2007 CarswellOnt 8775
Ontario Superior Court of Justice

Di Biase v. Vaughan (City)

2007 CarswellOnt 8775, [2007] O.J. No. 5490, 43 M.P.L.R. (4th) 287

Michael Di Biase (Applicant) and Corporation of the City of Vaughan, John Leach and Linda Jackson (Respondents)

P. Howden J.

Heard: April 11, 2007
Judgment: April 11, 2007*
Docket: Newmarket CV-06-082191, DC-06-082265

Proceedings: additional reasons at *Di Biase v. Vaughan (City)* (2007), 2007 CarswellOnt 5876, 39 M.P.L.R. (4th) 112 (Ont. Div. Ct.)

Counsel: James Ayres, for Applicant
George H. Rust-D'Eye, for Corporation of the City of Vaughan, John Leach
Andrew Jeannie, for Linda Jackson

Subject: Public; Property; Civil Practice and Procedure; Torts; Municipal

Headnote

Public law --- Elections — Practice and procedure on controverted elections — In municipal elections — Irregularities — By election officials
Applicant candidate lost election for mayor to respondent by 90 votes on election night and by 94 votes on municipal recount — Vote tabulating machines ("VTMs") were used on election night and recount — VTMs had ability to return ballots that could not be read by VTM to poll worker who could give voter chance to vote on another ballot — VTMs were programmed to not count as vote and not return unreadable ballot to voter for correction — VTMs were programmed so that vote would not count if there was visible mark occupying less than ten per cent of voting space — There were 1,656 unreadable ballots at recount — Candidates' representatives were allowed to view photographic images of ballots in question, but not actual ballots — Applicant brought application for declaration that election was not valid, or in alternative, recount of disputed ballots or manual recount of all ballots — Applicant brought application for judicial review of city clerk's refusal to allow inspection of 1,656 unreadable ballots — Applications granted; recount ordered — City clerk's decision to allow VTMs to be programmed to not return under-voted and over-voted ballots and to require ten-per-cent floor threshold lacked reasoned and principled basis and conflicted with principles of Municipal Elections Act, 1996 — Programming of VTMs likely resulted in failure to count unknown proportion of 1,656 unreadable ballots — For undetermined number of these 1,656 ballots, there were no doubt votes which were valid in law under Act and its regulation — As number in question greatly exceeded plurality of winner, recount was warranted.

Public law --- Elections — Practice and procedure on controverted elections — In municipal elections — Appropriate remedy
Applicant candidate lost election for mayor to respondent by 90 votes on election night and by 94 votes on municipal recount — Vote tabulating machines ("VTMs") were used on election night and recount — VTMs had ability to return ballots that could not be read by VTM to poll worker who could give voter chance to vote on another ballot — VTMs were programmed to not count as vote and not return unreadable ballot to voter for correction — VTMs were programmed so that vote would not count if there was visible mark occupying less than ten percent of voting space — There were 1,656 unreadable ballots — Applicant brought application for declaration that election was not valid, or in alternative, recount of disputed ballots or manual recount of all ballots — Application granted; recount ordered — City clerk's decision to allow VTMs to be

programmed to not return under-voted and over-voted ballots and to require ten-per-cent floor threshold lacked reasoned and principled basis and conflicted with principles of Municipal Elections Act, 1996 — Programming of VTMs likely resulted in failure to count unknown proportion of 1,656 ballots — For undetermined number of these 1,656 ballots, there were no doubt votes which were valid in law under Act and its regulation — As number in question greatly exceeded plurality of winner, recount was warranted — Declaration of invalidity was not warranted as ballots in question were available.

Public law --- Elections — Voting and ballots — Mistakes or misconduct by deputy returning officer — Refusal to provide ballot
Applicant candidate lost election for mayor to respondent by 90 votes on election night and by 94 votes on municipal recount — Voter alleged that he and his wife were not allowed to vote despite having their voting cards with them because they did not have photo identification — Applicant brought application for declaration that election was not valid, or in alternative, recount of disputed ballots or manual recount of all ballots — Application granted on other grounds — Identification requirement was ineffectively publicized — Fact that identification was required was not on voter cards — Voter lost his temper and perhaps did not hear that all that was required was to swear to his residency and identity.

Public law --- Elections — Voting and ballots — Polling places
Applicant candidate lost election for mayor to respondent by 90 votes on election night and by 94 votes on municipal recount — Some polling stations were located at halls affiliated with Christian churches — Member of synagogue complained to applicant after election that as Orthodox Jew, he could not enter facilities of Christian churches to vote — Applicant brought application for declaration that election was not valid or for recount on basis that city failed to accommodate religious needs of synagogue — Application granted on other grounds — Evidence of individuals on whose evidence this issue was based could not be relied upon because they failed or refused to attend for questioning on their written evidence when duly summoned — There was no air of reality to this concern — No one contacted clerk's office to raise any concern regarding this issue prior to election — Polling stations were placed in community or social hall affiliated with church, not sanctuary of church — Clerk had shown sensitivity to this issue — Applicant did not have standing to raise this as matter of public interest.

Table of Authorities

Cases considered by *P. Howden J.*:

Borowski v. Canada (Minister of Justice) (1981), [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 12 Sask. R. 420, 39 N.R. 331, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 1981 CarswellSask 167, [1981] 2 S.C.R. 575, 1981 CarswellSask 181 (S.C.C.) — referred to

Devine v. Scarborough (City) Clerk (1995), 1995 CarswellOnt 172, 27 M.P.L.R. (2d) 18 (Ont. Prov. Div.) — referred to

Freitag v. Penetanguishene (Town) (1999), 67 C.R.R. (2d) 1, 179 D.L.R. (4th) 150, 125 O.A.C. 139, 47 O.R. (3d) 301, 1999 CarswellOnt 2911, 4 M.P.L.R. (3d) 1 (Ont. C.A.) — considered

Haig v. R. (1993), 1993 CarswellNat 1384, *(*sub nom. *Haig v. Canada)* [1993] 2 S.C.R. 995, 1993 CarswellNat 2353, *(*sub nom. *Haig v. Canada)* 16 C.R.R. (2d) 193, *(*sub nom. *Haig v. Canada)* 156 N.R. 81, *(*sub nom. *Haig v. Canada)* 105 D.L.R. (4th) 577, *(*sub nom. *Haig v. Canada)* 66 F.T.R. 80 (note) (S.C.C.) — followed

Montgomery v. Balkissoon (1998), 159 D.L.R. (4th) 381, 45 M.P.L.R. (2d) 196, 1998 CarswellOnt 1545, 38 O.R. (3d) 321 (Ont. C.A.) — considered

Mullins v. Windsor (City) (1975), 9 O.R. (2d) 729, 61 D.L.R. (3d) 601, 1975 CarswellOnt 475 (Ont. Div. Ct.) — referred to

O'Brien v. Hamel (1990), 1990 CarswellOnt 764, 73 O.R. (2d) 87, 70 D.L.R. (4th) 466 (Ont. Div. Ct.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 43 Imm. L.R. (2d) 117, 226 N.R. 201, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387,

[1999] I.N.L.R. 36, 1998 CarswellNat 830, 1998 CarswellNat 831 (S.C.C.) — followed

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 2 — referred to

Judicial Review Procedure Act, R.S.O. 1990, c. J.1
Generally — referred to

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched.
Generally — referred to

s. 15(2) — referred to

s. 17 — referred to

s. 24(1) — referred to

s. 42(4) — considered

s. 45(1) — referred to

s. 45(2) — referred to

s. 58 — considered

s. 58(6) — considered

s. 60 — referred to

s. 60(1) — referred to

s. 63 — considered

s. 83 — considered

s. 83(6) — considered

s. 83(7) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

APPLICATION by candidate for declaration that election was not valid, or in alternative, for recount of disputed ballots or manual recount of all ballots; APPLICATION by candidate for judicial review of decisions of city clerk.

P. Howden J. **(orally):**

1 On November 13, 2006, municipal elections were held. In the City of Vaughan, there were four candidates for mayor. Two of the candidates became close contenders, the applicant, Michael Di Biase, and the respondent, Linda Jackson.

2 On election night, the respondent clerk, John Leach, declared Linda Jackson to be the winner. The results were arrived at by the use of vote tabulating machines or VTMs which have been used in Vaughan elections since city council authorized their use in 1991 by by-law.

3 The votes as tabulated on election night were

for Linda Jackson: 28,396

for Michael Di Biase: 28,306

a margin of 90 votes.

4 A municipal recount was held in late November 2006. The result of the recount was

for Linda Jackson: 28,402

for Michael Di Biase: 28,308

5 The margin of victory had moved slightly from 90 on election night, to 94 on the recount, both in favour of Ms. Jackson. VTMs were again used on the recount pursuant to section 60(1) of the *Municipal Elections Act*.

6 The applicant, Michael Di Biase, has requested this court to declare the election for mayor not valid and to order a by-election. He also requests, in the alternative, a recount of disputed ballots or a manual recount of all ballots. The relief sought is under section 83 of the *Municipal Elections Act* as well as sections 58 and 63.

7 Section 83 of the *Act* provides for an application to this court by a person entitled to vote for a determination whether the election is valid. The issues arise from subsections (6) and (7) of section 83 which deal with the effect of procedural irregularities and limit the jurisdiction to declare an election not valid to matters that affected the result or offended a principle of the *Municipal Elections Act*.

8 In this case, the applicant raises the following as evidence that significant or substantial errors going beyond mere procedural irregularities existed both at the election and at the municipal recount. The principle submissions for Mr. Di Biase concerned the following.

> (i) The machines, the VTMs, were programmed not to count as a vote and not to return a ballot to the voter for a correction where any ballot contained what are called an over-vote or an under-vote. (I will return and define those terms shortly.) There were 1,656 over-votes and under-votes which were not included in the candidate's totals either at the election or at the recount but were accepted by the VTMs.
>
> (ii) VTMs at four polling stations, (including Father Kelly School) experienced printer jams and three polling locations experienced ballot jams. When machines at some of these locations had to be replaced, they were not tested as the VTMs are tested at the start of the day to run a zero total, nor were the responses by election officials said to be consistent because no procedures by the City were allegedly in place to address them. Results from four of these locations came in late following which the prior lead by Mr. Di Biase disappeared and Ms. Jackson won by 90 votes. A polling location which allegedly suffered both printer and ballot jams was Father Kelly School where some 1206 ballots were cast at eight polling stations either for the Applicant Di Biase or the Respondent Jackson.
>
> (iii) Two voters were not allowed to vote, despite their having voting cards with them. One of them, the husband, said he and his wife could not vote and estimated that six others said they also were deprived of a vote.

(iv) A number of polling stations were located at social or recreational community halls affiliated with Christian churches, though only one was specifically identified. It is alleged that certain people of the Jewish faith could not enter churches to vote and, if so, the right to freedom of religion in section 2 of the *Canadian Charter* is engaged as well as the *Act's* principles of accessibility and integrity of process.

9 In addition, the applicant requests judicial review of the following decisions of the city clerk under the *Judicial Review Procedures Act*:

(a) the locating of polling stations and facilities affiliated to churches;

(b) his refusal to make available, at the recount, voters' lists and statements of results from deputy returning officers or DROs, thus preventing a reconciliation of ballots issued and cast;

(c) the clerk's acceptance of election results from DROs without final statements signed by them contrary to section 13(a)(vii) and (viii) of the Procedures for Use of Vote Tabulating Machines which were set by the clerk under his authority under the *Municipal Elections Act*;

(d) his refusal to make available at the recounts the ballots cast at Father John Kelly School; and

(e) his refusal to allow inspection of all ballots, particularly the 1,656 over- and under-votes during the recount rather than mere photographic images of them which were viewed by representatives of the candidates.

10 The respondents, the City and Ms. Jackson, take the broad position that these are, at best, irregularities which are procedural only or are in the clerk's statutory discretion to deal with and whether taken singly or cumulatively, they do not amount to the kind of error of significance which can be said to offend the principles of the *Municipal Elections Act* or to affect the result of the election.

11 S. 83 of the *Act* gives discretion to this court on a valid application to it to determine validity of the election. However, subsection 83(6) narrows that discretion somewhat. Subsection (6) does not permit a determination of validity where an irregularity or irregularities occurred which did not affect the result *and* the election was conducted in accordance with the principles of the *Act*. Subsection (7) of s. 83 provides a very broad meaning to the word "irregularity". It includes non-compliance not only with a clerk-designated procedure, but also non-compliance with provisions of the *Act* itself and its regulations dealing with voting, counting of votes or time requirements come within the saving provisions of subsection (6).

12 The clerk is designated, under the *Act*, to run the election. The clerk may delegate powers and duties at the level of the polling stations (where the voters vote) to the DROs, the deputy returning officers, to the extent required for the polls to operate fairly and effectively. (section 15(2)).

13 Where, as in the City of Vaughan, council has authorized the use of voting machines, the *Act* authorizes the clerk to "establish procedures and forms for the use of any ... vote-counting equipment" and to provide a copy to each candidate. The clerk's powers in this regard are given statutory authority; the procedures established by him by section 42(4) of the *Act* "prevail over anything in this *Act* and the Regulations". The *Act* at the same time, however, establishes an important limit on the clerk's exercise of his powers. That is, the procedures established by him must be "consistent with the principles of this Act". (s. 42(4))

14 The major issues in this case come down to whether the election itself and the procedures regarding the VTMs were conducted in accord with the principles of the *Act* or not.

15 The *Act* itself does not set out an express list of its principles. The parties all accept as those principles the list formulated by the clerk. They are:

(i) The secrecy and confidentiality of the voting process is paramount;

(ii) The election shall be fair and non-biased;

(iii) The election shall be accessible to the voters;

(iv) The integrity of the process shall be maintained throughout the election;

(v) There is to be certainty that the results of the election reflect the votes cast; and

(vi) Voters and candidates shall be treated fairly and consistently.

16 To that list, the principle referred to by the Court of Appeal in the case of *Montgomery v. Balkissoon* (1998), 38 O.R. (3d) 321 (Ont. C.A.) should be added. It may be that it is inferred in principle (v) requiring certainty of results reflecting votes cast but the Court of Appeal adds the important principle that the proper majority vote governs. The principle from *Montgomery* was stated by the Court of Appeal as follows at (page 2 of the QuickLaw version):

> At issue ... was the principle that the proper majority vote decides the election. That principle is achieved by ensuring, so far as is reasonably possible, that valid votes be counted and invalid votes be rejected.

17 The issues in this case deal with the conduct and procedures complained of by the applicant and whether they run counter to or are consistent with the principles of the *Municipal Elections Act*, particularly principles (ii) requiring fairness, (iv) stressing the maintenance of procedural integrity, and (v) requiring certainty of results reflecting votes cast. The principle in *Montgomery* is also engaged here in its requirement that a proper majority vote decides, i.e., that valid votes are counted and invalid votes are not.

18 Before dealing with the substance of the applications, I should refer to the remaining requests for orders. As an alternative to a declaration of invalidity, the applicant requests a partial recount of disputed ballots under s. 63 of the *Act*. He also requests a recount of all ballots cast pursuant to s. 58. That section provides a wide discretion in the court to order a recount; I must be satisfied that there are "sufficient grounds" for it; such recount shall be held within 15 days after the receipt by the clerk of the court's order. Subsection 58(6) states,

> A request for a recount due to problems related to voting and vote-counting equipment may be made only under this section.

The court has a discretion under section 60 to set conditions for how the recount should be conducted.

19 I now turn to the issues raised by the applicant.

1. The Programming of the Vote Tabulating Machines and the Over- and Under-votes

20 There is no doubt of the municipality's right to use vote-tabulating machines in municipal elections or of the wide powers of the clerk to establish procedures for use of those machines. There is also no doubt that he may not act arbitrarily, without regard to the principles of the *Municipal Elections Act*.

21 Now, the first thing that is clear to me is this. The vote tabulating machines are not thinking or reasoning entities. They are machines which do what they are told to do by the programmer, without exception. There is no issue in this case as to the accuracy of the vote tabulating machines and their memory cards. The procedures established by the clerk in ss. 7 and 8 required four-step mandatory testing of every vote-tabulating machine by the clerk or his designate to ensure accuracy prior to the day of the election. The machines were purchased pursuant to a rigorous tender requiring complete accuracy, among other things. The programming of the machines is vital to the integrity, certainty and propriety principles of the *Act*. Their programming is very important. It affects what is recorded as a vote for a candidate and what is not. Therefore, the programming of the VTMs deals with a fundamental right in a democracy. The Supreme court of Canada described the significance of voting rights in law in *Haig v. R.* [1993 CarswellNat 2353 (S.C.C.)] (at paras. 129-131) and I quote:

> [129.] The right to vote is of fundamental importance to Canadians and to our Canadian democracy.
>
> [130.] In the interpretation of all enfranchising statutes, the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the statute to enfranchise the voter.
>
> [131.] Conversely, every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

This principle of interpretation is very much in my mind as I deliberated on the issues here.

22 So as to understand how the VTMs were programmed, I should first set out what is meant by over- and under-votes. I take this from the affidavit and cross-examination of the City clerk, Mr. Leach. An over-vote occurs when there is more than one mark occupying more than 20 percent in the voting spaces for the office of Mayor. An under-vote is one where no mark is detected or there is a visible mark occupying less than ten percent of the voting space.

23 An over-vote can include a situation where the voter has marked a candidate's space in error and the voter tries to correct the error by marking the space of another candidate and perhaps crossing out the erroneous mark, or the voter simply marks two spaces for mayor for whatever reason. The voter could write "yes" for one and "no" for another. By the clerk's description, this would not be counted as a vote for any candidate. An under-vote could include a ballot marked too lightly, or perhaps marked without using the special pen provided in the voting booth. I take it there was good reason for the clear instructions in the voting booth to use the designated pen. An under-vote occurs also where the voting spaces on the ballot contain no marks for an office.

24 According to Exhibits D, E and F of the affidavit of Garry Stamm, the clerk reported to City council at the time when council was determining whether to lease the machines in question. The clerk emphasized to council then that these machines would provide an enhanced level of service. His report describes that enhanced service:

> Unlike central count systems such as the one previously used in Vaughan or in a manual-count election, if a voter over-votes his/her ballot, the machine returns the ballot to the poll worker who can advise the voter that an office has been over-voted. The voter is then given the chance to vote on another ballot and the first ballot is cancelled.

25 His report concludes very much in the *Haig* pro-enfranchising mould that this capability will reduce the number of lost votes. The Request for Proposal for lease of the machines, as approved by City council, included the following specification:

> The system is capable of being programmed to return an:
>
> (a) over-voted ballot;
>
> (b) blank ballot;
>
> (c) misread ballot
>
> to the voter immediately for voter correction.

26 In the clerk's evidence by affidavit on this application, no explanation whatsoever is provided for his unilateral decision to accept programming of the machines so that an over-voted ballot would *not* be returned or replaced for a correction and would *not* be counted as a vote. The clerk's reason for setting the ten percent floor for a counted vote, and anything less not being counted, was simply that the supplier of the VTMs recommended it. The clerk's statement that 25 other municipalities used these thresholds was based on nothing more than information from the supplier, not on any study of his own.

27 For an underdetermined number of the 1,656 ballots not counted for mayor as under- or over-votes, there are no doubt votes which are valid in law under the *Municipal Elections Act* and its regulation. The machine cannot read the intent of marks, only their spatial area. Thus, a voter who crosses out a mark and adds a mark for another candidate has cast a valid

vote under the *Act* and the regulations for that candidate. He or she has cast a vote for one candidate, though there are two marks. Yet because of the programming of the machines, that vote would not count and the voter would leave believing his vote for a candidate had meant something.

28 As to the under-votes, reliance merely on information from a supplier to determine the validity of a vote in a democratic process is simply unacceptable. In another city where over- and under-votes were returned for the voter's attention, fewer lost votes were experienced. Significantly fewer.

29 I have no doubt that these thresholds were set with a view to minimizing delays at the polls as Mr. Rust-D'Eye suggested. However, there was no balancing by the clerk of the deprivation caused to some voters who attended and left thinking their vote counted.

30 The City says that the candidates had prior notice of the programming because the procedures for use of the machines were sent to them prior to the election. I have looked at the Procedures for Use of the Vote Tabulating Machines set by the clerk. The relevant provision does not tell them that under- and over-votes would not be returned for the voter to correct nor does it say anything about the 10 percent and 20 percent thresholds.

31 It seems to me that the clerk's original reasoning to council of providing service to the public by saving otherwise lost votes was in line with the *Act*'s principles of integrity of process and certainty of result reflecting votes cast. The lack of any real consideration of the effect on voter's rights in setting these thresholds is troubling and not in line with both the principles of the *Act* as I have stated, and the principle in *Haig v. R.* regarding the importance of the right to vote. It is not proper for the democratic rights of individuals to rest solely on private corporate ideas of what votes should count.

32 The candidates' representatives were given no opportunity to review the actual ballots in question. They were allowed to view photographic images. From the evidence of Mr. Cirillo and Adrian Di Biase, it was thought that the over-votes would be reviewed at the recount so they were not analyzed. Adrian Di Biase said he could determine from the under-votes a gain for the applicant of some 17 votes but whether ballots were really blank could not be confirmed without seeing the originals. The Jackson representative was more definite on both under- and over-votes, but felt they would make no difference to the result. Her numbers were also different.

33 The evidence from these viewing sessions without the ability to view the actual ballots in question to determine which are valid votes is not determinative or convincing. The respondents have the onus of establishing consistency with the *Act*'s principles: *Mullins v. Windsor (City)* (1975), 9 O.R. (2d) 729 (Ont. Div. Ct.) at p. 734. They have not done so in this respect. I can only conclude that the programming of the computers likely resulted in the failure to count an unknown proportion of the 1,656 under- and over-votes. As the number in question exceeds greatly the plurality of the winner, a recount, at least, is warranted by this finding. It does not in itself warrant a declaration of invalidity as the ballots in question are available. They are not lost and they can be dealt with on a recount. The finding of inconsistency in principle in one instance must be balanced in exercising my discretion under section 83 only after I have made all of my findings. That section prevents a finding of invalidity where the result is not affected and the *Act*'s principles are not contravened. But section 83 does not mandate a finding of invalidity simply because of a finding of inconsistency with the principles of the *Act* where the circumstances are such that a properly conducted recount would suffice.

2. Printer- and Ballot-Jams

34 The evidence is that on election day, VTMs were replaced at several locations because of printer- or ballot-jams. The Procedures set by the clerk and the CF200 Handbook advised poll workers of procedures to be followed in such cases. I do not agree with the applicant that procedures for jams were not addressed. Of course some ballot jams could be dealt with on the spot by simply clearing the paper out of either the front or rear slot and, if necessary, replacing the cancelled damaged ballot, as recommended by the CF200 Instruction Handbook.

35 That handbook provided in section 3.5 for how a malfunctioning machine was to be replaced. It is very important to understand that each VTM has a memory card in it which retains the count even as printer- or ballot-jams occur. It is the memory which is tested at the start when the VTM is tested to ensure the memory is cleared to zero. All machines were pre-tested. When a machine malfunctions, the ballots are placed in an auxiliary slot and can be fed into a replacement

machine later. The memory card containing the count is transferred to the replacement machine. The report of Joseph Chiarelli and the representative of Dominion Voting Machines to the clerk indicated that when jams occurred at locations including Father Kelly School, the one the applicant is especially concerned about, the machine was replaced and the auxiliary slot kept any ballots not processed due to the malfunction. All ballots were fed in at the end of the day with scrutineers present for the candidates. Only two ballots in each of two locations were not accepted and they were retained. In the third, all ballots in the auxiliary slot were successfully accepted in the replacement machine. At the fourth location, the machine did not require replacing and so the auxiliary slot did not have to be used. The ballots had simply not been feeding smoothly but all were accepted.

36 On the evidence on this point, I accept the submission of the respondents that there is no evidence of any problems having occurred with the memory of any VTM and that is supported by the recount results where different machines were used and virtually the same result was obtained with only a few exceptions which were fully explained. No ballots were lost. The possibility of printer-jams and ballot-jams was anticipated in the material provided. The procedures were followed. I do not see the affidavits of Mr. Fuscaldo and Mr. Ricci as establishing any irregularity in this respect and in fact Mr. Fuscaldo's evidence confirms that the procedures were carried out.

37 I understand the applicant's concern that the results changed when the poll locations including a machine problem occurred and that he is suspicious of that. However, the incidents were handled correctly. No votes were lost. The evidence of Ms. Iaboni and Ms. Campagno, election workers, satisfies me that at no time were machines or an auxiliary slot with ballots left unattended. There is absolutely no evidentiary basis for any fear that a ballot box or a VTM was interfered with illegally. As the poll level results show, some individual polls showed huge swings in favour of either candidate in various parts of the municipality and not only in the area of Father John Kelly School.

3. Voter identity

38 One voter swore an affidavit that he had not been allowed to vote, despite his having a voter card. His wife also could not, or did not, vote. The person who swore the affidavit states that they came late, almost as the polls were to close, and he was told that without photo I.D., they could not vote. The person with whom he spoke, the person in charge, as he put it, swore an affidavit that Mr. Conte is not correct, that the official never told anyone on the voter's list they could not vote due to lack of I.D. and that what the official told all who asked was that they could vote without I.D. if they were prepared to take an oath of eligibility. A flyer had been sent out stating that I.D. was required; however it was not on the voter cards, unfortunately. That is where it would have been more effective.

39 I cannot find on the evidence before me, however, anything more than that the I.D. requirement was ineffectively publicized. It appears that the gentleman in question lost his temper and walked out and perhaps did not hear that all that was required was to swear to his residency and identity. It is not clear, also, if, as the voter stated, his I.D. was in the car, why he did not simply get it. No one else gave evidence of a similar problem. Clearly this situation was not as well handled as it should have been by both individuals. The affiant's evidence that six others were deprived of a vote is little more than hearsay speculation in the absence of knowing whether indeed those people were eligible voters at the poll in question, and we do not have any such evidence.

4. Use of Facilities Affiliated with Churches as Polling Stations

40 There was a complaint by a member of a local synagogue to Mr. Di Biase after the election that as an Orthodox Jew, he could not enter facilities of Christian churches to vote. The applicant, relying solely on this individual and one other, stated in his evidence that the members of the synagogue could not vote because the polling station was in a Christian church. He stated that the City failed "to accommodate the religious needs of the synagogue".

41 The two individuals on whose evidence this issue was based failed or refused to attend when duly summoned for questioning on their written evidence. According to the Civil Rules, their evidence cannot, therefore, be relied upon as they refused to allow any testing of their views.

42 The only other evidence regarding a failure to accommodate certain Jewish voters by use of facilities affiliated with a

Christian Church came from Rabbi Zirkind. His affidavit was very short. On the issue of religious belief and poll locations, he stated,

> During the Elections, various polls were located at House of Worship facilities. Devout individuals of the Jewish faith frequent their House of Worship twice daily for prayer and religious service. As such, individuals of the Jewish faith view corresponding facilities of other faiths as dedicated structures used predominantly for religious services.
>
> Accordingly, most observant Jews would likely not enter a House of Worship of a different faith and I am certain that numerous individuals did not vote in the Elections because of the location of polling stations in churches.

43 On his cross-examination, he was much less definitive both as to where the polls in question were in relation to the churches' worship facilities and his own duties and beliefs in that regard. At pages 11 and 12 of his cross-examination, he was ambiguous. He said very few Jewish people question about this practise. If they do, they may get an answer that one is permitted to go to the poll where there is a separate entrance to the social or recreational non-worship part of the church. And they may get an answer that government should put the poll in another place "to make the comfort level for them". He stated also that one should try to persuade government not to put polling stations in such places. When asked if he or any Rabbis in Vaughan had ever tried to persuade the City or even give notice to the City of their concern not to hold elections in churches, he could not answer for the other Rabbis; for himself, he had never expressed any such concern. He said, in reply, that he believed some 350 to 475 families were in his community but there is no evidence of discomfort or problems on their part.

44 Rabbi Tradburks of an Orthodox Jewish Synagogue in Toronto testified that the suggestion that Orthodox Jews are prevented from entering a church by their beliefs is "a misrepresentation of Orthodox Jewish doctrine". He said they can enter non-worship portions of a church, such as a recreation or a social hall, without offending their religious beliefs. He testified on cross-examination that he was unaware of any Rabbi in the Greater Toronto Area who took the more rigid approach and he had consulted two Rabbis in Vaughan on this subject. He said in regard to the use of a social hall rather than the worship part of the church,

> I think having polling stations in churches is a common thing, and I think it's become fairly common knowledge that one can vote in the hall and not in the sanctuary.

45 Mr. Leach, the clerk, established that at the church location complained of by the applicant, Holy Trinity Church, the community hall portion of the building was used, not the sanctuary of the church. He stated that such facilities have been used for years without incident or complaint, other than when a religious icon was seen near one poll in the last election; Mr. Leach took immediate action to have it removed.

46 The voting locations were made known to all by voter cards mailed two weeks before the advance poll. Anyone could vote at the advance poll in a community centre. No one, and certainly no party to this proceeding, contacted his office to raise any concern in this regard prior to the election.

47 The applicants cited the case of *Freitag v. Penetanguishene (Town)* (1999), 47 O.R. (3d) 301 (Ont. C.A.). In that case, there was evidence that the mayor commenced every council meeting with a Christian prayer. The applicant appellant, a non-Christian, attended council meetings and felt constrained to join in the practise. He told the mayor of his concern. The mayor refused to change the practise, citing moral values he felt should be brought into council's deliberations by means of this sectarian prayer. The Court of Appeal, following the case of *R. v. Big M Drug Mart Ltd.* in the Supreme Court of Canada, [1985] 1 S.C.R. 295 (S.C.C.), stated that in considering a complaint such as this under section 2 of the *Charter*, both purpose and effect must be considered, and where someone is forced or pressured to act in a way against their beliefs or conscience, intentionally or not, that person's freedom of religion is infringed.

48 I must say that if I were able to find some evidentiary basis for the applicant's concern, the issue, this particular issue, would be of great importance as not only a breach of the principles of fairness and accessibility under the *Municipal Elections Act* but also a violation of the *Charter* right of freedom of religion. Where, however, the polling stations in question were placed in a community or social hall affiliated with a church and not as Rabbi Zirkind spoke of as the "House of Worship" part, and where the clerk has shown, by his action regarding the religious icon near a poll, sensitivity to this issue,

and he has never heard from anyone of any discomfort, there is simply no air of reality shown to this as a problem or even a concern.

49 I find no merit in this ground of complaint. This is not the *Freitag* situation where there was evidence of a majoritarian moral religious tone being forced on anyone of a minority faith who wished to attend, or run for, council. If indeed there were a problem of even discomfiture caused by this practise, I would have expected, as a not onerous expectation, Rabbi Zirkind or anyone from a similar community to have given some notice of it. I find no inconsistency with fair electoral principles on this account.

50 Though I do not rest solely on the following, I do not find that the applicant has standing to raise this as a matter of public interest. His own rights are not affected and in the absence of any admissible evidence of impact on the vote for him in particular, he has no direct interest in the practise, as his lack of any objection pre-election to the polling places, confirms. (See *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.)) However, this issue was raised late and I have not used the standing issue to the prejudice of the applicant.

4. Judicial Review

51 The applicant applies for judicial review of certain decisions of the clerk. There is no issue that the clerk has a reviewable statutory power of decision in his position as the chief municipal electoral officer under the *Municipal Elections Act*. The standard of review of the clerk's decisions is not agreed and I was not made aware of any appellate authority on that subject.

52 The pragmatic and functional analysis is the required approach to the standard of review of decisions under a statutory power as set out in the Supreme Court of Canada case of *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.). The focus of that analysis is to determine the legislative intent - the appropriate level of deference to be shown the impugned decisions.

53 The points to be analyzed are, first, presence or absence of what is called a privative clause, that is, legislation protecting the tribunal or official from review; second, the purpose of the statute; third, nature of the problem; and lastly, the expertise of the tribunal or official.

54 First, no privative clause exists to protect the clerk's electoral decisions from judicial review. Recourse to the court is not expressly discouraged. In effect, the clerk is given wide powers to run elections and recounts within the principles of the *Act*. The court exercises a kind of overseer or supervisory function where a party shows sufficient grounds on issues of overall election validity and whether a recount is required. That function involves reviewing decisions and conduct during the electoral process, including those of the clerk, that are suggested to effect important statutory and democratic principles.

55 The fact that no privative clause is in place does not in itself imply a high standard of scrutiny. The lack of a privative clause combined with the provision of a relatively wide review jurisdiction in a court suggests something below the higher standard of review, that of patent unreasonableness which includes a very high level of deference.

56 The purpose of the legislation is to ensure that elections are run fairly, accessibly, and that public confidence can be placed in the result. The clerk is the chief municipal electoral officer, on whom the heavy responsibility of assuring the *Act's* principles are met in a multitude of circumstances, is placed. The clerk's decisions are vital to the integrity of the process and an appropriate public comfort level in the finality of the result after, at times, divisive hard-fought campaigns.

57 The decisions questioned by the applicant relate to mixed law and fact and electoral procedures established by the clerk within the parameters of the *Act*. Location of polls, for instance, is left to his discretion subject only to voter convenience and special needs. (s. 45(1) and (2)). Decisions on the recount regarding production of ballots for polls at the Father Kelly School or ballots generally, or accepting results without all poll statements or ballots having been signed by a DRO, involve assessment of the factual circumstances and regard for statutory procedures and substantive principles of law. In other words, most of them are questions of mixed fact and law which attract a moderate level of deference called reasonableness.

58 The expertise of the municipal clerk is highly variable. Clerks have taken courses in municipal administration, usually. They need not be trained in law, but as here, the clerk has available to him expert legal resources retained by the municipality. In this case, Mr. Leach has considerable experience in the conduct of elections; however in the area of statutory principle, the level of expertise suggests a lower level of deference the closer the issue comes to legal principle and further from administration.

59 Having regard to these factors, my conclusion is that the standard of review indicated is between the highest and lowest levels of deference, in other words, a standard of reasonableness on issues of mixed fact and law. As with building officials who also have training and experience in a specialized field but lack legal knowledge and training, this means a continuum between correctness on issues of law alone and as issues of fact and law approach the law end of the continuum, the standard of reasonableness should be more exacting.

60 Two decisions are dealt with by the applicant's factum in some detail at paragraphs 107 to 110 and were argued. They are the clerk's decision to accept results where not all DROs completed final statements required by the Procedures and the decision to locate some unidentified polling stations in the community, school or social halls of churches, allegedly without regard for faith sensitivities.

61 On the subject of acceptance of the election results despite irregularities, I would include the complaint that 79 persons voted who were not on the voters' list. In accepting results despite formal irregularities in completing forms and the kind of paper reconciliation of ballots cast and ballots counted used with manual counting, the clerk acted, in my view, reasonably within his authority in so doing. The Procedures promulgated by him for use of vote tabulating machines prior to the election (and not then objected to) do not require this sort of paper reconciliation as the counting is done and recorded by the machines which are pre-tested for accuracy. As well, Dominion Voting Machines Incorporated did a detailed analysis filed as Exhibit CC of Mr. Leach's affidavit during and after the election and the recount. All differences between election and recount results were accounted for within the limits of the VTMs' programming and that included all ballots cast.

62 The *Municipal Elections Act* in sections 17 and 24(1) permits DROs to allow additions to the voters' list on election day. There was no documented complaint of this power being abused or applied improperly. As for the decision on poll locations, I have found no fault and there was a reasonable basis in voter convenience, lowered expense, and no indication over years of this practise of any concern on religious grounds.

63 Except for the clerk's acceptance of the programming of the machines and his refusal at the recount to allow inspection of the actual over- and under-voted ballots, there is a basis in reason for his decisions as the statutorily designated chief elections officer.

64 I have found that his decision to allow the VTMs to be programmed to not return under- and over-voted ballots and to require a ten percent floor threshold for a vote to count for a particular candidate lack a reasoned and principled basis and conflict with several principles of the *Act* and of the proper majority vote principle in *Montgomery*. In view of the availability of all those ballots, there is no reason to invalidate the election on that account or on the basis of any other decision of the clerk.

65 I have considered within that general conclusion the complaints of certain ballots not having been signed by a DRO and insufficiency of some DRO poll statements. There is no evidence that any ballot was used which had not been supplied by a DRO. The court is well aware that elections depend on help from, at times, inexperienced officials and involving varying levels of willingness and ability. That does not save an election that breaches irrevocably statutory or democratic principles but it is reality.

66 However, on the evidence which I have reviewed in detail, save for the machine programming to exclude valid votes without allowing the voter to prevent their vote not counting for their candidate and the related failure to allow inspection of the 1656 ballots so affected, I find no breach or inconsistency in the conduct of the election which is inconsistent with the principles of the *Act* or which affected the result. This case is not at all like the situation facing the court in a case that no doubt is well known to some people in this area, *O'Brien v. Hamel*, [1990] O.J. No. 859 (Ont. Div. Ct.), where illegal votes by ineligible voters which exceeded in number Mr. Bevilacqua's apparent plurality were counted and did affect the result. Due to the secrecy of the ballot, those votes could not be identified and the election was irrevocably tainted. It was therefore

ruled not valid. In this case, there is no evidence of ballots cast illegally by voters who were not entitled to do so.

67 The application of Mr. Di Biase for the alternative relief of a recount under section 58 is granted. The recount shall be of votes cast for Mr. Di Biase and Ms. Jackson. As required by subsection 58(6), a recount request may only be allowed under section 58 because the problems requiring it relate to voting and vote counting equipment.

68 As for the manner in which the recount is to be conducted, I did not hear submissions from counsel that could assist me in exercising my discretion under section 60. At present, my inclination is to provide an order similar to that in *Devine v. Scarborough (City) Clerk*, [1995] O.J. No. 511 (Ont. Prov. Div.) (paras. 58-60) except that the machines should be programmed to identify and kick out all over- and under-voted ballots, not just the under-votes, for examination by the candidates or their representatives. However, I will consider other alternatives, including a manual recount if counsel wish to address me in that regard within the next few days now that they have my ruling on the applications. The other orders requested on the application under file 6-082191 are denied.

69 The application by way of judicial review for a declaration that the clerk erred in respect of his refusal to allow inspection of the 1,656 ballots of over-and under-votes at the municipal recount is granted. That error, in the wake of the programming issues, affected only the municipal recount and shall not be repeated in the recount to occur shortly. It had no effect on the validity of the election. The balance of the judicial review application is dismissed.

70 Counsel may make written submissions on costs, if not agreed, within 30 days of the conclusion of the recount under section 58.

.... Submissions by the parties re recount of ballots [Recorded, not transcribed.]

Recess

UPON RESUMING:

71 **THE COURT**: I have had a chance to meet with counsel and there is some difference of views in regard to how the recount is to proceed, so I am going to reserve on the terms. I will hear from counsel at a telephone conference on Friday, the 13th, and I will issue a written endorsement setting out the terms of the recount probably by early next week. The judgment, however, I have given today, and you know what it is. There will be a recount. It will be conducted by the clerk, but subject to terms set by the court and those terms you will know by early next week, hopefully. Thank you very much.

72 For reasons given orally a recount is ordered under 9.58 of this Municipal Election Act of all votes cast for the applicant and the respondent Jackson for mayor.

73 Costs submissions to be made within 30 days of completion of the recount.

74 Counsel may address me as to manner of the recount under 5.60 of the Municipal Election Act at a trial to be arranged today or by the TC.

75 For reasons given orally, application granted on the limited tenur in the judgment pronounced today which affect the municipal recount only.

76 A recount is ordered under sec. 58 of this Municipal Election Act.

77 File 06-82191-00

78 The balance of this application is dismissed. (File 06-082265) Counsel may address me as to recount conditions under 9.60 MEA.

Applications granted; recount ordered.

Footnotes

* Additional reasons at *Di Biase v. Vaughan (City)* (2007), 2007 CarswellOnt 5876, 39 M.P.L.R. (4th) 112 (Ont. Div. Ct.).