

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Habkirk v. Robinson*, 2017 NSSC 59

**Date:** 20170309  
**Docket:** ST 457320  
**Registry:** Truro

**Between:**

Nora Howell Habkirk, David Habkirk, Sean Howell, Terry Stanislow,  
David Baker, Charles Spurr, Kelly Shephard, Audrey Armsworthy,  
Pam Osborne, Theresa Rafuse, and Shannon Rafuse

Applicants

v.

Wendy Robinson, Sheldon Dorey in his capacity as Returning Officer,  
Charlotte Fleming in her capacity as Clerk, Roseanne Chapman,  
Mary Commo, Susan Creelman, Chad Ramsey, Rebecca Rogers-Laing,  
Russel Stoddart, Natasha Head, David LeBlanc, Anna Nibby-Woods,  
Ashlee Rhae Parks, and Judy Stoddart

Respondents

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Michael J. Wood

**Heard:** February 8, 2017, in Truro, Nova Scotia

**Written Decision:** March 9, 2017

**Subject:** Municipal Elections – Irregularities in voting – invalidity of result

**Summary:** In 2016 election for the Town of Stewiacke seven votes were cast improperly using telephone voting PIN. Persons who voted on behalf of electors were not qualified as “friend voters” under municipal by-law. Margin of victory for mayor was fourteen votes and for council twelve.

**Issues:** Should election result be set aside and a new election held?

**Result:**

Court reviewed authorities and concluded that respondents had shown that results not affected by invalid voting. Distinguished situation where voting irregularities due to actions of election officials. Did not agree with applicants' suggestion that invalid votes should be deducted from winning total and added to next place candidate. There was some evidence that votes cast for electors' choice of candidate even though proper procedure not followed. Election not declared invalid.

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**Decision**

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** February 8, 2017, in Truro, Nova Scotia

**Counsel:** Robert H. Pineo, for the applicants

Charles A. Thompson, for the respondents  
(Sheldon Dorey and Charlotte Fleming)

Peter Lederman, QC, for the respondent  
(Judy Stoddart)

**By the Court:**

[1] In the municipal election for the Town of Stewiacke held in October 2016, there were seven votes which were cast illegally, one by Janice Peterson and six by Judy Stoddart. All were cast by telephone on behalf of electors other than Ms. Peterson and Ms. Stoddart. These two individuals were assisting the electors who were entitled to vote but did not follow the prescribed process for doing so.

[2] The successful mayoral candidate was Wendy Robinson who won by a margin of 14 votes. The race for council had 11 candidates for six positions. The seventh place candidate lost by a margin of 12 votes.

[3] The applicants are electors in the Town of Stewiacke and two of the unsuccessful candidates. They have brought this proceeding for an order declaring the municipal election to be void under the provisions of the *Municipal Elections Act*, R.S.N.S. 1989, c. 300, (the “*Act*”) as a result of the votes cast by Ms. Peterson and Ms. Stoddart.

[4] The respondents are the returning officer and clerk along with the remaining candidates in the election and Ms. Stoddart. Only the returning officer and clerk participated in the hearing.

**Legislative Framework**

[5] Remote voting by telephone or computer is relatively new in Nova Scotia. It is presumably intended to make it easier for votes to be cast and thereby increase the rate of voter participation. Since the actual voting takes place outside of a polling station, there is no direct oversight by the returning officer or other election officials. Not surprisingly, there are a number of safeguards which have been created in order to avoid potential abuse.

[6] Section 146A of the *Act* allows alternative voting where it is authorized by by-law of municipal council. In the case of Stewiacke, such a by-law was passed in the spring of 2012.

[7] According to the Stewiacke by-law an elector can vote by telephone using a confidential Personal Identification Number (PIN) and following an audio set of instructions. Selections are made by depressing the number on a touchtone keypad. In certain limited circumstances an elector is permitted to cast their vote by use of a

“friend voter”. The process for this is found in s. 11 of the by-law which reads as follows:

Friend Voting

11. (1) A friend voter shall only vote for an elector by alternative voting if:
  - (a) an elector is unable to vote because the elector is blind, the elector cannot read, or the elector has a physical disability that prevents him or her from voting by alternative voting; and
  - (b) the elector and the friend appear, in person, before the Returning Officer and take the prescribed oaths.
- (2) A candidate shall not act as a friend voter unless the elector is a child, grandchild, brother, sister, parent, grandparent, or spouse of the candidate.
- (3) The elector shall take an oath in the prescribed form to this by-law providing that he or she is incapable of voting without assistance.
- (4) The friend of the elector shall take an oath in the prescribed form to this by-law that:
  - (a) the friend has not previously acted as a friend for any other elector in the election other than an elector who is a child, grandchild, brother, sister, parent, grandparent, or spouse of the friend of the elector;
  - (b) the friend will mark the ballot as requested by the elector; and
  - (c) the friend will keep secret the choice of the elector.
- (5) Where the elector requests assistance, the Deputy Returning Officer may act as a friend of the elector but shall not be required to take the oath referred to in subsections (1) and (4).
- (6) The Poll Clerk shall enter in the poll book:
  - (a) the reason why the elector is unable to vote;
  - (b) the name of the friend; and
  - (c) the fact that the oaths were taken.

[8] The by-law prohibits the use of another person’s PIN to cast a vote unless the person doing so is qualified as a friend voter. In addition, no person may communicate or attempt to communicate any information as to the candidate for whom another person has voted (s. 26).

[9] This application is brought pursuant to s. 158(1) of the *Act* which provides:

### **Voiding of election or vote**

**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.

[10] Section 164 is also applicable and it provides:

### **Irregularity**

**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* or a by-law made pursuant to this *Act* and that the irregularity, failure, non-compliance or mistake did not affect the result of the election. R.S., c. 300, s. 164;b 2008, c. 24, s. 4.

### **Voting in the Stewiacke Election**

[11] Ms. Peterson and Ms. Stoddart cast votes using the PIN numbers of other electors. They were not entitled to do so and the provisions of the by-law with respect to friend voters was not followed. This means the returning officer did not verify that the electors met the criteria to appoint a friend voter. Ms. Peterson and Ms. Stoddart did not take an oath confirming their eligibility to act as a friend nor undertake to mark the ballot as instructed and to keep the elector's choice secret. There is also no record in the poll book of the reason the elector was unable to vote.

[12] One of the electors, Phyllis MacDonald, filed an affidavit saying her daughter was Janice Peterson and she asked her to vote using her PIN because she did not feel

well enough to go to the polling station in person. She said her daughter voted as instructed.

[13] Ms. Stoddart filed an affidavit indicating that she is married to Russell Stoddart, who was a candidate for councillor in the Stewiacke municipal election. She said that two of the electors for whom she voted are her mother and aunt who both asked her to assist. Two of the other electors were Charlotte and Douglas Green and she went to their home to assist them in voting at their request. The final two electors were another couple and she went to their residence to assist them in voting at the request of Wendy Robinson, one of the mayoral candidates. Ms. Stoddart says she voted as instructed in all six cases.

[14] It is important to note that under the by-law a friend voter can only be used if the elector is blind, cannot read, or has a physical disability that prevents them from voting by alternative means. There is nothing in the record to indicate that any of the electors met that criteria. There is some evidence suggesting there may have been some physical limitations which might impact the ability of some of the electors to attend a polling station, but that is not the test.

[15] We do not know which candidates received the votes cast by Ms. Peterson and Ms. Stoddart and that is not surprising since the by-law prohibits disclosure of this information.

[16] It is clear that all seven of the votes cast by Ms. Peterson and Ms. Stoddart contravened the requirements for alternative voting found in the Stewiacke by-law. The question which I must determine is whether this justifies setting aside the results of the municipal election.

### **Analysis**

[17] Legislation governing elections in Canada generally include provisions similar to s. 158(1) and s. 164 of the *Act* permitting the court to set aside an election. The specific language varies somewhat between jurisdictions but the underlying principles are consistent. Where there are irregularities which call into question the legitimacy of the outcome, an election should be set aside and a new vote held. The leading case in this area is **Opitz v. Wrzesnewskyj**, 2012 SCC 55, which considered s. 524(1) of the *Canada Elections Act*, S.C. 2000, c. 9, which reads:

### **Contestation of election**

**524 (1)** Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that

(a) under section 65 the elected candidate was not eligible to be a candidate; or

(b) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

[18] The Supreme Court of Canada identified some issues arising out of the annulment of an election and explained in the following passage why it should only do so when the results are affected:

**2** At issue in this appeal are the principles to be applied when a federal election is challenged on the basis of "irregularities". We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.

...

**22** Under those provisions, if the grounds in paragraph (a) of s. 524(1) are established (the elected candidate was ineligible), then a court must declare the election null and void. In such circumstances it is as if no election was held. By contrast, if the grounds in paragraph (b) are established (there were irregularities, fraud or corrupt or illegal practices that affected the result of the election), a court *may* annul the election. Under these circumstances, a court must decide whether the election held was compromised in such a way as to justify its annulment.

**23** In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. 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.

[19] In deciding whether an election should be annulled the court noted that the focus is on the validity of the vote count. This is indicated in the following comments:

**51** Having regard to the centrality of the constitutional right to vote, the enfranchising purpose of the *Act*, the language of s. 524, and the numerous democratic values engaged, we conclude that an "irregularit[y] ... that affected the result" of an election is a breach of statutory procedure that has resulted in an individual voting who was not entitled to vote. Such breaches are serious because they are capable of undermining the integrity of the electoral process.

[20] The assessment to be undertaken should emphasize the substantive right of an elector to vote and not focus on whether procedural irregularities occurred. The Supreme Court described this as follows:

**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.

**58** There are two steps to this approach. First, an applicant must prove that there was an "irregularity": breach of a statutory provision designed to establish a person's entitlement to vote. We do not understand the minority to suggest otherwise. For example, a breach of s. 148.1 or s. 149 would amount to an "irregularity" because these provisions go to establishing entitlement.

**59** Second, an applicant must demonstrate that the irregularity "affected the result" of the election: someone not entitled to vote, voted. Where that is established, the vote is invalid, and must be rejected. Rejecting a vote affects the result of the election in the sense that it changes the vote count. It is at this second step that our approach departs from that of the minority.

**60** An "irregularity" constitutes evidence from which it may be inferred that a voter was not entitled to vote, because it is a breach of a procedure designed to establish the voter's entitlement. As indicated, proof of an irregularity may itself be sufficient to show that an invalid vote was cast, thereby affecting the result of the election.

[21] The substantive approach advocated in **Opitz** has been adopted and applied in Nova Scotia (see for example **Madden v. Muise**, 2013 NSSC 35, and **Pictou County (Municipality) (Re)**, 2017 NSSC 13).

[22] Prior to **Opitz** the Nova Scotia Court of Appeal had the opportunity to consider the application of s. 158(1) and s. 164 of the *Act* in **Warrington v. Pettipas**, 2006 NSCA 78. In that case the court set out the proper approach to the interpretation of the Nova Scotia legislation. After noting that the onus to satisfy s. 164 rests on the party seeking to save the election, the court said the following:

**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. See **Morgan**, p. 164; **Hickey**, at p. 342 *per* Riddell, J. and at pp. 327-8, *per* Anglin, J.; **Wright v. Koziak** (1981), 114 D.L.R. (3d) 549 (A.C.A.), at p. 558; **Pollard (Q.B.)**, at p. 546.

**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. **Morgan** at p. 164; **Pollard (Q.B.)** at pp. 544-6; **Hickey** at pp. 341-2. So the court must decide whether the irregularities are serious enough to offend the governing principles in the electoral legislation. Without attempting an exhaustive list, there are two such principles, drawn from the authorities, that are relevant to this case.

- (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. **Wright** at p. 559 and **R. v. Clay**, [1945] 4 D.L.R. 424 (Alta D.C.) at pp. 431-2. 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."

In **Blanchard**, at p. 320 Chief Justice Ilsley expressed similar views. To the same effect **O'Brien v. Hamel** (1990), 70 D.L.R. (4th) 466 (Ont. Div. Ct.), at pp. 472, 474; **Pollard** (Q.B.), at pp. 546, 551, 556; **Marion v. Hebert**, [1937] 3 D.L.R. 585 (MCA) at p. 588; **Lamb v. McLeod (No. 5)**, [1932] 3 W.W.R. 596 (SCA) at pp. 601, 603. 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. **Hickey**, at p. 328; **Pollard**, (Q.B.), at pp. 544-6, 551, 555-6; **O'Brien**, p. 473. 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.

[23] I do not believe the approach adopted by the Court of Appeal is changed by the subsequent Supreme Court decision in **Opitz**, except to emphasize substance over procedure in deciding whether irregularities are sufficient to set aside the election.

[24] As these cases indicate, this application requires the court to examine the extent to which legitimate electors have had their votes excluded or unqualified electors had their votes counted. I must also recognize that setting aside the election

will potentially disenfranchise other voters. This sentiment is captured in the following passage from **Opitz**:

**48** It should be remembered that annulling an election would disenfranchise not only those persons whose votes were disqualified, but every elector who voted in the riding. That voters will have the opportunity to vote in a by-election is not a perfect answer, as Professor Steven F. Huefner writes:

... a new election can never be run on a clean slate, but will always be colored by the perceived outcome of the election it superseded. New elections may also be an inconvenience for the voters, and almost certainly will mean that a different set of voters, with different information, will be deciding the election. Moreover, there can be no guarantee that the new election will itself be free from additional problems, including fraud. In the long term, rerunning elections might lead to disillusionment or apathy, even if in the short term they excite interest in the particular contest. Frequent new elections also would undercut democratic stability by calling into question the security and efficiency of the voting mechanics.

("Remedying Election Wrongs" (2007), 44 Harv. J. on Legis. 265, at pp. 295-96)

[25] If the application is granted and a new election held in the Town of Stewiacke, it is very likely that some electors who voted in the last election will not do so in the new one, and others who did not vote in October will cast ballots. Some may decide to vote for a different candidate. Ordering a new election should not be done lightly.

[26] In all of the cases I have referred to, the deficiency which led to the application resulted from some act or omission of election officials. More than once the court expressed the view that electors should not be disenfranchised as a result of conduct of election officials. In this case, there is no suggestion that municipal election officials did anything wrong. The voting by Ms. Stoddart and Ms. Peterson, which contravened the Stewiacke by-law, was the result of individuals who did not follow the rules for friend voters. Even if everyone was acting in good faith the electors bear some responsibility for the improper telephone voting. This is not a situation where someone has been disadvantaged by election officials.

[27] It is clear the Stewiacke election was not conducted in accordance with the *Act* which means s. 158(1) is triggered and the court may declare the election to be void. The respondents must satisfy the two requirements of s. 164 in order to save the election. The first is that the election was conducted in accordance with the principles of the *Act* and the other is that the non-compliance did not affect the result. Although the Court of Appeal in **Warrington** discussed these separately I believe

they are interrelated in this case. If the irregularities are such that the result of the election is not called into question, I do not believe a new election should be held. Both conditions of s. 164 would be met. On the other hand, if the integrity of the outcome is compromised and the respondent is unable to show that this did not affect the result the election should be set aside.

[28] The applicants argue that the court should conclude that the election results are called into question. They say the court should assume all seven of the improper votes were cast in favour of the successful mayoral candidate and the sixth place council candidate and be deducted from those totals. All of these votes should then be added to the total for the next highest candidate in each race which would change the result. The applicants submit that this is consistent with the approach referred to in **Opitz** as the “magic number”. The Supreme Court described it as follows:

**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.

**73** Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing contested election applications might be adopted by a court in a future case.

[29] It is one thing to conclude that the impeached votes should be deducted from the winning candidate but it is entirely different to take the next step and say they should be allocated to the second place candidate. The Supreme Court did not exactly give the “magic number” a ringing endorsement and it would be extending it unreasonably to take it as far as the applicants suggest. There are too many underlying assumptions about voter behaviour to give the applicants’ proposed approach much reliability. This is particularly so here where we have evidence from Ms. Stoddard and Ms. Peterson that votes were cast as instructed. To assume that the electors would have voted differently had they known about the unavailability of friend voting makes no sense in these circumstances.

[30] The applicants’ justified their approach by saying that to do otherwise would disenfranchise those people who obviously intended to cast votes. I do not agree

with their proposition, particularly where the problems arose from the actions of the electors themselves and not any election officials.

[31] In assessing the impact of the irregularities, I agree the court should consider the seven votes to be invalid and deduct that number from the totals for the successful candidates. If the margin of victory was less than this number, the result of the election would be called into question and I would set it aside. I would not artificially add these votes to the total for the next highest candidates for the reasons noted above.

[32] I am satisfied the respondents have established both the conditions found in s. 164 of the *Act* and as a result I will not invalidate the result.

[33] The application is dismissed.

Wood, J.