

# Devine v. Scarborough (City), [1995] O.J. No. 511

Ontario Judgments

Ontario Court of Justice (Provincial Division)

Toronto, Ontario

MacDonnell Prov. J.

February 24, 1995.

[1995] O.J. No. 511 | 27 M.P.L.R. (2d) 18 | 53 A.C.W.S. (3d) 997

IN THE MATTER OF Sections 47, 91, 93 and 105 of the Municipal Elections Act, R.S.O. 1990, c. M.53 as amended Between Carol Devine, applicant, and The Clerk of the City of Scarborough, the Recount Officer of the City of Scarborough, Tony Festino, Dave Hogg, and the Metropolitan Separate School Board, respondents And between Selwyn Hicks, applicant, and the Clerk of the City of Scarborough, the Recount Officer of the City of Scarborough, the Board of Education of the City of Scarborough, Tony Black, Pat Collie, Lynn King and Elizabeth Moyer, respondents

(28 pp.)

## Case Summary

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**Elections — Recounts — Ballots, counting of — Tabulators, whether in proper working condition.**

This was an application for an order that a recount be conducted following a municipal election in which central vote tabulators were used. The applicants argued that the tabulators may have failed to reject ballots which ought to have been rejected and may have failed to count all valid votes contained in the ballots read. There was uncertainty as to whether tabulators read markings other than the ones made by felt pens which were supplied and supposed to be used. Furthermore, the tabulators did not scan ballots for marks anywhere except in the target areas.

HELD: A recount was ordered since there were reasonable grounds to believe that the validity of the election was in doubt as a result of the use of the central vote tabulators to count the votes.

The fact that the vote was close was considered. The uncertainty as to whether votes marked with pens other than those provided were counted was a serious concern.

## Statutes, Regulations and Rules Cited:

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Municipal Elections Act, R.S.O. 1990, c. 53, ss. 46, 47(1), 48, 87, 91(1)(b), 93(1), 93(6), 105.  
Ont. Reg. 663/94, ss. 4(1), 4(2), 12, 15.

## Counsel

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James M. Ayres and John E. Callaghan, for Carol Devine. Jack B. Siegel, for Selwyn Hicks. Karl D. Jaffary, Q.C., and David Tang, for the Clerk and Recount Officer of the City of Scarborough.

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## A. NATURE OF THE RULING

### **MACDONNELL PROV. J.**

1 This is a ruling pursuant to s. 93(6) of the Municipal Elections Act, R.S.O. 1990, c. M.53 ("the Act") with respect to applications under ss. 47(1) of the Act for an order that a recount be conducted.

2 There are two applications before the Court. Each arises out of the municipal election held in the City of Scarborough on November 14, 1994.

3 The applicant Carol Devine was a candidate for the office of Separate School Trustee for Ward 15. There were, in addition to Ms. Devine, two other candidates for that office, namely Dave Hogg and Tony Festino. After the votes were counted; the City Clerk declared that Mr. Hogg had 2,412 votes, that Ms. Devine had 2,392, and that Mr. Festino had 585. By virtue of Mr. Hogg's 20 vote plurality, the City Clerk declared him to have been elected.

4 The applicant Selwyn Kicks was a candidate for the office of Public School Trustee for Ward 2. Mr. Hicks was one of five candidates for that position, the others being Tony Black, Pat Collie, Lynn King, and Elizabeth Moyer. After the votes were counted, the City Clerk declared that Ms. Moyer had received 1,188 votes and the applicant Hicks 1,165. The vote totals for Black, Collie and King, were 417,615, and 433 respectively. On the basis of Ms. Moyer's 23 vote margin over the applicant Hicks, the City Clerk declared her to have been elected.

5 In accordance with the provisions of s. 93(5) of the Act, Ms. Devine and Mr. Kicks caused notice of these applications to be served on the other candidates for the offices in issue. None of those candidates appeared at any stage of the proceedings. The recount officer for the City of Scarborough, Mr. Drew Westwater, did appear. In addition to being the recount officer, Mr. Westwater is also the Returning Officer for Scarborough and the City Clerk.

6 The issues raised by the applicants concern the use of central vote tabulators in the 1994 election. As many of the issues are common to the two applications, the applications were heard together.

## B. BACKGROUND

7 Pursuant to s. 46(1) of the Act, the council of a municipality may pass a by-law authorizing the use of optical scanning vote tabulators in a municipal election. On November 30, 1987, the council of the City of Scarborough passed such a by-law (By-law number 22056). It was, by its terms, applicable to the 1988 municipal election "and all elections thereafter". Under s. 46(3) of the Act, where a municipal council has passed a bylaw under s. 46(1), the Minister of Municipal Affairs may by regulation provide for matters "necessary to conduct the election by the use of the equipment". The procedures established by such a regulation may be different from the procedures established under the Act in respect of an 'ordinary' election: s. 46(4). On October 27, 1994, pursuant to s. 46(3), the Minister made and filed Ontario Regulation 663/94. In that Regulation, a "vote tabulator" is defined as "an apparatus that optically scans a specified area on the ballots to read the votes and tabulate the results".

8 The ballot used in Scarborough in the 1994 election was a "composite" ballot. That is, it contained lists of candidates for all the offices for which an elector was entitled to vote. It was printed on a card approximately 13 inches long and 9 inches wide. Subsections 4(1) and (2) of Regulation 663/94 provide:

## Devine v. Scarborough (City), [1995] O.J. No. 511

4. (1) There shall appear on the ballot to the right of each candidate's name a space suitable for the marking of the ballot.

(2) Arrows may appear on the ballot, one pointing to each candidate's name, with the head and tail of the arrow on opposite sides of the space for the marking of the ballot.

**9** The Scarborough ballot was designed in the manner contemplated by s. 4 of the Regulation. In essence, the voter was to mark the ballot by filling in the space between the head and the tail of the arrow. The area to be marked was quite small, measuring one-quarter (1/4) inch in width and one-sixteenth (1/16) inch in height.

**10** Section 14 of Regulation 663/94 lays down the procedure to be followed at the poll when an elector arrives to vote. The deputy returning officer is required to provide each elector with a ballot and a secrecy folder. The folder is designed so that when a ballot is inside, only the top portion of the ballot, where the deputy returning officer is required to place his or her initials, is exposed to view. The lists of candidates and the areas designated for voters to mark the ballot cannot be seen when the ballot is inside the folder. Upon receipt of the ballot and folder, the elector proceeds to the voting compartment, marks the ballot, inserts it into the secrecy folder, and returns it to the deputy returning officer. The deputy returning officer verifies that his or her initials are on the exposed portion of the ballot, and then inserts the ballot into the ballot box in a manner that preserves the secrecy of the ballot.

**11** The procedure to be followed at the close of the poll is set out in s. 15 of the Regulation. This procedure differs in significant respects from that which is applicable to an election in which central vote tabulators are not used. Ordinarily, upon the closing of a poll the deputy returning officer opens the ballot box in the presence of the scrutineers and counts the votes. In an election conducted with a central vote tabulator, however, the deputy returning officer does not open the ballot box but rather seals it up and transports it to the central counting centre, which in this case was located at the Scarborough City Hall.

**12** The vote tabulator used by the City of Scarborough, the Optech III-P system, is an optical scanner. It "reads" ballots by scanning the "target areas", i.e., the spaces between the head and tail of the arrow to the right of each candidate's name. It does not read parts of the ballot outside of the target areas.

**13** Regulation 663/94 does not specify which tabulators may or may not be used. That is left up to each municipality. However, the Regulation does require that whatever system is used be tested once within seven days of the date of the election and a second time on polling day, using on each occasion a pre-audited test deck of ballots. If the tabulators do not read the ballots accurately on either test, they are adjusted until they do. The tabulators used in the 1994 election in Scarborough were tested in the manner required by the Regulation. On the first test, some inaccuracies were observed, and the machines were adjusted. On the second test, conducted on election day, no further adjustments were required as the machines were found to be working properly.

**14** When the ballot boxes arrive at the counting centre, the ballots are removed by teams of election officials. The officials "fan through" the ballots to ensure that they are all oriented in the same direction. Then, stacks of ballots are placed into loading trays and are automatically fed into the tabulators.

**15** Regulation 663/94 requires that the City Clerk make accommodation available at the counting centre for each candidate or scrutineer who wishes to view the counting process. However, the accommodation need not be in the same room as the tabulating machines so long as the activity in the room can be observed either directly or by television from the room where the accommodation is provided. In Scarborough, in the 1994 election, the only persons permitted in the room where the tabulators were located were election officials. Any candidates and scrutineers in attendance watched the proceedings from another room by closed-circuit television.

**16** Mr. Westwater testified that the tabulators are programmed so that they will "outstack" into a separate bin any ballots which they do not recognize. This might occur if, for example, the ballot were damaged. Section 12(2) of the Regulation provides that a ballot which is damaged or defective, or which has been 50 marked that it cannot be

processed by the vote tabulator may be replaced by an election official with an undamaged ballot. The replacement ballot is to be marked "with the marks contained in the specified voting spaces on the original used ballot".

**17** Mr. Westwater testified that electors do not necessarily cast votes for every office listed on the ballot. A failure to cast a vote for a particular office is recorded as an "undervote". On occasion, as well, electors improperly vote for more than one candidate for an office (an "overvote"). Overvotes are recorded but they are not counted in the results. Mr. Westwater testified that it is possible to programme the vote tabulators in such a way that they will outstack not only damaged ballots but also all ballots containing undervotes and/or overvotes.

**18** The Optech III-C tabulator is manufactured by an American company based in Cincinnati, Ohio. There are approximately 13,000 units in use in the United States and Canada, although the particular model used in Scarborough is used in only two other Ontario municipalities, namely Etobicoke and St. Catherines. The Optech III-C is designed to read ballots marked with a black felt pen. Accordingly, in his capacity as Clerk and Returning Officer for the City of Scarborough, Mr. Westwater took steps to ensure that the voting compartments in each polling place were adequately supplied with the necessary black felt pens. Further, prior to the election, Mr. Westwater set in motion an extensive public education programme aimed at, among other things, impressing upon the electorate the need to mark the ballot with the pen provided at the polling place. Pamphlets containing that admonition were prepared in ten languages. The signage at the polling places clearly directed the electors to use the pen provided, and the instructions on the ballot itself directed the voter to mark the ballot "with the pen provided".

**19** It appears, however, that nothing in the advertising material, the signage, or the ballot suggested that there were any consequences attaching to a failure to use the pen provided. There was nothing to suggest, for example, that the elector's vote might not count if that pen were not used. Yet, at least in some circumstances, that was a very real possibility. The evidence is clear that the Optech III-C will not read red ink, and that it may not read marks in any colour if made by pens other than those provided by the City. At its highest, Mr. Westwater's evidence was that it is uncertain whether the Optech III-C tabulator will read marks made by voters in the target areas of a ballot if the voters have not used the pens provided. The depth of that uncertainty is demonstrated, in my view, by the extensive efforts made by the City to persuade voters not to use pens other than the ones provided in the voting compartments.

**20** The prospect that the tabulators might be unable to read marks other than those made by a black felt tip pen would be less of a concern if marks made in the target areas of a ballot with other writing instruments were invalid votes, or if electors could be relied upon to follow the direction to use the designated pen. However, it is common ground on these applications that there is nothing in either the Act nor the Regulation which requires a voter to use a particular kind of instrument or colour of ink in marking a ballot. Nor does the direction of the Returning Officer to use the pen provided have the force of law. In other words, a vote made with a voter's own pen, whatever colour ink it contains, is a valid vote. Further, the conclusion I draw from the evidence of Mr. Westwater and of Mr. Tom Derrick (the City Clerk in St. Catherines, Ontario), both of whom have had considerable experience as senior officials in municipal elections in various municipalities in Ontario, is that voters cannot be counted upon to consistently follow instructions as to how ballots should be marked, and Mr. Westwater testified that in his experience voters occasionally use their own pens to mark ballots.

**21** On behalf of the applicant Devine, Mr. Callaghan submitted that in addition to the tabulation problems which may be encountered if the proper pen is not used to mark the ballot, there may be other situations in which a validly marked vote would not be counted by the vote tabulator. He suggested that if the voter were to mark a ballot in the designated space with a circle, for example, the scanner might read the upper half and bottom half of the circle as two separate marks and record it improperly as an overvote. With respect, I regard that possibility -- and others that were suggested -- to be both remote and speculative, particularly having regard to the dimensions of the target area of the ballot used in Scarborough in 1994. As indicated earlier, the space within which the ballot was to be marked is quite small, measuring 1/4 inch by 1/16 of an inch. As Mr. Westwater sensibly observed, the possibility of a mark like a circle being made in such a small space has to be looked at in that context, and in light of the fact that the pen provided to the voter is a felt tip pen, not designed for the kind of fine marking which may give rise to the difficulty

## Devine v. Scarborough (City), [1995] O.J. No. 511

suggested. Of course, as discussed above, the voter may not use the pen provided. But in that event, it seems to me, the problem is not whether the tabulator is registering an overvote but rather whether it is reading any vote at all.

**22** Both applicants have asserted that they are aware that in other Ontario municipalities, problems have been encountered in elections in which vote tabulators have been used. Some material has been presented to support the position that tabulators in other municipalities have not always functioned in an accurate and reliable manner. In only one of those municipalities -- St. Catherines -- was the model of tabulator used in Scarborough involved. I do not regard the experience in other elections, in other places, using other equipment to be of much assistance in determining whether there may have been a problem in tabulating the votes in Scarborough on November 14. Nor do I regard the evidence of what occurred in St. Catherines, which has the same kind of tabulator as Scarborough, to be helpful. While I do not disregard the evidence of the experience in other municipalities using vote tabulators, I place little weight on it.

### C. THE POSITION OF THE PARTIES

#### (a) The Position of The Applicants

**23** The submissions of Mr. Callaghan, on behalf of Ms. Devine, and Mr. Siegal, on behalf of Mr. Hicks, as to whether there are reasonable grounds for believing that the validity of the 1994 municipal election in Scarborough is in doubt because of problems related to the use of central vote tabulators raise two broad concerns. The first is that the tabulators may have failed to reject ballots which ought to have been rejected; the second is that the tabulators may have failed to count all the valid votes contained in the ballots read.

**24** In addition, Mr. Callaghan raised a third issue, namely whether the recount officer properly interpreted the provisions of s. 91(1)(b) of the Act in denying Ms. Devine a "close vote" recount.

#### (i) the failure to reject invalid ballots

**25** The primary focus of the applicants in this respect is on s. 77(2)(d) of the Act, which requires a deputy returning officer to reject any ballot "upon which there is any writing or other mark by which the elector might be identified, or that has been so torn, defaced, or otherwise dealt with by the elector that he or she may thereby be identified.". Both Mr. Callaghan and Mr. Siegal submitted that as the tabulators are not programmed to read any area of the ballot other than the areas within which the voter is to make a mark, the tabulators are not able to pick up ballots upon which there are identifying marks. They submitted that such ballots are invalid; and that the failure of the tabulation system employed in Scarborough to provide a method of locating and rejecting those ballots gives rise to a reasonable concern that invalid votes may have been included in the tabulation of the election results.

#### (ii) the failure to count valid ballots

**26** The applicants further submitted that the uncertainty as to whether the tabulators counted ballots marked in a pen other than the pen provided in the voting compartment casts doubt upon the validity on the results of the election as determined by the tabulators. They also argued that a mark made by an elector in a location other than the small 'target' area beside a candidate's name, but in a location where the elector's intention to vote for a particular candidate was clear, was a valid vote for that candidate. As the tabulators do not scan any area apart from the target areas, they submitted, valid votes may have gone uncounted.

#### (iii) the application of the 'close vote' provision: s. 91(1)(b)

**27** Under s. 91(1) of the Act, a losing candidate is entitled as of right to a recount if the margin of victory is less than a particular number of votes derived by means of the formula laid down in s. 91(1)(b). Mr. Callaghan submitted

that the recount officer misconstrued the application of the formula, and that on a correct application of it his client was entitled to a recount. He submitted that s. 93(1) entitled him to apply to this court for an order directing a 'close vote' recount.

(b) The Position of The Respondents

**28** As I indicated earlier in these reasons, none of the other candidates for Separate School Trustee in Ward 15 or Public School Trustee in Ward 2, although duly served with notice, appeared on these applications. The recount officer, Mr. Westwater, who is also the City Clerk and the Returning Officer, did appear, represented by Mr. Jaffary.

**29** In relation to the submission of the applicants that the tabulators did not permit ballots upon which there appeared identifying marks to be segregated and rejected, Mr. Jaffary submitted that in an election in which the votes are counted by a central vote tabulator, there is no requirement that such ballots be rejected. With respect to whether the tabulators were capable of counting votes made otherwise than with the pens provided at the polling places, Mr. Jaffary pointed out that there was no evidence to raise that concern from the level of speculation.

**30** I did not call upon Mr. Jaffary to respond to Mr. Callaghan's submission that the recount officer had misapplied the formula set out in s. 91(1)(b) of the Act. In my respectful view, that submission is without merit

#### D. DISCUSSION

**31** Section 47(1) of the Act, under the authority of which these applications are brought, states as follows:

"If, in any election, an elector has reasonable grounds for believing that the validity of the election is in doubt because of problems related to the use of equipment described in an order under subsection 46(3), the elector may make an application to a judge of the Ontario Court (Provincial Division) for a determination as to whether a recount should be held."

**32** Section 47(3) provides that subsections 93(2) to (8) apply with necessary modifications to an application under s. 47(1). Section 93(6) provides, in part:

(6) The judge, if satisfied that there are sufficient grounds for a recount, shall order that a recount be held ...

(i) The Failure To Reject Invalid Ballots

**33** At the heart of the applicants' submission that votes contained on invalid ballots may have been counted by the vote tabulators is the proposition that the provisions of s. 77(2) of the Act, and in particular s. 77(2)(d), apply to an election conducted with central vote tabulators. For the reasons set out below, I reject that proposition.

**34** Sections 48 to 87 of the Act deal with the procedures applicable to the conduct of a traditional municipal election, that is, an election conducted with ballots which, at the close of the poll, are counted by hand in the polling place in the presence of scrutineers. Those provisions are concerned with, inter alia, the form of the ballot (ss. 48 to 50), directions for marking the ballot (s. 65(a)), the taking of votes (ss. 60 - 73), the examination of ballots to determine which should be rejected (s. 77), and the counting of the votes (ss. 76 to 82).

**35** Where, a municipality has passed a by-law authorizing the use of central vote tabulators, s. 46(3) and (4) of the Act provide that the Minister may by regulation establish different protocols and procedures in relation to the matters set out above, and that where the Minister does so, the procedures established under the regulation prevail. As was mentioned earlier, the council of the City of Scarborough did pass a by-law authorizing the use of vote tabulators, and Regulation 663/94, made and filed on October 27, 1994, was applicable to the 1994 election. Some of the procedures established by the Regulation are different from the procedures applicable to traditional elections. In particular, as was described earlier, the procedure to be followed upon the closing of the poll is quite

different in the two situations. In a traditional election, the deputy returning officer is required by s. 77 of the Act to open the ballot box in the presence of the scrutineers and to count the votes. In the course of this exercise, the deputy returning officer must examine each ballot to ensure that the requirements of s. 77(2) have been complied with, and the scrutineers must also be given a "full opportunity" to examine the ballots. It is in this context that the deputy returning officer is required, under s. 77(2)(d), to reject any ballots which have been marked or dealt with in such a way that the elector may be identified.

**36** The procedure to be followed upon the close of a poll in an election using a central vote tabulator is quite different. Rather than opening the ballot box upon the close of the poll, the deputy returning officer is required to seal it and transport it to the counting centre. There is no provision for anyone, and in particular scrutineers, to examine the ballots under this procedure. Clearly, this procedure and that contemplated by s. 77 of the Act are inconsistent with each other. In accordance with s. 46(4) of the Act, the procedure established by s. 15 of the Regulation is paramount.

**37** Section 2(2) of the Regulation provides that where the Regulation does not provide for any matter, an election covered by the Regulation "shall be conducted as far as practicable in accordance with the Act". In my opinion, that provision could not justify reading the requirements of s. 77(2)(d) into an election conducted with a central vote tabulator. For one thing, as will be seen below, it is not practicable to do so. But apart from that, the policy underlying s. 77(2)(d) has no application to an election in which machines or devices read the ballots. The requirement that ballots which might identify the voter be rejected is founded on a concern to protect, inter alia, the integrity of the electoral process and the secrecy of the ballot box. For example, if ballots marked in a manner which could identify the elector were not rejected, those who would bribe voters would be afforded a means of determining whether the voter had kept his or her end of an illicit and corrupt bargain. Where, however, central vote tabulators are used to count the ballots, those concerns are significantly attenuated. No one reads the ballots except the tabulators, and tabulators are blind to the identity of the elector no matter what is written or marked on the ballot. The concern of s. 77(2)(d) is that the elector not be able, by marking his or her ballot in some way, to communicate how he or she voted. When a tabulator is used, communication is impossible. There is no one to receive the information sought to be imparted. It appears to me that it was for this reason that the Regulation, in laying down a procedure to be followed at the close of the poll, did not include and did not contemplate any procedure by which ballots might be rejected because they contained identifying marks.

**38** Further, it is not practicable to read s. 77(2)(d) into the procedures to be followed in an election conducted with a central vote tabulator. If the applicants' submission in this respect were correct, the entire process contemplated by s. 46 of the Act would be rendered nugatory. The purpose of the Legislature in enacting s. 46 was to simplify and improve the process of tabulating the votes in municipal elections. Using a central vote tabulator makes it unnecessary for each ballot to be examined and counted by several sets of hands and eyes. The applicants' submission that ballots which come within the description in s. 77(2)(d) must still be rejected in a vote tabulator system would trap the tabulation process in the very position from which s. 46 of the Act was intended to rescue it, namely a position in which every ballot must be examined manually. By definition, a vote tabulator is designed to scan only specified areas of ballots "to read the votes and tabulate the results": s. 1 of Regulation 663/94. It is not designed to scan the entire ballot for all writings or marks which may enable the voter to be identified. And even if a vote tabulator could do that, s. 77(2)(d) would still require a manual examination of every ballot because it is not only writings or marks which will cause a ballot to be rejected under s. 77(2)(d): any manner of dealing with the ballot -- by, e.g. tearing it or defacing it -- which might be considered a source of identification will bring the ballot within the class of ballots which s. 77(2)(d) requires be rejected. Vote tabulators simply could not identify all the ballots which might fall within s. 77(2)(d). To interpret the Act and the Regulation as contemplating the rejection of ballots on the basis that they contain some mark, writing or other characteristic which could identify the voter would, in my opinion, completely frustrate the intention of the Legislature in authorizing central vote tabulators. That could not reasonably have been the Legislature's intention.

**39** I recognize that in *Re Martini and City of Toronto et al.* (1989), 68 O.R. (2d) 73 (Ont. Div. Ct.), (affirmed (1989), 70 O.R. (2d) 637 (C.A.)), Reid J., in commenting on the vote tabulators used in the 1988 municipal election in the

City of Toronto, stated, at p. 83:

But beyond that is the even more disturbing fact that the machines were programmed in such a way that invalid votes could be read as valid, but valid votes unread and unrecorded. Thus, a ballot bearing a mark or writing by which the voter could be identified is invalid under s. 71(1)(d) [now s. 77(1)(d)] of the Act. Yet, if any part of the mark or writing fell into the small space viewed by the machine's scanning eye it would, or could, be recorded as a valid vote. (emphasis added)

**40** The emphasized words must, of course, be read in context. In my opinion, Reid J. was not intending in that sentence to pronounce upon the question of whether s. 77(2)(d) applied to the determination of the validity of ballots under a vote tabulator system. I can find nothing in the remainder of Reid J.'s reasons to indicate that he intended to address himself to that issue. Accordingly, I do not regard Reid J. as having decided the point under discussion.

**41** Counsel for the applicants suggested other scenarios under which an invalid ballot might be improperly read as a valid ballot. For instance, taking the example suggested by Reid J., *supra*, it was suggested that if an elector wrote an insult across the face of the ballot, with part of the writing falling within the area designated for the marking of the vote, the machine might mistakenly read the mark as a vote. That, of course, is possible, but virtually anything is possible. More than a mere possibility that something might happen to "fool" the tabulator must be presented, in my opinion, to constitute reasonable grounds for believing that the validity of the election is in doubt. I do not read what was said by Reid J. to be to the contrary of that. If it were otherwise, it is difficult to see how a central vote tabulator system could ever withstand an application for a manual recount.

**42** In my opinion, no reasonable grounds have been shown for a belief that the validity of any of the results in the 1994 Scarborough municipal election is in doubt because of any problem with respect to the counting of invalid ballots. I would not, therefore, order a recount on this ground. It is therefore necessary to consider the applicants's submissions that the Optech III-C system may have failed to count valid votes.

(ii) The Failure to Ensure That All Valid Votes Were Counted

**43** The applicants suggested several scenarios under which the vote tabulators used in Scarborough might have failed to count all valid votes. It was suggested, for example, that if an elector were to have marked the ballot in the designated space with a circle, the tabulator's scanner might have incorrectly read the mark as an overvote. It was suggested that if an elector marked the ballot outside of the area scanned by the tabulator, the vote might well be valid, but it would not be counted by the tabulator. Finally, it was suggested that the use of pens other than those provided in the voting compartment could result in valid votes not being included in the election results.

**44** The suggestion that the tabulator might incorrectly read a circle as an overvote was discussed earlier in these reasons. As I indicated then, I regard this suggestion as speculative and remote, particularly having regard to the size of the target area within which a voter is directed to mark the ballot. To constitute reasonable grounds to doubt the validity of the election, in my view, requires more than the kind of speculation represented by this suggestion.

**45** It is common ground that the tabulators do not scan ballots for marks anywhere except in the target areas. Accordingly, the submission that a mark made elsewhere on the ballot than the target area may constitute a valid vote requires careful consideration. The applicants argued that notwithstanding provisions such as s. 65(a) of the Act, which sets out the manner in which ballots in traditional elections are to be marked, the paramount consideration in determining the validity of a ballot marked elsewhere than where directed is the intention of the voter. If that can be discerned, the applicants submitted, provisions such as s. 65(a) are to be considered as directory only.

**46** In making this submission, the applicants relied in particular upon the decision of the Ontario Divisional Court in *Re Dingley and McLean* (1973), 34 D.L.R. (3d) 38. The reasons for judgment in that case support the applicants



positions' but that does not end the matter. Since *Re Dingley and McLean* was decided, s. 77(3) has been enacted, which provides:

In counting the votes, the deputy returning officer shall reject any vote that is not marked within the circle or circular space to the right of the name of a candidate.

**47** In *Re Firth et al. and Nickerson et al.* (1980), 111 D.L.R. (3d) 525 (N.W.T. C.A.), the issue was whether a provision of the Canada Elections Act, R.S.C. 1970, c. 14, which was substantially identical to s. 77(3) of the Ontario statute, had overtaken the principle that the intention of the voter was paramount in considering a ballot which was not marked in accordance with provisions such as s. 65(a). *Morrow J.A.* held it had. He regarded the provision as "clear and unambiguous", and held that it constituted a new and marked departure from the earlier approach. *Morrow J.A.* distinguished *Re Dingley and McLean* on the basis that the Ontario statute did not (at the time) contain any provision specifically requiring improperly marked ballots to be rejected. In my opinion, that reasoning in *Re Firth et al. and Nickerson et al.* in relation to the provision in issue in that case applies with equal force to s. 77(3) of the Act. In a traditional election, therefore, where the deputy returning officer counts the ballots manually, a mark made elsewhere than in the designated area must be rejected.

**48** Earlier in these reasons, in discussing s. 77(2)(d) of the Act, I pointed out that the procedures contemplated by s. 77(1) and (2) could only sensibly be applied to an election in which the votes here counted manually. The reasoning which led to that view leads equally to the conclusion that s. 77(3) also is inapplicable to an election in which vote tabulators are employed. The question therefore arises whether, if s. 77(3) does not apply, the principle in *Re Dingley and McLean* is resurrected for elections in which vote tabulators count the votes. In my opinion, the answer is no. The provisions of Regulation 663/94 are inconsistent with the principle that voter intention is paramount regardless of whether the ballot has been marked in the specified area. A "vote tabulator" is defined in s. 1 of the Regulation as "an apparatus that optically scans a specified area on the ballots to read the votes and tabulate the results" [emphasis added]. Section 4 provides for the designation of a particular space for the marking of the ballot. Section 12(2) provides that damaged ballots that cannot be properly processed by the tabulator shall be remarked "with the marks contained in the specified voting spaces on the original used ballot". The latter provision clearly implies that marks contained elsewhere than in the specified voting spaces are not to be reproduced on the replacement ballot.

**49** Reading the provisions of the Regulation as a whole, the inference is inescapable that what is intended is that only those votes marked within the spaces provided to the right of the candidates' names are valid votes. That interpretation brings the Act and the Regulation into harmony in relation to the implications of a failure to mark the ballot in the designated space. Unlike the s. 77(2)(d) issue, there is no reason for different approaches to be taken to the validity of ballots marked outside of the designated areas depending upon whether the votes are being counted by hand at a polling place or by a tabulator at a counting centre. Accordingly, I conclude that a "vote" marked outside of the designated voting space on a ballot is not a valid vote. It follows that the failure of the tabulators to count such "votes" is not something which affects the validity of the election.

**50** This leaves for consideration the more substantial question of whether the tabulators may have failed to count valid votes because of a failure of voters to follow the directions to use the pen provided in the voting compartments. In this respect, it bears repeating that there is no requirement in the Regulation or in the Act that a ballot be marked with a particular kind of pen or pencil. As was discussed earlier, in an election conducted with a vote tabulator a vote recorded with a red-ink ball point pen is as valid as a vote marked with the black felt-tipped pen provided by the Returning Officer. And, as has already been pointed out, it is quite uncertain whether votes marked with pens other than those provided by the Returning Officer were counted by the tabulators in the 1994 election. In my opinion, in an election in which there were a number of close races, this is a serious concern. The fact that such an extensive campaign was mounted by the City to persuade electors to use the pens provided demonstrates the potential seriousness of the problem, and makes clear that the City was aware of it.

**51** Unfortunately, no steps were taken by the Returning Officer to put some procedure in place to ensure that votes marked with pens other than the pens provided were counted. What is particularly disturbing about this is that it

appears that steps could easily have been taken to ensure that no votes were missed due to this shortcoming of the Optech III-C tabulators. The tabulators were capable of being programmed to outstack all ballots containing either overvotes or undervotes. If that had been done, election officials could have examined the outstacked ballots and determined whether they were being read as either undervotes or overvotes only because of a failure to use the pen provided. If that were the case, the ballots could have been re-marked under s. 12(2) of the Regulation because they had been "marked in such a way that [they] cannot properly be processed by the vote tabulator", and they could have been re-fed into the tabulator. Instead, the City seems to have taken the position that voters who ignored the direction to use the pen provided rendered themselves liable to being disenfranchised. The City, of course, has no authority to impose such a penalty for failing to comply with non-binding directions.

**52** Is this a sufficient basis to order a recount? In considering that question, I take into account, among other things, the relatively small margins by which each applicant was defeated in the two races under examination. In Ms. Devine's case, Mr. Callaghan calculated the difference between her and the person declared elected to be about 1/3 of one percent of the votes cast.

**53** On this application, I am not required to determine whether the results of the election are in fact invalid. Reading s. 47(1) and s. 93(6) together, I conclude that the test is whether I am satisfied that there are reasonable grounds to believe that the validity of the election is in doubt as a result of the use of the central vote tabulators to count the votes. In the particular circumstances of this case, I conclude that there are such grounds, and accordingly I direct a recount.

#### E. DISPOSITION

**54** Where a recount is ordered pursuant to an application brought under s. 47(1) of the Act, the following provisions apply:

47. (3) An order of a judge requiring a recount to be held shall provide that the recount be conducted by equipment in accordance with an order under subsection 46(3) or manually in accordance with this Act.

(4) Despite subsection (3), the judge may require that the recount be conducted in such manner and on such terms as specified in the order, and these requirements may differ from the method of conducting a recount established in an order under subsection 46(3) or established under this Act.

**55** With respect to recounts, Regulation 663/94 provides, in part, as follows:

16. Subject to the order of a judge under section 47 of the Act, if a recount of votes is held, the votes shall be counted in the same manner as the votes were counted on polling day.

**56** For the reasons which I have stated, I have concluded that the applicants have demonstrated one basis upon which the validity of the election might be doubted, namely that the tabulators may have regarded as undervotes, and thus failed to count, votes which were marked with a pen other than the pen provided in the voting compartment. The applicants have not persuaded me that there are any other grounds related to the use of the vote tabulators upon which a recount should be ordered.

**57** To remedy the problem which the applicants have demonstrated does not require that all the ballots be recounted manually. The ballots which need to be examined are those which the tabulators read as containing undervotes. As Mr. Westwater testified, the tabulators can be programmed to outstack those ballots.

**58** In my opinion, the recount should be conducted by means of the vote tabulator in accordance with the terms of Regulation 663/94, but subject to the conditions described in what follows. The tabulator shall be programmed to outstack all of the undervotes so that they can be examined to determine whether they have been improperly read by the tabulator. The procedure for making this determination has given me some concern. My initial inclination was

## Devine v. Scarborough (City), [1995] O.J. No. 511

to direct that the examination of the outstacked undervotes occur in the same manner as the examination of ballots which the tabulator was unable to read on election night. That is, the election officials would examine the outstacked ballots, make a determination as to whether the ballot had been properly or improperly recorded as an undervote and, if necessary, mark a replacement ballot in the manner contemplated by s. 12(2) of the Regulation.

**59** However, on behalf of the City of Scarborough, Mr. Jaffary submitted that I ought to direct that the examination of the outstacked ballots occur in the presence of the candidates and/or their representatives. Upon reflection, it seems to me that that approach would be preferable to the one which I had been considering.

**60** Accordingly, I direct that the outstacked ballots be recounted in accordance with the procedure which governs recounts to which the provisions of the Act applies. As the examination of the outstacked ballots will occur in the presence of the candidates and their representatives, it follows that any outstacked ballot which is found to come within the class described in s. 77(2)(d) of the Act shall be rejected.

**61** The applications for orders under s. 105 of the Act are dismissed.

**62** The applicants are entitled to the costs of these applications and of the recount on a solicitor and client scale.

MACDONNELL PROV. J.