CITATION: Wrzesnewskyj v. Attorney General (Canada), 2012 ONSC 2873
COURT FILE NO.: CV-11-429669
DATE: 20120518

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
BORYS WRZESNEWSKYJ	)	*Gavin Tighe & Stephen Thiele*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), ALLAN SPERLING (RETURNING OFFICER, ETOBICOKE CENTRE), TED OPITZ, ANA MARIA RIVERO, SARAH THOMPSON and KATRINA ZORICIC	)	*David Di Paolo & Alessandro Nosko*, for Marc Mayrand (The Chief Electoral Officer) & Allan Sperling (Returning Officer, Etobicoke Centre), Respondents
	)	
	)	*W. Thomas Barlow & Nicholas Shkordoff*, for Ted Opitz, Respondent
	)	
Respondents	)	
	)	
	)	
	)	
	)	**HEARD: April 23-27, 30, May 1-2, 2012**

LEDERER J.:

[1] A hard-fought election resulted in a narrow win for the respondent, Ted Opitz. Given the number of votes cast and the small plurality, it is hardly surprising that the runner-up, the applicant, Borys Wrzesnewskyj, would want to closely scrutinize the ballots and the voting procedure. Given the complexity of a federal election, the number of workers required and the short time from the calling of the election to the date of the vote, it is understandable that mistakes will be made. In this case, the applicant argues that the mistakes were of a nature and number that the election should not stand.

[2] At the outset, it should be said that there was no suggestion of any wrongdoing on the part of either the applicant or the respondent. The issues relate to the conduct of the election, at certain polls, in the electoral district of Etobicoke Centre. As a result, the Chief Electoral Officer and the returning officer for Etobicoke Centre were also represented. For ease of reference and consistency, these reasons will refer to Borys Wrzesnewskyj as the "applicant", to Ted Opitz as the "respondent" and to the Chief Electoral Officer and the returning officer, collectively, as the

"election officials". Employees of Elections Canada working at polls on the day of the election (such as deputy returning officers, poll clerks and registration officers) are collectively referred to as "polling officials".

INTRODUCTION

Background

[3] The 41st Canadian General Election took place on May 2, 2011. The election in the electoral district of Etobicoke Centre was decided by a plurality of only 26 votes. This application seeks to set aside that election.

[4] All parties acknowledge that, in the course of any general election, there will be errors in the record keeping required of the officials who conduct it. These errors may lead to questions concerning whether all of those who voted were properly permitted to do so. This is distinct from whether they were qualified to vote. A person is qualified if he or she is at least eighteen years of age and a Canadian citizen (see: *Canada Elections Act,* S.C. 2000, c. 9, s. 3). Once qualified, a person is entitled to have their name placed on the list of electors (see: *Canada Elections Act,* s. 6). The name of a person is recorded on the list of electors for the polling division in which he or she is ordinarily resident. A person will be given a ballot and is able to vote after he or she has been identified as an individual whose name is on the list.

[5] Mistakes are made. Forms may not be filled out correctly, or recorded properly, in the poll books that are required to be kept. As a result, it may not be clear whether the preconditions to the exercise of the right to vote were satisfied. Where irregularities that affect the result of the election are present, the *Canada Elections Act* provides the means by which the election may be set aside. Some errors in record keeping may constitute irregularities that affect the result of an election. They may not be errors on the part of the voter but, rather, on the part of the officials who run the many polling stations in any riding across the country. Where the result of the election is close, it may be that these mistakes will be enough that the Canadian public cannot be confident in the result or the process that lead to it. It is that proposition on which this application rests.

[6] One does not have to dig very deep to understand that this case presents a true conundrum. At its core, this case concerns the confidence that Canadians must have in our electoral process. If that confidence is diminished, it follows that our interest in, and respect for, government will be similarly diminished. It surely follows that if people who are not qualified to vote were permitted to do so, or if there is a concern that people may have been permitted to vote more than once, confidence in our electoral process will fade. The provision of the *Canada Elections Act* that provides for this application allows for a response to those concerns. Without the protections found in the *Canada Elections Act*, Canadians would lose confidence in the electoral process. The conundrum arises in that making it too easy to set aside the results of an election may also lead to a loss of confidence in the process. Mistakes in the records are inevitable. As such, every time there is a close election the result in the affected electoral district may be susceptible to challenge.

The Application, Part 1

[7] The application was brought pursuant to s. 524 of the *Canada Elections Act*:

> **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.
>
> (2) An application may not be made on the grounds for which a recount may be requested under subsection 301(2).

[8] In this case, a judicial recount was conducted on May 18, 19, 20 and 22, 2011, and a decision released on June 15, 2011. The issues raised here are distinct from those that could have been, or were, considered there. It was not suggested that any candidate who stood for election in Etobicoke Centre was not qualified to do so. Most importantly, it was acknowledged by all parties that there was no suggestion of any "fraud or corrupt or illegal practices" in the conduct of the election. The application is founded on the submission that "there were irregularities... that affected the results of the election". I point this out at this early stage of these reasons to make clear that there is no suggestion that anyone involved attempted to subvert or undermine the conduct of this election. So far as I can see, this election was conducted by responsible public officials and well-intentioned individuals who were motivated by nothing less than a desire to do the job properly.

Voting

[9] To come to grips with this application, one must begin by understanding the process that leads to a vote being cast in a federal election.

[10] Every person who is qualified as an elector is entitled to have his or her name included in the list of electors for the polling division in which he or she is ordinarily resident and to vote at the polling station for that polling division (see: *Canada Elections Act,* s. 6).

[11] How does a name get on the list of electors? When an election is called (when the writ is dropped) the Chief Electoral Officer (see: *Canada Elections Act,* ss. 13-15) is required, "as soon as possible" to prepare "a preliminary list of electors for each polling division in an electoral district" (see: *Canada Elections Act,* s. 93). An "electoral district" is commonly referred to as a "riding". Each electoral district is divided into polling divisions (each containing at least 250 electors), which identifies where each elector is to cast his or her vote (see: *Canada Elections Act,* s. 538). The preparation of the preliminary list relies on the Register of Electors, which the Chief Electoral Officer is required to keep, maintain and update (see: *Canada Elections Act,* ss. 44-46). The *Canada Elections Act* provides a process by which the preliminary list is to be

revised and updated (see: *Canada Elections Act,* ss. 96-104). The Chief Electoral Officer appoints a returning officer for each electoral district (see: *Canada Elections Act,* s. 24 (1)). The returning officer is required, on the 11th day before polling day, to prepare a revised list of electors for each polling division in the electoral district for which he or she is responsible (see: *Canada Elections Act*, s. 105). The revised list of electors is used at the advance poll. Each returning officer, on the third day before polling day, must prepare the official list of electors (see: *Canada Elections Act,* s. 106). This is the list that is used on the day of the election by those responsible for running each polling division.

[12] In a modern, mobile society, it cannot be expected that the official list of electors will be a complete record of every qualified voter. The *Canada Elections Act* provides a means by which a qualified elector can be added to the list on election day. A qualified elector whose name is not on the official list of electors may register in order to be added to the list and permitted to vote. A person registers by appearing, in person, at the polling station for the polling division in which the elector ordinarily resides, and identifying himself or herself as required by the *Canada Elections Act.* There are three means by which the elector may be identified:

- by providing one piece of identification issued by a Canadian government; federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address;

- by providing two pieces of identification authorized by the Chief Electoral Officer, each of which establish the name of the elector and, at least one of which, provides the address of the elector; or

- by taking a prescribed oath and being accompanied by an elector whose name appears on the list of electors for the same polling division, and who provides to the deputy returning officer and poll clerk responsible for the polling division the prescribed identification, and who vouches for the elector by an oath in a prescribed form ("vouching") (see: *Canada Elections Act,* ss. 161(1) and 143(3)).

[13] Once the elector satisfies one of these requirements, the appropriate official at the polling station is to complete a "registration certificate" which the elector is required to sign. By signing, the prospective elector "certif[ies]" that he or she is a "Canadian citizen, 18 years of age or over on the polling day". It is on this basis that a person seeking registration demonstrates that he or she is qualified to vote. By signing, the elector confirms the address at which he or she resides. The completed registration certificate is the authority for the elector to vote. When a registration certificate is completed, the list of electors is deemed to have been modified to include the elector in whose name it was prepared (see: *Canada Elections Act,* ss. 161(4) and (5)).

[14] Once the name of an elector is on the list of electors, he or she, after identifying himself or herself as required by the *Canada Elections Act,* will be "admitted" to vote and be given a ballot. In order to obtain a ballot, the elector is required to prove his or her identity in order to confirm that he or she is the person on the list. This is done using one of the same three means,

listed above, by which a prospective elector is identified for the purpose of being registered and added to the list of electors (see: *Canada Elections Act,* ss. 143(1), 143(3) and 150).

[15] Records must be kept as to what took place during the election. After the issue of the writ, a returning officer appoints one deputy returning officer and one poll clerk for each polling station in the electoral district for which he or she is responsible (see: *Canada Elections Act,* s. 32). Once the deputy returning officer is satisfied that an elector's identity and residence have been proven, the name of the elector is crossed-off the list and the elector is allowed to vote (see: *Canada Elections Act,* s. 143(4)). Once the elector has voted, the poll clerk is required to indicate on the list that the vote was cast (see: *Canada Elections Act,* s. 162(b)). He or she does this by placing a check mark in a box set aside for that purpose. The poll clerk is also required to make entries in what the legislation refers to as the "prescribed form". The prescribed form is commonly referred to as the poll book. The required entries include, as applicable, that the elector has taken an oath, the type of oath and that the elector has voted under a registration certificate (see: *Canada Elections Act,* ss. 162(f) and (j)).

Position of the Parties

[16] I return to what I referred to earlier as the conundrum. The general question is how to ensure the conduct of elections is such that the candidates, voters, and Canadians in general, are confident in the process and the result. Parliament has addressed this concern through the *Canada Elections Act.*

[17] The specific question is whether the identification provisions of the legislation are such that they set conditions that must be present before a person qualified to vote is permitted to do so or, instead, whether it provides a series safeguards which are relied on to confirm that the person voting is qualified. The former implies that each provision of the legislation must be complied with, or else a vote cast is invalid. The latter can be satisfied, and a valid vote cast, where there is sufficient compliance with the legislation to confirm that the elector was qualified.

[18] As the applicant sees it, the elector and polling officials must comply with the directives found in the *Canada Elections Act.* On this understanding,

- where the elector identifies himself or herself through vouching, the person who vouches must reside in the same polling division as the elector for whom he or she is vouching and shall not vouch for more than one elector (see: *Canada Elections Act,* ss. 143(3), 143(5) 161(1)(b) and 161(6));

- where the elector is added to the list through the preparation of a registration certificate, the deputy returning officer or the registration officer, if one was appointed (see: *Canada Elections Act,* s. 39), must complete the registration certificate, in the prescribed form, and the elector must sign it (see: *Canada Elections Act,* s. 161(4));

- where the elector is on the list of electors for a polling division, he or she shall not apply to be included on the list for another polling division (see: *Canada Elections Act*, s. 111(b)); and

- the elector is required to vote in the polling division in which he or she ordinarily resides (see: *Canada Elections Act,* at s. 6).

[19] Counsel for the applicant submitted that, if any of these requirements were not met, the ballot should not have been cast. The ballot should be treated as withdrawn for the purposes of determining whether the result of the election was affected. Counsel submitted that, if these requirements were not met, the elector did not demonstrate that he or she was entitled to vote.

[20] Counsel for the respondent and counsel for the election officials take a different position. They submit that the statutory provisions do not provide strict preconditions that must be met for a ballot to be valid. Rather, these preconditions establish procedural safeguards that protect the right to vote. Where there are multiple safeguards, the fact that a single safeguard failed, or was not followed, does not establish that the ballot should not have been cast and is void.

The Application, Part 2

[21] The applicant contests the election on the basis that a review of the record demonstrates irregularities in the registration and identification of electors, which affect the result of the election such that it should be declared "null and void" (see: *Canada Elections Act,* ss. 524 and 531(2)).

[22] The parties, to their considerable credit, worked to limit the issues so that the Court would be able to adhere to the direction, found in the *Canada Elections Act*, that this application be dealt with "in a summary way" (see: *Canada Elections Act,* s. 525(3)). The result of these efforts was the subject of a consent order made on February 12, 2012. By this Order, the applicant agreed, among other things, to restrict the submissions made on his behalf to ten of the polls that make up the electoral district of Etobicoke Centre (Polls 16, 21, 30, 31, 83-1, 89, 174, 400, 426, and 502). Counsel for the applicant submitted that a review of the poll books and the registration certificates for these ten polls provided evidence of sufficient irregularities to require that the result of election be declared "null and void".

[23] The applicant submitted that a review of the record reveals the following errors in respect of vouching:

(a) individuals were registered and/or permitted to vote, on the basis that they were vouched for where the poll book does not show a person as having vouched for the elector;

(b) individuals were registered and/or permitted to vote, on the basis that they were vouched for, where the poll book identifies the person who vouched by his or her relationship to the person being vouched for (e.g. "daughter") but does not name the person vouching;

(c) individuals are recorded as having vouched for others but no individual is identified as having been vouched for; and

(d) individuals were registered and/or permitted to vote where the person vouching for them was not a valid voucher because he or she vouched for more than one elector, or did not reside in the same polling division as the elector.

The applicant submitted that a review of the record reveals the following errors in respect of the preparation of registration certificates:

(e) individuals were added to the list of voters by means of registration certificates that were not signed by the polling official responsible for completing them;

(f) individuals were added to the list of voters by means of registration certificates where the polling official responsible for completing them failed to check a box indicating how the person seeking registration identified himself or herself;

(g) individuals were added to the list of voters where the elector failed to sign the registration certificate;

(h) individuals were added to the list of voters by means of registration certificates where a polling official signed on behalf of the elector, in the space reserved for the elector; did not sign where the polling official was required to sign; and failed to check a box indicating how the person seeking registration identified himself or herself;

(i) individuals were permitted to vote by registration certificate when they were already on the list of electors in another polling division;

(j) individuals were added to the list of voters where the elector failed to sign the registration certificate, the polling official responsible for completing the registration certificate signed in the space reserved for the elector, the polling official did not sign where he or she was required to and failed to check a box indicating how the person seeking registration identified himself or herself; and

(k) individuals were added to the list of voters on the basis that a registration certificate had been properly prepared, in circumstances where either there never was a registration certificate, or none can be located.

The applicant submitted that a review of the record reveals the following additional errors:

(l) individuals whose names appear on the official list of electors were struck off, indicating that they voted. They also appear in the poll book as having voted based on a registration certificate, signifying either that they had voted twice, or voted once but appeared twice in the records that were kept;

(m) polling divisions where the number of votes determined to have been cast cannot be reconciled with the election result; and

(n) individuals were permitted to vote in a polling division other than the one in which they ordinarily reside.

FUNDAMENTAL PRINCIPLES

Onus or Burden of Proof

[24] The issue at the core of this application is whether these errors satisfy the test set by s. 524 of the *Canada Elections Act*. Are the errors "irregularities" that affected "the result of the election"?

[25] Before undertaking the analysis, it is necessary to consider the principles to be applied.

[26] The starting point for the analysis is the proposition that there is a presumption of regularity in respect of elections. An examination of the conduct of an election begins with a presumption that it was conducted in a fashion that is consistent with the requirements of the applicable legislation. The presumption will stand in the absence of evidence to the contrary.

[27] The presence of the presumption was considered, by this court, in *Cusimano v. Toronto (City)*, 2011 ONSC 2527, [2011] O.J. No. 1876 (Sup. Ct. J.) (QL) (appeal granted on other grounds by the Divisional Court, 2011 ONSC 7271, [2011] O.J. 5986 (QL); leave to appeal granted by Court of Appeal, April 4, 2012). This was an application to set aside the results of two elections that were part of a municipal vote held on October 25, 2010. The application was successful. The applications judge found that the elections were invalid. The appeal was granted and the two elections reinstated. In that case, two unsuccessful candidates, one for City Council and the other for School Trustee, sought to set aside the two elections on the basis that a significant number of the forms used to assist voters in applying to be added to the list of voters were not signed by the applicable polling official.

[28] The applications judge accepted that there was a presumption of regularity, but refused to apply it on the basis that there was evidence that one voter had voted twice. As the applications judge saw it, "[a]ny general presumption of regularity was therefore inappropriate." (see: *Cusimano, supra*, Sup. Ct. J. at para. 64, quoted in Div. Ct. at para. 78). When the presumption was set aside, the onus shifted to those defending the vote to prove that the requirements of a proper election had been satisfied. In *Cusimano*, this meant that the applications judge declined to presume that polling officials only gave ballots to persons who were qualified to vote. The Divisional Court found that the applications judge erred in her finding that the presumption was rebutted, as there was no evidentiary foundation to support the rebuttal. As it was, there were affidavits from an assortment of officials involved in the election, who deposed that appropriate

procedures were followed and that only qualified voters were given ballots. Despite this, the applications judge had "reasoned that because the number of votes at issue exceeded the margin of votes by which the elections at issue was won, the failure of election officials to sign some of the [Voters Change Request Forms] affected the result of the election, and the elections... were... both invalid." (see: *Cusimano*, *supra*, Div. Ct. at para. 76).

[29] A problem arises in terms of how the onus of proof operates in company with the presumption of regularity. This problem was apparent in the case I am asked to decide. At the outset of his submissions, counsel for the applicant, relying on the presumption of regularity, submitted that each of the errors was an irregularity and stood as evidence which rebutted the presumption. He proposed that, in each case, this reversed the onus and required those seeking to uphold the election to prove that the irregularity did not affect the result.

[30] The time between the election being called and the vote being held was 37 days. During the election, 235,867 election worker positions were filled. For the purposes of this application, it was estimated that approximately 180,000 poll officials worked on the day of the election and that 7,000 were on standby to replace field staff as needed. Given the breadth of this country, the diversity of its communities and the number of positions involved it is hardly surprising that the parties agreed that mistakes are inevitable. They are. This being so, it stands to reason that if the position taken by the applicant is accepted, it is possible that every time there is a small plurality, an unsuccessful candidate will seek to review the record in the hope of finding enough errors to put the winner to the test of proving those errors did not affect the result of the election. Whatever effect the presumption of regularity may have, it cannot have been intended to lead to a search for unavoidable clerical errors in the hope of finding enough to question the efficacy of the vote and compel the respondent to prove that the mistakes did not affect the result.

[31] Late in the proceeding, counsel for the applicant modified his position to acknowledge that the onus to prove both parts of the test found in s. 524(1)(b) of the *Canada Elections Act* lies with the applicant, albeit there may be a point where an evidentiary burden moves to the respondent. If there is evidence that demonstrates that the results were affected, it may behoove the respondent to answer. Be that as it may, it would seem that all the parties to this application agree the onus is on the applicant to prove both elements of the test.

[32] The need for a strong presumption of regularity is underscored by the limits to the evidence that can be adduced on applications contesting the validity of an election. I repeat that, pursuant to s. 525(3) of the *Canada Elections Act,* such applications are to be heard "without delay and in a summary way". The meaning of "without delay" does not require much explanation. Such matters are to be dealt with expeditiously. The word "summary" is not defined in the *Canada Elections Act.* In the context of judicial process, "summary" has been referred to as "...conducted without the customary legal formalities" (see: *Concise Oxford English Dictionary,* 11th ed. (revised), (Toronto: Oxford University Press, 2006)). It has been said to mean "...a short application to a court without the formality of a full proceeding" (see: *Black's Law Dictionary,* 8th ed., (Thomson West, 1999)). Rule 76.12(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, refers to "Summary Trial". The Rule makes clear that for a summary trial some of the usual formalities are circumscribed: evidence is adduced by affidavit and, subject to the discretion of the judge, cross-examination, re-examination and argument are

limited in the time they can take. All of which suggests that to move "in a summary way" foresees some limitation to the evidence that may be gathered and heard.

[33] This limitation is given substance by the injunction that "[t]he vote is secret" and that "[e]very candidate, election officer or representative of a candidate...shall maintain the secrecy of the vote" (see: *Canada Elections Act,* ss. 163 and 164(1)). The import of this is that it would be improper to approach individual electors to review with them the circumstances surrounding their vote or how they voted, in order to determine whether there were any "irregularities" that affected "the result of the election". In *Cusimano*, efforts were made to determine the eligibility of voters by canvassing them and having them sign forms. The Divisional Court acknowledged that the candidate on whose behalf this was done had not been a party before the applications judge and, therefore, had been unable to bring this information forward at that time. Nonetheless, the Court refused to accept the material. It had "...serious concerns about reliability" and observed that,

> [a]lthough nothing in the questioning that was carried out violated the secrecy of the ballot, it cannot be denied that the questioning of citizens about their voting is a sensitive matter, is bound to raise concerns, and must be handled with great delicacy. If it was to be done at all, it should have been done by the City, or by some obviously disinterested, professional third party. Instead it was done by partisans. Some people refused to cooperate, no doubt for this very reason. Others may have provided answers that were influenced one way or the other by the partisanship of the interrogators. As a result, we found the evidence to be unreliable and inadmissible.
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> (*Cusimano*, *supra*, Div. Ct. at para. 43)

[34] In this case, the parties agreed that it would be inappropriate to approach individual voters and that no such evidence should be, or would be, brought forward or relied on. Considerable effort was made to remove, from the record, all references that identified voters by name.

[35] There was a further limitation to the evidence which arose from the peculiar position of the Chief Electoral Officer. He was named as a respondent to this application. This official is responsible for supervising the conduct of our federal elections. He or she is to ensure that those involved in running an election act with fairness and impartiality and comply with the law. He or she is appointed by resolution of the House of Commons and holds office during good behaviour. The person holding the position "...may be removed for cause by the Governor General on address of the Senate and the House of Commons" (see: *Canada Elections Act,* s. 13(1)). All of which is to say that the office is an independent, non-partisan agency that reports directly to Parliament. Returning officers are appointed for each of the electoral districts across Canada. It is their job to manage the election, in the electoral district for which they are responsible, in accordance with the *Canada Elections Act* and instructions issued by the Chief Electoral Officer. The returning officer for Etobicoke Centre was also named as a party. The submissions made on behalf the Chief Electoral Officer and the returning officer were limited to,

(i) apprising the Court of policy considerations that may be material to the matters in issue;

(ii) ensuring that an accurate factual record was provided to the Court;

(iii) making submissions on the application of the legislative framework which governs the administration of elections in Canada; and

(iv) making submissions on the relevant criteria to be applied on a contested election application.

[36] Counsel for the election officials was careful to advise the Court that they would take no position on the merits of the application. While there was some suggestion, made on behalf of the applicant, that the submissions made on behalf of the Chief Electoral Officer and the returning officer strayed from this intention, this is not something I am prepared to accept. In the factum prepared on their behalf and in the submission that he made, counsel for the election officials took no position that favoured either the applicant or the respondent. Counsel reviewed the responsibilities of polling officials, their training and the voting process. He reviewed the test to be applied and the meaning of key words that inform that test and suggested how the Court could approach the analysis it is required to undertake. The factum filed on behalf of these officials refers to the "applicant's unfounded allegations of systemic failings in the conduct of the Election..." but did so to address "... the broad ramifications that such allegations would have on contested election applications in future cases". At no time were any submissions made that touched on any of the specific errors relied on by the applicant and alleged to be irregularities that affected the result of the election.

[37] This is not the first time the Chief Electoral Officer has managed the involvement of the office, in a court proceeding, in this way. Section 3 of the *Charter of Rights and Freedoms* guarantees the right to vote:

> 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.

[38] In *Henry v. Canada (Attorney General)*, 2010 BCSC 610, 7 B.C.L.R. (5th) 70, 2010 CarswellBC 1089 (WL), an application was brought attacking the constitutional validity of the voter identification rules in federal elections, the very rules that are at the heart of this matter. The applicable sections of the *Canada Election Act* had been amended, effective June 2007. The challenge proposed that the new voter identification requirements limited the exercise of the right to vote by those persons who do not have standard documentary proof of their identity and residence available to them. As here, the Chief Electoral Officer neither supported nor opposed the orders requested (see: *Henry v. Canada*, *supra*, at para. 121).

[39] Finally, insofar as the evidence is concerned, it is as well to bear in mind, not just the evidence that was not available, but also some of that which was. The majority of the evidence relied on was the poll books, lists of electors and registration certificates. "Documents purporting

to be certified by the Chief Electoral Officer are admissible in evidence without further proof" (see: *Canada Elections Act*, ss. 540(5) and (6)). The documents were produced by the Chief Electoral Officer, pursuant to the Order of this Court, made on September 29, 2011. Counsel for the Chief Electoral Officer advised the Court that the documents were certified.

[40] Having said this, counsel for the respondent expressed concern for what these documents might be relied on for. His concern was that some of what they say is hearsay. For example, information obtained from a third party, that is reported in the poll books, may be an accurate statement of what the voter said, or what the identification produced provided, but should not necessarily be accepted as proving the truth of the underlying statement. Ultimately, it may be necessary for a judgment to be made as to the necessity and reliability of such evidence to determine its value (see: *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed., (Markham ON: LexisNexis Canada Inc., 2009) at p. 235, para. 6.24). I observe only that this poses another potential limitation to the available evidence.

[41] Having described the limitations on the evidence, I return to the presumption of regularity. The difficulty is that if the presumption of regularity is easily rebutted, and the responding party left to demonstrate that the result of the election was not affected, it may leave that party in a position where the evidence could not be expected to produce a satisfactory answer no matter the nature of the irregularities cited.

[42] The answer is in the proper understanding of the applicable onus or burden of proof. There is no doubt that the responsibility for demonstrating the presence of an irregularity rests with the applicant, the party seeking to have the election set aside. While, for this case, the parties have agreed the applicant bears the onus throughout, the case law suggests that the issue of who must show that an irregularity affected the result of the election is not as clear. Given the circumstances, it may be as well that I comment further. In the authorities, there is a dispute as to where this onus lies (see: *Twaites v. Georgian Bay (Township)*, [2001] O.J. No. 2847 at para. 24 (Sup. Ct. J.) (QL), as quoted in *Cusimano, supra*, Div. Ct. at para. 71). Cases on both sides of the issue were referred to by the applications judge in *Cusimano*, where she observed the following at paras. 54-55:

> The respondents rely on, among other cases, *Abrahamson v. Baker and Smishek* (1964), 48 D.L.R. (2d) 725 (Sask. C.A.); *Flookes v. Shrake*; *Camsell v. Rabesca*, [1987] N.W.T.R. 186 (S.C.); and *Beamish v. Miltenberger*, [1997] N.W.T.J. No. 19 (S.C.) to argue that the applicants have the onus of demonstrating that the irregularity affected the result of the election. They say that it would be unreasonable and unfair to require the City to positively prove that each voter on each VLCRF had the right to vote.
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> The applicants rely on *Stoddart v. Owen Sound (Town)*, *supra*, *Rose v. Cranbrook (City)*, [1982] B.C.J. No. 1600 (S.C.) (a decision of McLachlin J.) and *Warrington v. Lunenburg (Municipality)*, [2006] N.S.J. No. 256 (C.A.) to say the respondents must demonstrate that the irregularity did not affect the outcome of the election.

(*Cusimano, supra*, Sup. Ct. J. at paras. 54-55, as quoted in Div. Ct. at para. 70)

[43] In its review, the Divisional Court found that applicant has the onus of demonstrating that an irregularity affected the result of an election. The Court referred to the following cases: *Re Sinclair v. Owen Sound* (1906), 12 O.L.R. 488, [1906] O.J. No. 84 at para 41-43, 47, (Div. Ct.) (QL), aff'd (1906), 13 O.L.R. 447 (C.A.), aff'd (1907), 39 S.C.R. 236; *Rex ex rel. Fennessy v. Wade and Plaunt*, [1939] O.R. 537 at p. 4 (H.C.J.); and *Twaites v. Georgian Bay*, *supra*, at para 27). With these cases identified, the Divisional Court repeated and relied on the following quotation, which refers to the confusion surrounding the onus of proof, identifies the concern with respect to the limits on the evidence and determines that the better view is that the onus throughout is on the applicants:

> I turn again to the question of onus or burden of proof. The confusion in the cases, it seems to me, arises from the interpretation of the early statutes in which showing that the irregularity was innocuous was treated as a proviso. So the cases cast a burden on the petitioners to show an irregularity, and the cases held that this in itself would give rise to the petitioner's right. Showing that the irregularity did not offset the result, it seems, was treated as a special fact, and the burden for this was placed on the party seeking to uphold the election. Later statutes and some of the cases recognized this, but others, especially those that followed the strong precedent in the *Hickey* case did not.
>
> The problem with that allocation of onus, aside from the fact that it does not accord with the general rule as to onus, nor with the English and some of the Canadian authorities that I have cited, is that it will not lead to a proper result, I think, in some of the cases. As I have said, most elections will give rise to irregularities in the taking of the vote. In many instances of irregularities there may be no evidence on the issue, other than that the irregularity occurred. If the rule in the [*sic*] *Hickey* were the law, such election would have had to be declared invalid, that is, if there was no evidence on the question of whether the result might have been affected by the irregularity or not, or indeed if the evidence on the point were in balance. That, as this case shows, I think, will not uncommonly be the case.
>
> On the other view, that is, following the decision in the *Morgan* case and the other cases I cited, taking the view that the onus throughout is on the petitioners, the petitioners are asserting and should be required to prove not only that there were irregularities, but that these irregularities might have affected the result. It should not be just a part of but the entire factual situation that must be shown, to give rise to the right in the petitioners, See *Vines v. Djordjevitch* (1955), 91 C.L.R. 512.
>
> The standard of proof is not a heavy one, that is, to show that, on a balance of probabilities, the result might have been different, See *Morgan*, *supra*, and *Storey v. Zazelenchuk* (1984), 36 Sask. R. 103 (C.A.).

> This view as to onus, it seems to me, as well comports with the general rule regarding the legal or persuasive burden of proof. The general rule is that he who asserts must prove, See *Woolmington v. D.P.P.*, [1935] A.C. 462, and [1935] All E.R. 1 (H.L.). The reasons [*sic*] for the rule is grounded in plain common sense, that is: that he who would call another to account in the courts, with all the trouble and expense that that entails, should be able to make out a case. The rule discourages harassment in the courts and the improper use of the legal process by enemies, adversaries, busybodies, and others.
>
> (*Camsell v. Rabesca*, [1987] N.W.T.R. 186, [1987] CarwellNWT 17 at paras. 56-60 (S.C.) (WL), as cited in *Cusimano*, *supra*, Div. Ct. at para. 73)

[44] This is consistent with s. 531(2) of the *Canada Elections Act*. This section provides the options available to a court upon hearing an application to contest an election:

> After hearing the application, the court may dismiss it if the grounds referred to in paragraph 524(1) (a) or (b), as the case may be, are not established and, where they are established, shall declare the election null and void or may annul the election, respectively.

[45] The court acts when the required grounds are "established". In this context, "establish" means to "...show to be true or certain by determining the facts" (see: *Concise Oxford English Dictionary*, *supra*). Pursuant to s. 524(1)(b) of the *Canada Elections Act*, the grounds that are required to be established are that there were irregularities that affected the results of the election. This connotes a positive prerequisite to success on the application. This instruction directs the applicant to prove both elements of the test. It is not for the respondent to disprove the second part of the test.

[46] Counsel for the applicant pointed out that, given the limitations on the available evidence, it would be equally difficult for the applicant to prove the irregularities affected the result of the election, as it would be for the respondent to disprove this proposition. I am not sympathetic to this complaint. I referred earlier to the conundrum that would result if elections were easily overturned. It is not supposed to be easy to overturn an election. If it was, the frequent efforts to set aside elections would challenge the confidence of Canadians in the efficacy of our election process.

[47] The reality is that s. 524(1)(b) of the *Canada Elections Act,* on which this proceeding is founded, foresees that evidence, in addition to the documents maintained by the election officials, may be required if an application to set aside an election is to succeed. The section does not just refer to "irregularities". An application may also rely on the presence of "fraud or corrupt or illegal practices" that affected the result of the election. "Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." (see: *Derry v. Peek*, [1886-1890] All E.R. Rep. 1 (H.L.); adopted in *Vale v. Sun Life Assurance Co. of Canada,* [1998] O.J. No. 6465 at para. 18 (Gen. Div.) (QL); and, *Gregory v. Jolley,* [2001] O.J. No. 2313 at para. 15 (C.A.) (QL); as quoted in *Canada v. Granitile Inc.,* 2008 CanLII 63568 (Ont. Sup. Ct. J.) at para. 286). It

would not be possible to demonstrate fraud, or for that matter corrupt practices, without some evidence in addition to the documents prepared and kept by polling officials in the course of running the election. There is no reason why this should be necessarily different where the applicant is relying on "irregularities" as the transgression on which an application to set aside an election is based.

[48] In this case, there was evidence in addition to the documents prepared in the course of the election. There were affidavits provided by an employee of the office of the Chief Electoral Officer, the returning officer for Etobicoke Centre, the campaign manager for the respondent and others who worked on his behalf. The returning officer was cross-examined, the others were not. Two polling officials were cross-examined under summons. The first was the deputy returning officer responsible for Poll 16 and the second the central poll supervisor at the place where polling stations 28, 29, 30 and 31 were jointly located. It is possible that other evidence could have been provided. In the end, this is not something the court can assess. It is for the parties to determine.

[49] Counsel for the respondent pointed out that, for six of the ten polls in issue, candidates had representatives present during the election. Candidate's representatives, or "scrutineers", are entitled to be present at a polling station on the day of the election. A candidate is permitted to have two representatives at each polling station (see: *Canada Elections Act*, ss. 135(d) and 136(1)). These scrutineers have considerable authority to review the election process as it takes place. On behalf of a candidate, they may,

- examine the list of electors (see: *Canada Elections Act*, s. 136(3));
- require that an elector provide his or her name and address (see: *Canada Elections Act*, s. 143 (1));
- request that the elector take the oath prescribed to confirm or demonstrate the address at which he or she ordinarily resides (see: *Canada Elections Act*, s. 143 (3.2));
- request that any elector take the prescribed oath to confirm they are qualified to vote (see: *Canada Elections Act*, s. 144);
- be present when a registration officer undertake the process of registering an elector (see: *Canada Elections Act,* s. 161(3));
- request a list of every elector who exercised his or her right to vote, excluding those who registered on the day of the poll (see: *Canada Elections Act,* s. 162(i.1)); and
- be present when the votes are counted (see: *Canada Elections Act,* s. 283(1)).

[50] Individuals who carried out this role could provide affidavit evidence, concerning the conduct of the election, if they had any concerns with it or, alternatively, they could provide evidence to demonstrate that they had no such concerns. In this case, a scrutineer who acted on behalf of the respondent did provide an affidavit.

Standard of Proof

[51] This is a matter of civil law, as opposed to one of criminal law. In the circumstances, one would assume that the applicable standard is that of "a balance of probabilities". The available case law would seem to support this approach (see: *Cusimano*, *supra*, Div. Ct. at para. 74; and *Storey v. Zazelenchuk* (1984), 36 Sask. R. 103, [1984] S.J. No. 800 at para. 31 (C.A.) (QL)). Counsel for the respondent does not accept this position. He submitted that the applicable standard of proof depends on the nature of the irregularity being alleged. If the irregularity is also an offence under the *Canada Elections Act*, he submitted, it must be proven beyond a reasonable doubt. In all other cases, the standard of proof is a balance of probabilities.

[52] In making this submission, counsel relied on the case of *Johnson v. Yake,* [1923] 2 D.L.R. 95 (S.C.C). In that case, following an election, it was revealed that certain election expenses were made without the authorization of the "official agent" of the candidate. Rather than acknowledge the error, the agent, with the approval of the candidate, declared in his return that he had approved the payments. Both were found to be guilty of corrupt and illegal practices as defined by the prevailing legislation and the election was declared void. In his judgment, Duff J., as he then was, observed at p. 97 that where a charge that "...may entail consequences of a penal nature..." is made, it should not be taken to be established unless it is "...satisfied beyond a reasonable doubt".

[53] In the present case, there is no charge; no one is at risk of any penalty being imposed as a result of any finding that may be made, nor has anyone been convicted of any offence under the *Canada Elections Act*. The allegations made are of "irregularities" not of "corrupt or illegal practices". In *Johnson v. Yake*, the election was declared void *because* the two individuals were found guilty of such offences. The finding of guilt was "...the most important point..." (see: *Johnson v. Yake, supra*, per Brodeur J. at p. 106). Under s. 51 of the legislation applicable in that case, a candidate's election would be void if it was found that any corrupt or illegal practice had been committed by the candidate and/or his agent. The offences charged would have to be proven beyond a reasonable doubt, but the voiding of the election flowed automatically from the convictions.

[54] I do not agree with counsel for the respondent. I find that the appropriate standard of proof is a balance of probabilities.

[55] Quite apart from everything else, in searching for the balance between allowing elections to be contested and making the test too easy to meet, requiring that an irregularity affecting the result be proven beyond a reasonable doubt would set the bar too high.

ANALYSIS

Purpose of the Legislation

[56] To understand the legislation, one must consider its purposes. Much has been written as to the goals of this kind of legislation, most recently by Madam Justice Himel, who undertook the recount of this election (see: *Judicial Recount Arising out of the 41st General Election in the Electoral District of Etobicoke-Centre (Re)*, 2011 ONSC 3652, 2011 CanLII 36068). While a recount has different concerns than a contested election, some of what is referred to there is helpful here. Voting is a fundamental right of citizenship. It is guaranteed by section 3 of the *Charter of Rights and Freedoms*. Consistent with this, the case law suggests that the primary concern of the legislation is the enfranchisement of our citizens. We want people, who are qualified, to vote. In the case of *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 at pp. 1048-49, Cory J. made the following observations:

> All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.
>
> (as quoted in *Judicial Recount Arising out of the 41st General Election in the Electoral District of Etobicoke-Centre (Re), supra,* at para. 29)

[57] Himel J. observed that this leads to "...the necessity to give a broad interpretation to statutes that provide for the vote":

> The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with... *It looks to realities, not technicalities or mere formalities*, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute.
>
> (*Cawley v. Branchflower* (1884), 1 B.C.R. (Pt. II) 35 (S.C.) at p. 37, as quoted in *Judicial Recount Arising out of the 41st General Election in the Electoral District of Etobicoke-Centre (Re), supra*, at para. 29; emphasis by Himel J.)

Moreover,

> [t]he Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise...

> (*Re: Lincoln Election* (1876), 2 O.A.R. 316 at p. 323 (C.A.), as quoted in *Judicial Recount Arising out of the 41st General Election in the Electoral District of Etobicoke-Centre (Re), supra*, at para. 29)

[58] That this legislation should be interpreted liberally is confirmed by an understanding that to require it to be complied with strictly could detract from the overall goal of enfranchisement:

> ... To hold that an Act which required an officer to prepare and deliver to another officer a list of voters, on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it, to disenfranchise the electors; a conclusion too unreasonable for acceptance.
>
> (*Anderson v. Stewart and Diotte* (1921), 62 D.L.R. 98 (N.B. S.C. (A.D.)), as quoted in *Wright v. Koziak* (1980), 24 A.R. 255 at p. 266 (C.A.), as referred to in *Flookes v. Shrake*, 1989 CanLII 3220 (A.B. Q.B.), at para. 51)

[59] Understood from this perspective, it becomes clear that there are provisions in the *Canada Elections Act* that should be seen as directory rather than mandatory: "...an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially" (see: *Woodward v. Sarsons and Sadler; Birmingham Mun. Election* (1875) LR 10 CP 733, 44 LJCP 293 at p. 746, as quoted in *Melynchuk v. Heard* (1963), 45 W.W.R. 257 (A.B. S.C.), and referred to in *Flookes v. Shrake*, *supra*, at para. 50).

[60] Himel J. concluded that "[i]t can be seen that enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely, restrictions on that right should be narrowly interpreted and strictly limited." (see: *Judicial Recount Arising out of the 41st General Election in the Electoral District of Etobicoke-Centre (Re)*, *supra*, at para. 29). I agree. In this case, in determining whether any impugned vote should stand we cannot ignore the words of the statute but they should be interpreted in a liberal fashion, directed to enfranchising those who are qualified to vote.

The meaning of "irregularities"

[61] Section 524 of the *Canada Elections Act* requires a determination as to whether there are "irregularities..." that "affected the result of the election". An examination of the test this sets begins with the consideration of what is meant by the word "irregularity". The word is not defined by the legislation. Counsel for the applicant and counsel for the election officials submit it should be interpreted broadly. In its plain and ordinary meaning an irregularity is: "... an act or practice that varies from the normal conduct of an action" (see: *Black's Law Dictionary, supra*). Both counsel suggested that this is a general term open to wide application, and there is no reason why it should not be interpreted on that basis here. Counsel for the election officials observed that when the *Canada Elections Act* was amended, in 2000, s. 524 represented a significant departure from what existed before. In the prior *Canada Elections Act*, the comparable section was s. 272, which stated:

> No election shall be declared invalid by reason of
>
> (a) non-compliance with the provisions of this Act relating to
>
> (i) limitations of time, or
>
> (ii) the taking of the poll or the counting of the votes,
>
> (b) any want of qualifications in the person signing any nomination paper,
>
> (c) any error in the name, or omission of, or error in, the address or occupation of any candidate as stated on a nomination paper received by a returning officer, or
>
> (d) any insufficiency in any publication of any proclamation, notice or other document, or any mistake in the use of the Forms contained in the Act or prescribed by the Chief Electoral Officer pursuant to this Act,
>
> if it appears to the tribunal that is considering the question that the election was conducted in accordance with the principles laid down in this Act, and that the non-compliance did not affect the result of the election.
>
> (*Canada Elections Act*, R.S.C. 1970 (1st Supp.), c.14; *Canada Elections Act,* R.S.C. 1985, c. E-2)

[62] What is apparent is that what was a specific test has been replaced by more general language ("irregularities, fraud or corrupt or illegal practices"). What this suggests is that the words in the current section should be interpreted more liberally to encompass the many kinds of errors that could potentially affect the result of an election.

[63] Counsel for the respondent disagrees. In his mind, a narrower interpretation is what is called for. In coming to this, he relies on the principle that the meaning of a word is revealed by its association with other terms (see: *2747-3174 Quebec Inc. c. Quebec (Regie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 195; as quoted in *McDiarmid Lumber Ltd. v. God's Lake First Nation,* 2006 SCC 58, [2006] 2 S.C.R. 846 at para. 30). Put another way "...when two or more words linked by 'and' or 'or' serve an analogous grammatical and logical function, within a provision, they should be interpreted with a view to their common features" (see: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham ON: Butterworths, 2002), at p. 173; as quoted in *McDiarmid Lumber Ltd. v. God's Lake First Nation, supra,* at para. 30).

[64] As counsel for the respondent applies this principle, "irregularity" is not meant to include mistakes, errors, and trivial non-compliance with the *Canada Elections Act*. Rather, as a result of its association with "fraud" and "corrupt or illegal practices", the word has a much more serious meaning. "Fraud" connotes an act which involves a purposeful deception to gain an advantage. "Corrupt or illegal practices" deals with offences under the *Canada Elections Act* such as a candidate, or agents of a candidate, publishing false statements, inciting or conspiring to act in a

disorderly manner, signing a document that limits freedom of action in Parliament, voting more than once or impersonating a revising agent. These all carry the possibility of imprisonment (see: *Canada Elections Act,* s. 502). Counsel submitted that this extends the meaning of irregularity, to say that irregularity excludes "mistakes, errors and *other actions that are unintentional*" (see: Factum of the Respondent, Ted Opitz, at para. 182; emphasis added).

[65] The implication of this approach is that no error, regardless of how egregious and regardless of the extent of its affect on the results of the election, could be subject to an application to set aside the vote unless it was done intentionally. To adopt this approach would, to a large degree, negate any utility in the presence of the word "irregularity" in the section. Mistakes by their nature do not arise from an intended act. To do something "by mistake" is to do it accidentally or without intention. It is "fraud", or "corrupt or illegal practices" that require deceit or a conscious act. In *O'Brien v. Hamel*, (1990), 73 O.R. (2d) 87, 1990 CarswellOnt 764 (Div. Ct.) (WL), an election was set aside as a result of errors in the way it was conducted. In its reasons, the Court was careful to say that there was "...no evidence to say that the irregularities arose out of the misconduct of any voters or election officials" (see: *O'Brien v. Hamel, supra*, at para. 10). A similar approach was adopted in *Pollard v. Paterson* (1974), 50 D.L.R. (3d) 542, 1974 CarswellMan 95 at para. 3 (Q.B.) (WL).

[66] Counsel for the respondent relied on *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, as supporting his position. In that case, a provision of the *Environmental Protection Act* of Ontario was challenged as being unconstitutionally vague or overbroad, in violation of s. 7 of the *Charter of Rights and Freedoms*. In upholding the validity of the section, Gonthier J. considered the words in issue in the context of the section in which they appeared, and found that the section was not unduly vague. In the case before me, no one suggested that the meaning of the word "irregularity" was vague. Nor is there any dispute that words should be interpreted in reference to other words in the section. Rather, the question is whether the word "irregularities" should be interpreted broadly, as expanding the list of matters covered by s. 524, or whether it should be interpreted narrowly, as requiring an intentional act similar to "fraud or corrupt or illegal practices". As such, *R. v. Canadian Pacific Ltd.* does not assist the respondent in his argument that irregularities must mean something intentional.

[67] The better view is that the word "irregularity" should be seen as adding to the grounds contemplated under s. 524 of the *Canada Elections Act*, not as constraining them, and it should be given the broad interpretation suggested by counsel on behalf of the applicant and counsel on behalf of the election officials.

[68] Having said this, I am obliged to say that I do not think that it matters whether a broad or narrow interpretation is applied. The test turns on its second element: Did the irregularity affect the result of the election? It stands to reason that any non-compliance with the *Canada Elections Act* that affected the result of the election would not be trivial and would be an irregularity. To my mind, the correct approach is to conflate the two elements into a single consideration: Was there an irregularity that affected the result of the election? The decision as to the second element may impact on the conclusion with respect to the first. This is the effect of the decision in *Cusimano, supra*, where the Divisional Court observed, at para. 59, that, "...there is no policy

reason to read s. 83(7) narrowly, since no irregularity can be excused if it affects the outcome of an election or violates the fundamental principles of the [*Municipal Elections Act*]."

[69] This is also consistent with the way in which the test has been dealt with in earlier cases, under predecessor legislation. In *O'Brien v. Hamel,* after several recounts, it was determined that the respondent won the election with a plurality of 77 votes. The court was asked to find the election invalid under the *Dominion Controverted Elections Act*, R.S.C. 1970, c. C-28, as amended. The case proceeded based on an Agreed Statement of Fact. Among other problems, people had been permitted to vote who were not on the official list of electors and who were not properly vouched for. In *Neilsen v. Simmons* (1957), 14 D.L.R. (2d) 446, 1957 CarswellYukon 1 (T.C.) (WL), the plurality was 64 votes. The court was asked to determine if the election was valid in light of votes cast by persons who were not on the voter's list and who were not qualified. In both cases, the elections were set aside. There was no separate consideration of whether the demonstrated errors were irregularities. Both courts asked only whether there were irregularities that affected the result of the election.

[70] This takes me to the heart of the test: What is required to establish that an irregularity affected the result of the election?

[71] The case law suggests that this is a narrow question and generally, the parties agree. "[I]f the number of irregular votes exceeds the plurality of votes cast, the election cannot stand" (see: *O'Brien v. Hamel*, *supra*, at para. 25). The plurality, the number of votes that must be set aside before an election can be declared invalid, has been referred to in cases such as this as a "magic number" (see: *O'Brien v. Hamel*, *supra*, at para. 25) . In *O'Brien v. Hamel*, the number was 77. In *Neilsen v. Simmons* the number was 64. In both cases, the determination was made that the number of irregular ballots exceeded the plurality and the elections were set aside. In *Flookes v. Shrake,* the plurality was 127 votes. 18 votes were discarded as a result of "irregularities and failure to comply with the provisions of the Act". As a result, it was determined that these errors did not affect the outcome and the election was left to stand (see: *Flookes v. Shrake*, *supra*, at paras. 81 and 83).

[72] The question to be asked in determining whether an election should be set aside has been expressed in different ways:

- Were there ballots in the box that should not have been there?" (see: *O'Brien v. Hamel, supra*, at para. 34).

- Were there persons who voted who "...should not have been permitted to vote...?" (see: *Flookes v. Shrake*, *supra*, at para. 29).

These questions reflect on the need to analyse each impugned ballot, individually or as part of a group which may be subject to the same irregularity, and then total up the ones that should not have been cast and see if the number equals or exceeds the plurality. If the votes that should not have been cast exceed or equal the plurality, then the election should be declared void.

- "Now it is the clear intention of the law that the member for a constituency shall receive a majority, over his nearest opponent of the qualified votes cast at the election. If the facts disclosed make it impossible to determine that any candidate is in this position, no candidate can validly be declared elected, and the election is void." (see: *Lamb v. McLeod (No. 5)*, [1932] 3 W.W.R. 596 at p. 598 (C.A.); as quoted in *Neilsen v. Simmons*, *supra*, at para. 33).

This suggests the same sort of inquiry but appears to acknowledge the possibility that it may not be possible to come to a definitive answer.

- "The difference between *O'Brien v. Hamel* and this case is illustrated by considering what would have happened on election day if the applicable statute had been complied with. In *O'Brien v. Hamel*, the result of the election would have been different: 121 ballots that were in fact counted would not have been. In this case, the result of the election would have been the same. If the [*Municipal Elections Act*] had been complied with, the clerk would have endorsed the unendorsed [Voters List Change Request Forms] and the ballots would have been counted." (see: *Cusimano*, *supra*, Div. Ct. at para. 91).

On this formulation, the test centres on whether, absent the irregularity, the person would have been permitted to cast the ballot.

[73] These questions are each phrased in a way that responds to the particular problem in the case at hand. They restate the issue but do not create a clear test to determine when an irregularity affects a vote such that it should be discounted. Ultimately, this aspect of the test, however stated, has to be analysed on a case-by-case basis.

[74] Before getting to the analysis of the irregularities in this case, there is one further issue that was raised in respect of applying the test. Counsel for the respondent submitted that a determination that there were sufficient irregularities to overcome the plurality would not necessarily end the matter. There may be factors that impact on the understanding of the irregularities such that the vote should, nonetheless, be sustained. Counsel for the respondent submitted that the Court should not apply the "magic number" approach strictly. It could be that, in some of the polls at issue, the applicant received substantially more votes than the respondent. Counsel for the respondent argued that the Court could find that even if the impugned votes exceeded the plurality, it would not affect the result because it could not be reasonably assumed that all of these votes were cast for the respondent.

[75] In making this submission, counsel relied on *Beamish v. Miltonberger*, [1997] N.W.T.R. 160, 1997 CarswellNWT 10 (S.C.) (WL). In an election for the Legislative Assembly, the petitioner lost by 36 votes. The system in place allowed for votes by proxy. The judge determined that 24 of these were invalid. Since this was insufficient to overcome the plurality the election was found to be valid. Despite this, the court went on to make what it acknowledged were "strictly *obiter*" comments with respect to whether, with a different result, it would have

been appropriate to "... draw any inferences or come to any conclusions as for whom those votes would likely have been cast" (see: *Beamish v. Miltonberger*, *supra*, at paras. 182-83).

[76] At its root, the issue concerns the potential to breach the secrecy of the ballot. The judge found that there was evidence that convinced him that most of the invalid proxy votes would have been cast for the unsuccessful party. The presence of proxy voting is a distinguishing factor which cannot be discounted. Proxy voting provides a basis for drawing an inference as to who the ballots were cast for without breaching the secrecy of the ballot. We cannot do the same here. Nonetheless, counsel for the respondent took up an observation made in the decision. The supporters of a candidate could engage in improper practices, then, if that candidate lost the election, they could challenge the results on the basis of their own improper conduct. If those invalid ballots exceeded the majority, and no further account was taken, the unsuccessful party could succeed in obtaining new election (see: *Beamish v. Miltonberger, supra*, at para. 187). There is no evidence of such conduct here, but, from this, counsel suggested that it was open to the Court to consider how the invalid votes would have been cast in its determination as to whether the results of the election had been affected. I find there is nothing to support this idea and nothing to suggest any basis on which this kind of analysis could be undertaken. I will not engage in what would be nothing more than speculation as to which candidate ballots may have been cast for.

Assessing the "irregularities"

[77] I turn now to a consideration of the allegations of irregularity referred to by the applicant.

[78] Counsel for the applicant took the position that the directives found in the *Canada Elections Act* must be complied with, but he acknowledged that not every failure to do so demonstrated an irregularity that would affect the result of the election.

Irregularities that were not relied on

[79] The registration certificates are to be signed both by a polling official (the registration officer if one is appointed for the polling division or the deputy returning officer) and the elector seeking to be registered. The form requires that each of them provide the date on which they signed. Many registration certificates are missing one or both of these dates. This is an irregularity, as the registration certificate would not have been completed in the "prescribed form" (see: *Canada Elections Act,* s. 161(4)). It is not an irregularity on which counsel for the applicant relied. Registration certificates are only used on the day of the election. There is no other date that could appear on the form and no questions were raised as to the date on which the certificates were completed.

[80] In the same vein, each poll book, on its last pages, contains places for the total number of voters, falling into various categories, to be recorded: "Electors who voted according the list of electors", "Electors who voted by *Registration Certificate*", "Electors who voted by *Transfer Certificate*", etc. In the poll book for Poll 83-1, the number 14 appears as "[t]he total number of electors who were vouched for at this polling station". A review of the poll book shows that no one was identified as having been vouched for at Poll 83-1. When this was raised, counsel for the

applicant was quick to concede that the number 14 was an error. It represented the total number of votes cast at this polling station. This was not an irregularity on which counsel for the applicant relied in his submissions.

Irregularities that were not relied on as affecting the result of the election

[81] There were other irregularities which counsel for the applicant did rely on, but which he agreed did not directly affect the result of the election. It was his view that among the issues raised by this application was the overarching concern for the confidence that Canadian citizens must have in our electoral process. If there were too many uncertainties, mistakes or irregularities, that confidence could be undermined by an overall concern for the efficacy of the process. This could happen even if it could not be shown that the result of the election was directly impacted by these failings. In this case, there was a spectrum of irregularities which, counsel said, could contribute to this concern despite the fact they did not, by themselves, affect the result of the election:

- the registration certificates are to be signed by an polling official (the registration officer if one was appointed, or the deputy returning officer). By signing, the polling official confirms that the registration certificate has been completed to his or her satisfaction. There were registration certificates that were not signed by a polling official. This occurred in circumstances where the elector had signed, certifying that he or she was qualified to vote. The error was that of the official and not the voter (see: Poll 16);

- the registration certificates require a polling official who signs them to indicate the method by which the elector was identified. This is done by checking a box indicating whether the identification was either by "Proof(s) of identity and address shown" or "Vouching". There are registration certificates where there is no indication of how the elector was identified (see: Polls 30 and 31);

- the poll books contain space, on page 23, to record oaths that are taken and whether they are "sworn" or "affirmed" or "vouched for any elector", or "assisted as a friend, spouse, common-law partner or relative, or if the person refused to swear". In some cases, these pages were not completed in compliance with the directions provided. In some circumstances they failed to provide the required information. In some cases they identify the person vouching only by his or her relationship to the person being vouched for (see: Polls 400, 89 and 502);

- the documents, as produced, were not properly organized. A hand-written note that recorded three additional pairs of vouchers and those being vouched for, belonging in Poll 11, was distributed as part of the record for Poll 174.

[82] Counsel for the applicant submitted that these "irregularities" added to a demonstration that the officials who conducted the election did not do so in a manner that would instil the necessary confidence in the electoral process. Counsel acknowledged that these errors would not add to any list of votes that were to be discounted and set against the plurality of the respondent. Nonetheless, he submitted that the overall failure of the process should be taken into account in considering whether any irregularities that could affect the result of the election did so.

[83] Section 524 of the *Canada Elections Act* is clear. On this application, the irregularities to be accounted for are those that affect the result of the election. It may be that overall confidence in the process should be a concern for those responsible for running federal elections but, in my view, it does not help here.

[84] This is not a question that is without controversy. In *Wright v. Koziak,* which concerned a provincial election in Alberta, the court examined the results of the vote in one constituency. It considered the import of the cumulative effect of errors that were not in themselves breaches of the applicable legislation. Cases saying that the cumulative effect should not be accounted for were referred to and the following quotation repeated:

> ...irregularities are not cumulative in their effect and that it cannot be said that one irregularity that is not fatal becomes fatal when it is accompanied by other irregularities which taken alone would be harmless.
>
> (*Anderson v. Stewart & Diotte, supra,* at pp. 115-16; as quoted in *Rex ex rel. McClellan v. Clay,* [1945] 4 D.L.R. 424 at p. 430 (Alta. Dist. Ct.); as referred to in *Wright v. Koziak, supra*, at para. 47)

This was followed by a reference to the opposite effect:

> Indeed, in the face of so many errors one may question whether the election was conducted 'in accordance with the principles of this Act', so that the saving clause could not apply.
>
> (*Pollard v. Patterson, supra*, referring to *Hickey and Orillia* (1908), 17 O.L.R. 317 (Div. Ct.) and *Jacques v. Mitchell* (1924), 55 O.L.R. 286 (S.C.); as quoted in *Wright v. Koziak, supra,* at para. 48)

[85] The judge in *Wright v. Koziak* concluded that the cumulative impact was a consideration that could impact on the result: "Certainly one non-compliance or irregularity might not materially affect the result, whereas the combination of four or five, taken together, might". He considered the cumulative impact and concluded that he remained of the view that the election should not be set aside (see: *Wright v. Koziak, supra*, at paras. 48-49). It is important to understand what the judge was referring to when he took account of the "cumulative impact". Apart from the cumulative impact, there were four substantive complaints. None was accepted by the judge. In dealing with the cumulative impact, he made the following observation:

> As I say, I can conceive of a case where permitting a number of unauthorized persons to vote, which was not sufficient in number to affect the result, could be

> taken with another breach of the Act which resulted in another group of persons not being able to vote, and, again, not of sufficient number which would materially affect the result, but if these irregularities were taken together, the result might well be affected. In these circumstances, it might well be that a cumulative effect has to be considered.
>
> (*Wright v. Koziak*, *supra*, at para. 49)

[86] In other words, he considered whether the total number of votes affected by the different irregularities would affect the result. This is nothing more than adding up all the discounted votes to see if there are enough to overcome the plurality. This is consistent with determining if the "magic number" had been met. It is not the sort of general assessment proposed by counsel for the applicant. The *Canada Elections Act* does not allow for elections to be set aside simply by the accumulation of errors. It is required that the result of the election be shown to have been affected.

The irregularities that remain to be reviewed

[87] The irregularities that were raised by counsel for the applicant that have not yet been reviewed can be broken into four main categories:

> (1) Discrepancies: where the total of votes cast and the votes counted do not agree.
>
> (2) Polling location: where the elector voted in a poll other than the one where he or she ordinarily resided.
>
> (3) Failure of registration: where there is no confirmation that the elector was a qualified elector either because a registration certificate is not available, or had not been properly completed.
>
> (4) Failure of vouching: where vouching that did not comply with the requirements of the *Canada Elections Act* was relied upon as the basis for providing a ballot to an elector.

Discrepancies

[88] The parties agree that there were 206 votes cast in Poll 426. Counsel for the applicant submitted that 173 of these were by voters who appeared on the official list of electors and 33 were added on the day of the election, by registration certificate. The difficulty arises because 5 of the 33 people who voted by registration certificate are also on the official list of electors, where their names are crossed off (signifying that they were given a ballot) and checked off (signifying they voted). Counsel for the applicant submitted that either these 5 voted twice, or there is a discrepancy in the count.

[89] Counsel for the respondent referred to 5 other voters, on the official list of electors, that were not among the 33 who voted by registration certificate. Their names were crossed off the

list but not checked off. Strictly speaking, this would suggest that they were given ballots but had not voted. Counsel produced the Statement of the Vote for Poll 426. It indicates that there were 275 ballots received from the returning officer. Of these, 206 were cast and 69 were unused. None were rejected and none were spoiled, meaning that all the ballots that were distributed to electors were cast. This being the case, counsel for the respondent submitted that the best explanation was that the 5 votes were cast but were, mistakenly, not checked off. I agree. This is the most logical explanation. I find there was no discrepancy. Accordingly, there was no irregularity that could have affected the result of the election.

[90] The parties agree that 332 votes were cast in Poll 31. Counsel for the applicant identified 236 as having been crossed off and checked off the official list of electors and 86 recorded as voting by registration certificate. There are 7 voters crossed off the list but not checked off. For the purpose of this calculation counsel for the applicant conceded that the 7 should be accounted for as having voted. On this basis, he submitted that there were (236 + 86 + 7) 329 votes counted as cast, resulting in a discrepancy of 3 votes.

[91] Counsel for the respondent accepted these numbers but submitted that there were two additional electors on the official list of electors who should be identified as having voted. He said the discrepancy between the total votes cast and the vote count is 1 vote.

[92] In *Camsell v. Rabesca*, the residents of a town petitioned the minister to hold a plebiscite to determine whether alcohol ought to be prohibited. Because many residents would soon be absent, an early date was set. The measure passed by a margin of 5 votes out of 455. An application was sought to declare the vote void. There were a number of irregularities relied on. Among them were irregularities in compiling voting lists and their discrepancies with the number of votes cast. At the end of the polling 5 more ballots were cast than had been recorded. The list was "[brought] up to date" and "the discrepancy was removed". The court noted, "[t]here was perhaps some confusion, but there was no evidence that anyone voted twice or that anyone voted who should not have voted: see [*Mullins and Windsor (City)* (1975), 9 O.R. (2d) 729, 61 D.L.R. (3d) 601 (Div. Ct.)]" (see: *Camsell v. Rabesca, supra,* at para. 22). The same applies here. There is no evidence to suggest that the missing vote or votes represent anyone having voted twice or anyone voting who should not have.

[93] Similarly, in *Flookes v. Shrake,* where in 11 polls there was a difference of 1 vote between the number of voters and the number of ballots, the court did not consider that the discrepancies had any material effect on the results of the election and no vote was discounted as a result (see: *Flookes v. Shrake*, *supra*, at para. 75).

[94] While there may be errors on the face of the poll documents, the apparent discrepancies in Poll 426 and Poll 31 do not demonstrate any irregularity which could have affected the results of the election.

Polling location

[95] An elector who is qualified to vote is entitled to have his or her name included on the list of electors for the polling division in which he or she is ordinarily resident and to vote at the

polling station for that polling division (see: *Canada Elections Act*, s. 6). The poll book for Poll 31 identifies 86 electors who voted by registration certificate. According to the poll book, of the 86, 66 lived in other polling divisions in the electoral district of Etobicoke Centre and 2 share an address located in another electoral district.

[96] It was explained that of the 66, 44 lived in polling divisions for which the polling stations were at the same location as Poll 31. As such, it appears that these 44 simply went to vote at the wrong table. The other 22 were at the wrong polling location and should have voted elsewhere.

[97] There was a further example of an elector who voted in the wrong polling division. The record concerning Poll 16 contains a registration certificate clearly indicating that the voter resided in Poll 19. It would seem that no one noticed and this elector was given a ballot and voted in Poll 16.

[98] In *Flookes v. Shrake,* in order to accommodate them, a large number of voters who had not been enumerated and who would have trouble understanding the oath they would be required to take, were directed to polls other than the one in which they resided. At the end of the day, the lists were corrected so that the names of the 126 voters involved were moved to the list representing the poll in which they lived. As part of the application to set aside the election in that case, it was argued that those persons should not have been permitted to vote as result of this noncompliance with the applicable legislation. The concern raised was the possibility that they could have voted at more than one poll. The court found that there was no evidence anyone voted more than at one poll. Under the circumstances, there was no reason to declare the votes of the people who voted in this way to be invalid (see: *Flookes v. Shrake*, *supra*, at paras. 22, 60 and 63).

[99] There was no evidence that anyone who voted at Poll 31 when they did not live there, or the single elector who voted at Poll 16 rather than Poll 19, voted at more than one poll. Consistent with the purpose of enfranchising our citizens, these votes should stand. This irregularity does not change the result. Rather, the change would occur if these votes were disallowed. Each of these people voted in the correct electoral district and, absent evidence of double voting, the fact that they voted in the wrong polling division did not affect the result of the election.

[100] In the normal course, the same could not apply to the 2 votes cast by those who provided an address outside the electoral district. If they were resident outside the electoral district, their votes should not be counted. As it is, counsel for the respondent provided evidence indicating that the Friday before the election, individuals with the names of these 2 electors purchased a home in Etobicoke Centre. I should be clear that by purchase I mean that the transaction closed and they became the registered owners of the property on that date. There are two concerns, first, whether these electors were properly resident in Etobicoke Centre on election day, and second, whether they voted twice. It would seem from the evidence presented by the respondent that on the day of the election, they were ordinarily resident in Etobicoke Centre and there is no evidence to suggest that double voting occurred. On this basis, I would allow these votes to stand but, as it is, there is more to these votes than has appeared to this point. I shall return to these voters shortly.

Failure of registration

[101] To understand these suggested irregularities, it is helpful to review some history. In 1990, when *O'Brien v. Hamel* was decided, when an election was called, voters were enumerated and the list of electors was based on that enumeration. There was a distinction drawn between "urban polls" and "rural polls". Urban polls were "closed polls". Subject to two exceptions that have no application here, an elector could only vote if his or her name appeared on the list. Rural polls were "open polls". If an elector's name did not appear on the list, he or she could still cast a ballot if "vouched for" by a properly qualified elector (see: *Canada Elections Act,* R.S.C. 1970, c. 14 (1st Supp.), ss. 121(2), (3), 147(1) (2) and (3) and *O'Brien v. Hamel*, *supra*, at paras. 19 & 20).

[102] Over time, the *Canada Elections Act* was amended. The first relevant amendment occurred in 1993. In that year, it became possible for voters in both urban and rural polls to obtain a registration certificate if his or her name did not appear on the list of electors. Despite this, a distinction between the two types of polls remained. In an urban poll, a voter was required to attend at a "revisal office" and to prove his or her identity by documents of a class determined by the Chief Electoral Officer. In a rural poll, a voter had the further option of being vouched for (see: S.C. 1993, c. 19, ss. 66 and 80).

[103] The *Canada Elections Act* was amended, again, in 1996. The applicable sections were modified so that, in an urban poll, an elector could register by attending at a "registration office". The proof required to register, in the respective polls, did not change. The distinction remained.

[104] It was only with the present *Canada Elections Act*, passed in 2000, that electors in urban polls were permitted to register at the polling station and could identify themselves by vouching.

[105] For those who are added to the list of electors in this way, registration is a fundamental part of the process. It is by signing the registration certificate that a person certifies that they are qualified to vote. This is the means by which the voter declares that he or she is 18 years of age and a Canadian citizen. The person also declares that they reside at the address shown on the registration certificate. Section 161(4) of the *Canada Elections Act* requires electors to sign the registration certificate. Arguably, without a signed registration certificate, there is no way to know whether the voter is qualified to vote in the electoral district in question.

Poll 426

[106] The poll book for Poll 426, on the page set aside for the purpose (p. 18), records that 33 people voted by registration certificate. The names appear and so, too, does a checkmark signifying each of them voted. Their addresses, which should have been included, are not. This is the only record of anyone, in this poll, voting by registration. This number is not repeated on the page which summarizes the results of the election (p. 31). That page is blank. Most importantly, no registration certificates have been produced for Poll 426. If registration certificates were completed, they cannot be located.

[107] The poll book also contain a page set aside to record those who took oaths (p. 22) and a page to record those who vouched for others (p. 23). In the normal course, it is expected that these pages would show the names of those who, for the purpose of registering, identified themselves by vouching and those who vouched for them. These pages are also blank.

[108] How do we know if these people were qualified to vote? Poll 426 was located in a senior citizens home and those who voted there were its residents. Counsel agreed that those who voted must have been over 18 years of age. Either residents, or employees who lived on site, would have been at least that age.

[109] The problem that arises is whether there is any way of knowing whether these persons are Canadian citizens. The Court was advised that when an election is over and the votes have been counted, the registration certificates for each polling division are to be delivered to the returning officer for the electoral district. The returning officer is to see that the official list of electors is updated by adding the names of those who voted by registration. The product of this work is the final list of electors to which s. 109 of the *Canada Elections Act* refers. Once this task is completed, the registration certificates for the electoral district are gathered together and sent to the office of the Chief Electoral Officer, in Ottawa, where they are to be maintained in case of further inquiry. Counsel for the election officials advised that no names from Poll 426 were added to the final list of electors. The safeguard that the final list of electors represents does not provide assurance that the registration certificates were prepared at Poll 426. The implication of this is that if they were prepared, they were never delivered to the returning officer. It follows that they were never delivered to the Chief Electoral Officer.

[110] Counsel for the respondent submitted that there is enough evidence for the Court to conclude, on the balance of probabilities, that the registration certificates were properly completed.

[111] Counsel for the respondent pointed out that the person who fills out the poll book is the poll clerk (see: *Canada Election Act,* s. 162(a)). It is the registration officer, if one was appointed, or the deputy returning officer who conducts the registration of an elector. Accordingly, as counsel sees it, there is a safeguard that should protect the process. The poll clerk would not identify a person in the poll book as having been registered without being presented with the completed registration certificate. I point out, parenthetically, that it is quite clear that two people were engaged in filling out the poll book for Poll 426. The handwriting changes between the 22nd and 23rd names on the list of 33. From this, it would seem that the poll clerk was not the only person who wrote in the poll book.

[112] Counsel also pointed out that as a result of inquiries made by the returning officer, the deputy returning officer reported that "she thought they completed the registration certificates and returned them as per the process", that "33 registrants sounds about right" and that "she has done this many times so knows the process". As counsel sees it, this evidence is similar to the affidavits provided by election officials in *Cusimano.* In that case, there were 17 affidavits saying that the proper procedure had been followed even though the Voters Change Request Forms had not been signed by the election officials. The absence of a signature is substantially different from a failure to produce the document. It is one thing to say "I completed the process; I just did

not sign the document". It is quite another to say "I cannot find the document, but 33 sounds about right." The registration certificates are not just records. It is the act of signing the certification, by which the person declares they are qualified to vote. Without it, we do not know if he or she is qualified. What is missing is not just a signature but the substantive declaration of age and citizenship.

[113] The question is not whether I am, on a balance of probabilities, prepared to accept that these registration certificates existed but whether, in the circumstances, I am prepared to find that these 33 people certified that they were qualified to vote (particularly that they were Canadian citizens). I would have to find these 33 voters were qualified in the face of the following facts:

- the absence of the registration certificates;
- the poll book page that should confirm the number of voters that registered is blank (p. 31);
- the poll book pages that should record the voters who registered by vouching and those who vouched for them are blank (pp. 22 and 23); and
- the 33 people in question were not added to the final list of electors.

[114] Moreover, even if I were to accept that the registration certificates were prepared, I would also have to assume that they included a proper, signed certification of the person's qualifications to vote.

[115] The only "safeguards" left to be relied on are the list of names of those said to have voted by registration in the poll book, shown on p. 18, and the words of the deputy returning officer. It appears that the poll book was not prepared exclusively by the poll clerk. The placement of the names in the book, in the absence of these names having been added to the final list of electors, does little to confirm that registration certificates were prepared. The comment that the deputy returning officer "thought" the forms were completed is not definitive, and the statement that "33 sounds about right" is too general to provide much confidence as to whether these documents were completed. I am not prepared to find that, on a balance of probabilities, these 33 people declared that they were qualified to vote. Rather, I find, on a balance of probabilities, that there are 33 persons for whom no such declaration was made.

[116] The question remains whether all 33 of these votes should be discounted. As reported by counsel for the election officials, there were 7 names on the official list of electors which also appeared on the page of the poll book that recorded the names of those who ostensibly voted by registration certificate. The implication of this is that there were 7 people who, if registration certificates were prepared, did not need them and should not have had them. Since these 7 were on the official list of electors, from the fact of its preparation, it may be assumed they were qualified to vote. There is no evidence to suggest that any of them voted more than once. On this basis their votes should not be discounted. Accordingly, there are 26 votes that must be set aside.

Poll 31

[117] I have already noted that the poll book for Poll 31 records that 86 people voted by registration certificate. There are 70 registration certificates that have been produced with respect to this polling division. For the remaining 16 persons, no registration certificate has been produced. Like the 33 registration certificates in Poll 426, they either cannot be found or they were not completed. The pages set aside to record those who took oaths (p. 22) and to record those who vouched for others (p. 23) are blank. Counsel for the election officials indicated that no one was added to the final list of electors as a result of the preparation of a registration certificate for Poll 31. The safeguards provided by the pages in the poll book and the final list of electors do not assist in confirming that these 16 registration certificates were prepared.

[118] As with Poll 426, counsel for the respondent submitted that there is enough evidence for the Court to conclude, on the balance of probabilities, that the 16 registration certificates were completed. The names and the addresses are included in the poll book. The total number of registration certificates is repeated on the page which summarizes the results of the election (p. 31). Counsel also submitted that because 70 were completed it is clear that the staff, at this polling station, knew the forms were required.

[119] For this polling division, the returning officer spoke to the registration officer, the deputy returning officer and the poll clerk. The registration officer advised that elderly voters who came to this polling division, but were registered to vote at another location, were allowed to vote at Poll 31. They told her that they did not have the energy to go elsewhere and, otherwise, would not vote. The deputy returning officer and the poll clerk had no recollection of electors registered at other polling divisions being permitted to vote at Poll 31. "[A]ny elector with a registration certificate with a different polling division recorded on it would not be allowed to vote at their polling division." It is not clear from these statements what took place at this poll. Generally, they do not reflect on what happened to the "missing" registration certificates. Rather, they deal with whether people from other polling divisions were permitted to vote at Poll 31. The comment of the registration officer might be interpreted to mean that people appeared, advised they were registered elsewhere and were allowed to vote without a registration certificate being prepared. In which case, as the applicant suggests, these registration certificates never were prepared. It may be that the comments of the registration officer suggest that, in fact, registration certificates were prepared for these people at Poll 31, in which case the situation is no different from that in Poll 426. They were never delivered to the returning officer and we cannot know whether they were ever created.

[120] For me to conclude that these 16 people certified themselves as qualified to vote, the finding would have to be made:

- in the absence of the registration certificates;
- with the poll book pages that should record the voters who registered by vouching and those who vouched for them being blank (pp. 22 and 23); and
- without the 16 people being added to the final list of electors as a result of the registration certificates being delivered to the returning officer.

[121] As in Poll 426, if I assume the registration certificates were prepared, I would also have to assume they included a proper certification of the person's qualification to vote.

[122] The only "safeguards" left to be relied on are the list of names of those said to have voted by registration in the poll book (p. 18). The placement of the names in the book, in the absence of the parties having been added to the final list of electors, does little to confirm that registration certificates were prepared. I am not prepared to find that on a balance of probabilities these 16 people certified that they were qualified to vote. Rather, I find, on a balance of probabilities, that these are 16 people for whom no declaration of qualification to vote was made.

[123] Should all 16 of these votes be discounted? Counsel suggested that one of the people named in the poll book as having voted by registration, but for whom no registration certificate was produced, did appear on the final list of electors, albeit in respect of Poll 30. The information provided also suggested that this individual was on the official list of electors. This being the case, this voter had demonstrated the qualification to vote through the process by which that list was prepared. There is no suggestion he or she voted more than once. That vote should not be discounted. Accordingly, there are 15 votes that must be set aside.

[124] I return to the 2 electors who voted in Poll 31 after giving an address that was in another electoral district. These votes were among the 16 for which there was no registration certificate. They are included within the 15 votes being set aside. As such, it does not matter whether they were ordinarily resident in Etobicoke Centre. Their votes must be set aside, in any event.

Poll 174

[125] In the material produced with respect to Poll 174, there is a registration certificate where the certification of qualification to vote is blank and unsigned (Box 5). Counsel for the respondent observed that the polling official did sign the document in the box set aside for that purpose (Box 6). It is the view of counsel for the respondent that this demonstrates that the polling official applied his or her mind to the preparation of the registration certificate and that it is reasonable to infer that the necessary declaration was made.

[126] I do not accept this as a sufficient safeguard for the certification of the qualification to vote. The question of qualification to vote stands apart from the other irregularities that have so far been considered. This is the fundamental premise on which the right to vote is based. Any understanding of the registration certificate should begin with a reading that is consistent with what is present on its face. Where the polling official signed, there is a box checked off indicating that the prospective voter was identified and his or her address shown. In my mind,it is more likely that the polling official addressed the question of identity and did not deal with citizenship. In the absence of any indication that the question of qualification was raised, I am not prepared to find that citizenship was certified. This vote should be set aside.

Poll 89

[127] In Poll 89, there are 10 registration certificates. None have been signed by the polling official in the place reserved for that purpose. Rather, the polling official has signed in the place

where the prospective voter is to sign to certify that he or she is qualified to vote. None of these 10 people have signed the registration certificate. Counsel for the respondent submitted that this is sufficient to demonstrate the qualification to vote, or alternatively, that the polling official signed on behalf of the voter. Under the *Canada Elections Act*, polling officials may assist electors at the polling station, up to and including by assisting in the casting of the ballot. I have found that some requirements of the *Canada Elections Act* are more important than others. Qualification to vote is the essential prerequisite to being entitled to vote. There is nothing to suggest that the prospective voters were asked to, or did, declare they were qualified to vote. There is no support for the suggestion that the official signed on behalf of the elector. On their face, these registration certificates are consistent with the polling official signing the document on his or her own behalf, albeit in the wrong place. These 10 votes should be set aside.

[128] Consistent with the idea that qualified people should be permitted to vote, and as important as the signing a registration certificate is, it may be that the process can tolerate other means of certifying the qualification to vote. In Poll 89, there are two voters who are not on the official list of electors and for whom no registration certificate has been produced. The names of these two voters appear, in the poll book, on the page entitled "Record of Electors Requiring an Oath" (p. 22). They are shown as having been vouched for by relatives, one by his wife the other by her granddaughter, both of whom are named and whose addresses are recorded. Counsel for the respondent referred to the oath taken by those being vouched for. It includes the swearing or solemn affirmation that the person is 18 years of age and a Canadian citizen. The oath having been taken, the qualification to vote is demonstrated through the process provided for by the *Canada Elections Act.* These votes should be allowed to stand.

[129] To be clear, I should confirm that none of the 10 voters from Poll 89 shown to have voted by registration certificate, and whose votes I have discounted, are included on the list of voters who were vouched for.

Poll 83-1

[130] There are also 2 registration certificates in Poll 83-1 that should be accounted for. The page in the poll book where electors who voted by registration certificate are to be listed is blank (p. 18). The summary page indicates that there were two electors who voted by registration certificate (p. 31). The 2 registration certificates are included in the record. The certification of qualification is signed by a polling official but by a means that make it clear this signature was provided on behalf of the elector. Using fictional names, the signatures read "George Brown per John Smith", where George Brown is the elector and John Smith the polling official. This is different from those registration certificates where only the name of the polling official appears in the place set aside for the signature of the elector. This form of endorsement makes clear that it was the obligations and responsibilities of the elector that were being accounted for, and that the polling official was simply signing on behalf of, or in assistance of, the elector. These votes should stand.

[131] Before leaving "*failures of registration*", I return to the history of polling-day registration. As these processes have evolved, it is only recently that urban voters have been permitted to establish the qualification to vote through the preparation of a registration

certificate, at the polling station, on the day of the election. The change was significant. The lists of electors no longer rely on a fresh enumeration carried out for the purpose of the specific election. The preparation of registration certificates is no longer carried out at a location set aside for the purpose. The responsibility has been moved to polling officials who are on site, and their work must be carried out as the casting of ballots is taking place. These officials are among the 180,000 who worked at polls across the country in the 41st General Election. The fact that the responsibility is carried out in these circumstances does not make the requirement that voters be qualified any less important.

Failure of vouching

[132] Counsel for the applicant submitted that any error in vouching is sufficient to set aside the resulting vote. Vouching is a critical part of the identification of an elector being admitted to vote.

[133] Counsel relied on *Blanchard v. Cole*, [1950] 4 D.L.R. 316, 1950 CarswellNS 18 (S.C.) (WL), where it was held that there were two individuals who had been permitted to vote based on being vouched for. In the first circumstance, the father of the prospective voter advised that his son was home from the navy, whereupon those present agreed that he should vote. The Court referred to this as "highly informal". In the second situation, a man advised that he was not on the list but had lived in the area for over 20 years. Another, who was present, said he had been assessing the man for over 20 years and thought that he should have a vote. Others spoke up and agreed. The Court determined that in both cases no vouching had taken place. The requirements of vouching, as outlined by the provisions of the applicable legislation, had not been followed (see: *Blanchard v. Cole*, *supra*, at paras. 31 and 36). Both ballots were invalid.

[134] The principle has been extended to include cases where the elector was improperly vouched for by someone who was not on the list of electors. It has been held that vouching done by an unqualified person is the same as if there was no vouching at all (see: *Nielsen v. Simmons, supra,* at para. 37, as referred to in *O'Brien v. Hamel*, *supra*, at para. 27).

[135] These cases suggest that proper vouching is mandatory. The *Canada Elections Act,* s. 161, provides considerable direction as to the limits on proper vouching. Given the purpose of the legislation and the individual circumstances that can arise, careful scrutiny is required.

Poll 16

[136] In Poll 16, on the page set aside for the purpose, 6 voters are shown as requiring an oath. It should be said that each one is associated with a "sequence number". The number confirms that the individual named is on the official list of electors. Therefore, the vouching is with respect to being identified for the purpose of voting and not for the preparation of a registration certificate. Counsel for the applicant submitted this was confirmed by the words "No address ID" or "No address" next to 5 of the 6 names. In the absence of identification, which provides the address, the elector must be vouched for to obtain a ballot. No individuals were identified, on page 23 of the poll book, as having vouched for any of the 6 voters.

[137] Counsel for the respondent pointed out that there are circumstances when an oath may be taken only for the purpose of establishing the address of the elector. For that oath, no person is required to vouch. As counsel for the applicant sees it, the difficulty is that this oath does not arise where there is "no ID", but only where the address provided was not accepted by the polling officials or a scrutineer.

[138] In the circumstances, it is not possible to so carefully parse the words "no address ID" to ascertain with certainty the circumstances in which the oath was required. On its face, the poll book would accurately reflect either a circumstance where the oath was with respect to the address of the elector, or where the oaths were taken from people vouching for the electors but the names of those vouching were not recorded. The applicant has not met the onus of demonstrating that these 6 entries are irregularities because the poll book is consistent with regularity – namely, that these 6 were address oaths that did not require vouching.

[139] This does not deal with the 1 of the 6 names where no reference is made to "no address ID". There is no suggestion what oath was taken. There are several oaths that do not require vouching. While the purpose of the oath should be recorded, for me to find that vouching was required and did not occur, I would have to presume that the oath was to be taken in order that the elector could be identified and admitted to vote. I would have to assume that the polling officials did not require an oath from a person vouching for the elector, when the official should have required such an oath. In other words, I would have to presume irregularity, rather than regularity. In the absence of evidence, I refuse to draw such a conclusion.

[140] I am not prepared to discount any of these 6 votes.

Poll 21

[141] There is a similar problem at Poll 21. In the poll book, there are 14 individuals shown as requiring an oath. All 14 are associated with "sequence numbers", confirming they were on the official list of electors.

[142] In this case, there are 4 with comments similar to those at Poll 16 ("on list, no ID for address", "on list no address ID" or "on list, no address"). As with Poll 16, there are 2 where no comment is made. For the same reasons as Poll 16, I will not discount these 6 votes.

[143] The remaining 8 names have comments that reflect more than an issue with the address. They also refer to "no photo" or "photo but no address". The references to "no photo" and "photo" demonstrate a broader concern. The requirement for a photograph refers to the first of the three means by which an elector can identify himself for the purpose of obtaining a ballot (one piece of approved identification containing a photograph). In the absence of a photograph or compliance with the second of the means of identification (two pieces of approved identification, one of which provides the address), in order to be given a ballot, the elector would require a voucher. These comments reflect a person seeking to identify himself or herself in order to be admitted to vote, for which they would require vouching. The page where people vouching are to be listed is blank (p. 23). On the face of the poll book, there was no vouching. These 8 votes should be set aside.

Poll 400

[144] At Poll 400, the page where those vouching are to be listed refers to 16 vouchers. Who they are is unclear. For the most part, their names are not mentioned. Counsel for the applicant, granting a considerable amount of latitude to what was written, conceded that a generous interpretation would allow for a pairing of 10 of the people vouching (p. 23) to 10 of the people being vouched for (p. 22). This leaves 6 of those vouching unaccounted for. As I read this page, and it is not easy to do, 5 of the 6 reflect oaths that do not require a person to vouch for the elector (e.g. "assisted as a relative" (see: p. 14 of the poll book), "Error on List" (see: p. 13 of the poll book)). The space for the remaining person vouching is blank, other than the relationship of the person vouching to the person being vouched for. Given the 10 vouching pairs and the number of oaths not requiring a voucher, I would allow the 16 votes to stand.

Poll 30

[145] At Poll 30, there are 11 people listed as requiring an oath (p. 22). Each of these has a "sequence number" confirming that they are on the official list of electors. There are 10 people listed as vouching for others. The 1 remaining oath is said to be an "address oath" and would not require someone to vouch. Of the 10, where vouchers are identified, 4 are questioned by counsel for the applicant. The *Canada Elections Act,* s. 161(6), states that, "[n]o elector shall vouch for more than one elector at election". There are two vouchers at this poll who each vouched for two electors. On this basis, counsel for the applicant says that 2 of the 4 should be discounted. Vouching is an important undertaking. It is the means of identification of an elector, allowing him or her to vote. If an elector is not properly identified, it cannot be said that they should have received a ballot. On the basis of the evidence I have reviewed, I would discount 2 of the 4 votes. This is not the only concern expressed by counsel for the applicant in respect of these 4 votes. I shall return to them later.

Poll 174

[146] At Poll 174, the poll book records the names of 8 people who apparently vouched for someone (p. 23). The last page of the poll book records that 8 people were vouched for. Next to each name is an indication of the familial relationship of the person listed to the person vouched for (e.g. "spouse", "son", "mother"). The problem is that there is no way of knowing who was being vouched for. The page where these names were to be written is blank (p. 22). Counsel for the applicant pointed to the *Canada Elections Act*, s. 162(f), which requires the poll clerk to "indicate, if applicable, on the prescribed form [the poll book] that the elector has taken an oath and the type of oath". Counsel for the respondent says there is a safeguard. For each of the eight people listed, there is at least one person on the official list of electors that would appear to fit the familial relationship recorded with the name. In this situation, it is not a question of whether someone was vouched for but whether the vouching was proper and in compliance with the *Canada Elections Act*. Counsel for the respondent says that in the absence of anything further the applicant has failed to meet the onus to demonstrate that the vouching was improper. The only thing that is known, with certainty, is that the names were not recorded as the *Canada Elections Act* requires. The presence of this error does not lead to the presumption that any vouching that was done was proper but, rather, that it was not. In furtherance of this, counsel for the applicant

submitted that it cannot have been intended that the parties were to undertake what he referred to as a "forensic analysis" to determine which of the people on the official list of electors could be those vouched for by the people listed. I agree. These 8 votes should be set aside.

Polls 30 and 502, and the 'residency requirement'

[147] There is only one issue that remains. The *Canada Elections Act,* s. 161(1)(b), requires that a person vouching for another must be "an elector whose name appears on the list of electors for the same polling division" as the person being vouched for. This is underscored, in the same subsection, at (b)(ii), where it is said that the prescribed form of the oath taken by the person vouching "must include a statement of as to the residence of both electors".

[148] I return now to a consideration of the 2 people, in Poll 30, who, contrary to the *Canada Elections Act*, s. 161(6), each vouched for 2 electors. The further difficulty is that both of the people vouching did not reside in Poll 30.

[149] In Poll 502, there were 7 people who vouched for others. Poll 502 was located in a senior citizens home. The only people on the official list of electors were residents of the home. None of the 7 people who vouched were resident in the home and, accordingly, none of them lived in the polling division. The requirements of the *Canada Elections Act* were not complied with in either poll. A senior citizens home has been recognized as a special circumstance. The process allows for a letter or list of attestation to establish the address of those who live in a senior citizens home. No similar accommodation has been made with respect to vouching.

[150] On a first glance, this does not appear remarkably different from circumstances where an elector is required to vote in the polling division in which he or she ordinarily resides. In that situation, I have found that the *Canada Elections Act* is directory and allows that votes cast in a polling division other than the one in which the elector resides may still stand so long as the two polling stations are in the same and proper electoral district. On reflection, however, this situation is different. In the case of the elector voting, we know where he or she resides and can, therefore, be assured it is in the proper electoral district. In the case of those vouching, we may not know from other sources (e.g. the official list of electors, a registration certificate, etc.) where they reside if they do not reside in the polling division, and there is no constraint if we do not compel compliance with the words of the legislation. This is borne out by the fact that of the 7 people who vouched in Poll 502, there are 4 who did not provide addresses. It is not clear why some of the residents of a senior citizens home could not vouch for other residents.

[151] Vouching is an important part of identifying electors. Those who vouch for another in the course of the preparation of a registration certificate are, by their confirmation, an essential part of the demonstration that the elector is qualified to vote. Those who vouch for another in order that they may obtain a ballot, by their confirmation, are an essential part of the identification of the elector as the person entitled to receive a ballot. As such, it is essential that the *Canada Election Act* requirements – including the residence requirement – be strictly complied with.

[152] The 11 votes should be set aside. This includes all 4 of the votes associated with the 2 people who vouched in Poll 30.

CONCLUSION

[153] Based on this analysis the following votes are set aside.

On account of failure of registration:

At Poll 426.....26

At Poll 31.....15

At Poll 174.....1

At Poll 89.....10

On account of failure of vouching:

At Poll 21.....8

At Poll 30.....4

At Poll 174.....8

At Poll 502.....7

[154] This exceeds the plurality of 26. I declare the election null and void as contemplated under s. 531(2) of the *Canada Elections Act.*

[155] As for what was referred to earlier as the conundrum, it should be evident that in deciding these applications, the court walks a thin line in search of a delicate balance.

[156] On the one hand, people who are qualified to do so should be allowed to vote and to have their votes count. True clerical errors, such as recording the number of ballots cast in the place reserved for the number who were vouched for, do not matter. Some oversights, such as a failure to check off the means by which a voter identified himself or herself, can be accepted, when considered in context of the overall requirements to register. There are irregularities, such as voting in the wrong polling division which, in the absence of any suggestion of double voting, should not impact the result. These should not cause a qualified voter to be disenfranchised.

[157] On the other hand, there are requirements of the process which are fundamental. We need to be assured that those who vote are qualified to do so. We need to be confident that those who receive a ballot have been identified as persons who are on the official list of electors or who have registered. If we give up these foundations of our electoral system, we are risking a loss of confidence in our elections and in our government.

[158] If this case can be summarized, in a single observation, it would be that it cannot be good enough to accept that individuals who voted were qualified to do so by registration, in the absence of the registration certificates, in the absence of the poll books recording anyone who

registered by vouching and in the absence of the names from the final list of electors. Our system requires more.

[159] The fact of this application demonstrates that our electoral process has the necessary checks and that they can work even where the plurality is as small as 26 votes and the number of impugned ballots is 79. There are places in the world that would wonder that such a result was possible. This is not to say we should be content. This is just one of so many areas where our society is changing more quickly than the ability of our systems to keep up. I repeat an observation made at the outset. This election was conducted by responsible public officials and well-intentioned individuals, who were motivated by nothing less than a desire to do the job properly. What this case represents is an opportunity to learn and for the process to evolve in order to guard against the particular problems that appeared in this case.

COSTS

[160] No submissions were made as to costs. In the event the parties are unable to agree, I may be spoken to. While, in the absence of submissions from the parties, I cannot know the considerations they would each bring to bear on this issue, I would ask them each to consider a submission made during the hearing of the application. They all agreed that this was a public interest issue. This is not a circumstance where any individual is at fault. It could be that this is a situation where each of the parties should pay their own costs.

[161] If the parties are able to agree, I would ask that the Court be informed in order that the file can be closed.

LEDERER J.

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COURT FILE NO.: CV-11-429669
DATE: 20120518

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BORIS WRZESNEWSKYJ

Applicant

– and –

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), ALLAN SPERLING (RETURNING OFFICER, ETOBICOKE CENTRE), TED OPITZ, ANA MARIA RIVERO, SARAH THOMPSON and KATRINA ZORICIC

Respondents

JUDGMENT

LEDERER J.

Released: 20120518