes."

... If the irregularities are such that the result may have been affected, the party relying on s. 164 must prove that the result was not affected. If he does so, then he will satisfy both conditions of s. 164. Otherwise, he will satisfy neither condition.

(b) If the deficiency involves a substantial breach of a statutory requirement, then the election was not "conducted in accordance with the principles of this Act." It does not matter whether or how the deficiencies affected the result. Section 164 does not operate, and the election will be declared void... As Lord Denning said in *Morgan*, p. 164:

If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. [Emphasis added.]

8 Language resembling that of s 164 was considered by the Supreme Court of Canada in *Opitz*, which was decided more recently than *Warrington* and must be taken into account. That case involved a provision of the *Canada Elections Act*, SC 2000, c 9, which permitted an election to be contested on the grounds that "there were irregularities, fraud or corrupt or illegal practices that affected the result of the election." Section 164, in turn, provides that an election shall not be voided where it "was conducted in accordance with the principles of this *Act* and that the irregularity, failure, non-compliance or mistake did not affect the result of the election." The majority in *Opitz* commented on the determination of whether an irregularity affected the result:

74 The following approach should be followed in determining whether there were "irregularities ... that affected the result of the election": An applicant must prove that a procedural safeguard designed to establish an elector's entitlement to vote was not respected. This is an "irregularity". An applicant must then demonstrate that the irregularity "affected the result" of the election because an individual voted who was not entitled to do so. In determining whether the result was affected, an application judge may consider any evidence in the record capable of establishing that the person was in fact entitled to vote despite the irregularity, or that the person was not in fact entitled to vote.

75 If it is established that there were "irregularities ... that affected the result of the election", a court may annul the election. In exercising this discretion, if a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election. For the purposes of this application, the "magic number" test will be used to make that determination.

72 The "magic number" test "is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.

- 9 Muise J applied these remarks in the context of the Nova Scotia *Act* in *Madden*. He noted that the majority in *Opitz* preferred a 'substantive' approach, which emphasizes substantive voting rights, to a 'strict procedural'

approach, which would invalidate votes cast with entitlement simply because the proper procedure was not followed.

Analysis

[5] The circumstances surrounding the irregularity is set out in the Municipality's brief and are not in dispute.

1 An elector (the "third party elector") attended the Polling Station on October 14, 2016 and indicated that there was an older couple (the "couple") who were unable to come into the Polling Station and the third party elector inquired whether the ballot box (the "ballot box") at the Polling Station could be taken to the couple so that the couple could cast their vote.

2 A polling clerk and deputy returning officer took the ballot box to the couple's house approximately one kilometer or less from the polling station and then returned to the polling Station with the ballot box after each of the couple completed and then inserted their ballot in the ballot box at the couple's house.

3 The polling clerk and the deputy returning officer were away from the polling station with the ballot box for approximately 10 minutes in total.

4 Over the period of time from the ballot box leaving the polling station, to its return (as described above):

- a. the ballot box remained in sight of the polling clerk and the deputy returning officer;
- b. no ballots were removed from the ballot box; and
- c. the only ballots placed in the ballot box were the two ballots cast by the couple at their home.

5 When the polling clerk and the deputy returning officer returned to the polling state with the ballot box, there were two individuals waiting to vote , who arrived only a few minutes prior to the ballot box’s return. Those two individual voted upon the ballot box’s return. Other than those two aforementioned individuals, no one else entered or left the polling station while the ballot box was not there.

[6] There is no dispute that the removal of the ballot box violated section 68(6) of the *Municipal Elections Act* which provides: “subject to section 88, ballot boxes shall not be removed from the polling station during the hours the poll is open and until the votes have been counted”. It is agreed that the section 88 exception – for the movement of a ballot box in a hospital or similar facility – does not apply here. Accordingly, it is clear that the election was not conducted in accordance with the *Municipal Elections Act* and section 158 is triggered.

[7] Mr. Davidson submits there was a substantial breach of a statutory requirement that was more than technical non-compliance and therefore amounted to a violation of the principles of the *Act (Warrington)*. Further, applying the “magic number” test puts Mr. Davidson ahead by one vote which would effect the results of the election.

[8] Following the comments of the Supreme Court in *Opitz*, the court does not automatically resort to the magic number test just because the number of impugned votes were enough to effect the result. The majority appears to reject the “strict procedural approach” in favor of a “substantive approach”. That is, there is a purposive analysis that requires a consideration of whether anyone voted who was not entitled to vote. Only then does the magic number test come into play.

25 "Affected the result" asks whether someone not entitled to vote, voted. Manifestly, if a vote is found to be invalid, it must be discounted, thereby altering the vote count, and in that sense, affecting the election's result. "Affected the result" could also include a situation where a person entitled to vote was improperly prevented from doing so, due to an irregularity on the part of an election official. That is not the case here and we need not address it.

54 Two approaches have been used in the past by courts to determine whether there was an "irregularit[y] ... that affected the result" of an election. A strict procedural approach was followed by courts in *O'Brien v. Hamel* (1990), 73 O.R. (2d) 87 (H.C.J.); *Nielsen v. Simmons* (1957), 14 D.L.R. (2d) 446 (Y. Terr. Ct.); *Hogan v. Careen and Hickey* (1993), 116 Nfld. & P.E.I.R. 310 (S.C. (T.D.)); and *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C.). Under that approach, all votes cast pursuant to an irregular procedure were held to be invalid. The failure to comply with a procedural step aimed at determining entitlement was considered to directly affect the result of the election. In these cases, even where the elector's right to vote in the election could have been proven to the court after the fact, failure to comply with the procedural safeguards sufficed to discount the votes in question.

55 A second approach, sometimes referred to as the "substantive" approach, emphasizes the substantive right of the elector to vote. An approach along these lines has been followed in other Canadian contested election cases: *Camsell* [page102]

and *Flookes and Long v. Shrake* (1989), 100 A.R. 98 (Q.B.). On this approach, failure to follow a procedural safeguard is not determinative of whether the result of the election has been affected.

56 In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even where the result of the election reflects the will of the electors who in fact had the right to vote. This approach places a premium on form over substance, and relegates to the back burner the *Charter* right to vote and the enfranchising objective of the Act. It also runs the risk of enlarging the margin of litigation, and is contrary to the principle that elections should not be lightly overturned, especially where neither candidates nor voters have engaged in any wrongdoing. Part 20 of the Act should not be taken by losing candidates as an invitation to examine the election records in search of technical administrative errors, in the hopes of getting a second chance.

57 The substantive approach is recommended by the fact that it focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right. In our view, an approach that places a premium on substance is the approach to follow in determining whether there were "irregularities ... that affected the result of the election". On this approach, a judge should look at the whole of the evidence, with a view to determining whether a person who was not entitled to vote, voted. Unlike the "strict procedural" approach, evidence going to entitlement is admissible. By the same token, direct evidence of a lack of entitlement is not required. Proof of an irregularity may itself be sufficient to discount a vote.

[14] Applying the reasoning in *Opitz* and considering the evidence as a whole, I am not satisfied that the singular irregularity amounted to a substantial breach or effected the result. The couple who voted were entitled to vote in District 9, but

ended up doing so in circumstances where the ballot temporarily left the polling station contrary to the requirements of the *Municipal Elections Act*. *Opitz* emphasizes protecting the voting rights of eligible voters. In the present case, no one voted who was not eligible to vote and everyone who showed up at the poll voted. There is no suggestion of any irregularity in the process beyond the temporary removal of the ballot box. The evidence of polling officials discloses no untoward intentions and the ballot box remained within their care and control at all times.

[15] As a result, the court declares the election valid for counsellor to represent the Municipality of the County of Pictou for District 9.

Scaravelli, J.