

SUPREME COURT OF NOVA SCOTIA

Citation: *St. Mary's (District) (Re)* 2017 NSSC 8

Date: 2017-01-10

Docket: Antigonish, No. 456787

Registry: Antigonish

Between:

The Municipality of the District of St. Mary's

Applicant

v.

Ruth Legge – Returning Officer, Municipality of the District of St. Mary's; Aubrey (Rennie) Beaver – District 3/5 Candidate, of 416 Hattie Road, Glenelg, Nova Scotia; and Kaytland Smith – District 3/5 Candidate of 4953 Highway 348
Respondents

DECISION

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

Heard: December 21, 2016, in Antigonish, Nova Scotia

Counsel: Adam Rodgers for Municipality of the District of St. Mary's

Duncan Chisholm for Aubrey (Rennie) Beaver

[1] The Municipality of the District of St. Mary's has made an application in court for an order declaring the 2016 municipal election held on October 15th, 2016 in District 3/5 of the Municipality to be void.

[2] The two candidates in the election were Aubrey (Rennie) Beaver and Kaytland Smith. Mr. Beaver received 75 votes while Ms. Smith received 73 votes. Soon after the election a number of irregularities with the conduct of the election were identified resulting this in this application. The parties have submitted an agreed statement of facts setting out the irregularities. Mr. Beaver opposes the application by the Municipality. Ms. Smith appeared in support of the application.

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] The majority acknowledged that this test "inherently favours the challenger."

[10] 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.

[11] In this applications there is no dispute that s 158(1) has been triggered; that is, it is undisputed that there have been irregularities that depart from the directions in the *Act*, so that the elections were not conducted in accordance with the *Act*. Therefore, the issue is whether the party defending the elections has established that it should be saved by s 164, in that the principles of the *Act* were observed, and the irregularities did not affect the results.

Analysis

[12] The municipality takes the position that the election was not conducted in accordance with the principles of the *Municipal Elections Act*, and should be declared void. Based on the agreed facts, the applicant municipality relies on five violations of the *Municipal Elections Act*, pursuant to s 158:

- (1) A voter was permitted to vote by proxy by the Deputy Returning Officer (DRO) at Poll 5A without observing the applicable protocols in ss 76 and 77 of the Act.

The applicant points out, if this ballot were removed from the total, the “magic number” analysis (as described in *Optiz*) would reduce the margin of victory to a single vote. This would not change the outcome, but would magnify the significance of the other alleged violations. The respondent – Mr Beaver, the

winning candidate – agrees that the proxy vote was improper, but maintains that it was only a technical violation that should not disturb the result.

- (2) During the vote-counting process at Poll 5B, the agent for one candidate handled a spoiled ballot and a basket of cast ballots, contrary to s 107 of the Act. The spoiled ballot was handled during the first count by the DRO; the agent handled the basket of ballots during the DTO's second count, which confirmed the results of the first count.

The applicant points to various possible violations of the Act that could result from an agent handling ballots, including:

ballots being altered (so that perhaps ballots previously considered valid now appear spoiled), ballots being removed where votes were cast for the opponent of the agent's candidate, or unused ballots being marked in favour of the agent's candidate. Such violations, should they have occurred, would be difficult (if not impossible) to detect on a simple recount, particularly where the Record of Poll was not properly completed.

There was no evidence of such tampering in this case, although the applicant points out that the ballot boxes have remained sealed since the Returning Officer sealed them after the counting.

- (3) The ballot boxes for Polls 5A and 5B were delivered to the Returning Officer (RO) unsealed, contrary to s 111(3) of the Act. According to the applicant municipality, this omission raises various risks in addition to those arising from the agent handling ballots: there would also be a risk of changed entries in the Poll Book, which was completed in pencil, as well as a risk of things simply falling out of the box during transit.

(4) None of the Poll Agents at Polls 5A and 5B had signed the necessary Oath of Confidentiality, contrary to s 69(1)(d) of the Act.

(5) The DROs at Polls 5A and 5B did not complete the required Records of Poll, as required by s 94 of the Act.

[13] The applicant does not suggest that these last two omissions on their own would be a sufficient basis to void the election. It does submit, however, that they supplement the more serious violations so as to make the irregularities inexcusable under s 164. The municipality says the irregularities were of a nature or number that could have altered the result. The applicant emphasizes that the s 164 standard is not "would have", but "could have", altered the result.

[14] In addition to the possibility that the irregularities affected the result, the applicant submits that the violations were serious enough to call into question the conduct of the election as a whole, giving rise to an alternative basis for voiding the result. Fichaud JA stated in *Warrington* that "[i]f 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 how the deficiencies affected the result.

[15] Mr. Beaver maintains that the irregularities are technical violations of the *Act* that do not justify overturning an otherwise valid election. He argues that there are distinctions on the facts between the present case and *Madden* and *Warrington*. In *Madden*, two eligible voters were refused, and the election was decided by two votes, so that it was not possible to say that the irregularity did not affect the result. In this case, there is no allegation that eligible voters were unable to vote, or that ineligible voters did vote.

[16] In this case, the respondent argues, the votes were counted prior to any violations of the *Act*, other than the proxy vote, and the parties agreed on the vote tally. The agent only handled the ballots during the second count, but the count was consistent with the first. There is no allegation that a person voted who was ineligible, or that an eligible voter was prevented from voting. A further tally (though apparently not an actual vote count) on 18 October 2016 was consistent with the two counts on 15 October 2016. In effect, the respondent's position is that there is no suggestion that the violations affected the outcome, and that they were therefore mere technicalities that did not violate the principles of the *Act*. Moreover, the "magic number test" indicates that the single invalid vote could not have affected the outcome of the St Mary's election.

[17] Regardless of whether the deficiencies may have effected the result, Mr. Beaver has the burden of proving that despite these violations, the election was nevertheless conducted in accordance with the principles of the *Act*. In my view he has not done this. These violations were not simply well – intentioned attempts to comply with the *Act*, but numerous and relatively serious departures from the legal requirements imposed by the *Act*. The respondent’s position is, in essence, that the court should find that the principles of the *Act* were observed because there was “no harm done”, but in my view this sequence of violations should be looked at cumulatively. Several procedural safeguards imposed by the *Municipal Elections Act* were not followed. The physical handling of ballots by a candidate’s agent, and the failure to seal ballot boxes, on top of the failure to observe proper protocol in regard to proxy votes and other violations seem sufficient to amount to a violation of the principles of the *Act*. To find otherwise would undermine the requirement for specific and clear procedures in service of the principles of the *Act* and further undermine public confidence in the outcome of elections.

[18] As a result, the court will grant an order declaring the 2016 election in District 3/5 of the Municipality of the District of St. Mary’s to be void.

Scaravelli, J.

