

ONTARIO  
SUPERIOR COURT OF JUSTICE

**B E T W E E N:** )  
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Michael Di Biase ) S. Makuch, J. Ayres and N. Auty, for the  
 ) Applicant  
 )  
Applicant )  
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**- and -** )  
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Corporation of the City of Vaughan, John ) G. Rust-D'Eye, for the Corporation of the  
Leach and Linda Jackson ) City of Vaughan and A. Jeanrie for Linda  
 ) Jackson  
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Respondents )  
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 ) **HEARD:** April 13, 2007

2007 CanLII 12701 (ON SC)

**REASONS FOR DECISION**

**HOWDEN J.**

[1] On April 11, 2007, I granted the alternate relief requested by the applicant of a recount pursuant to s. 58 of the *Municipal Elections Act*, 1996, S.O., c.32. For oral reasons given that day, I found there to be sufficient grounds, in accordance with s. 58(3). The recount is to count all votes cast for the applicant and the respondent Jackson in accordance with the *Act* and the directions referred to later in this decision. Because the recount is due to problems related to the vote-counting equipment, in particular the programming to exclude from the candidates' vote counts all under and over votes as defined in my reasons of April 11, 2007, it must be performed by the clerk (s. 58(6)). I reserved my decision regarding the manner of the recount under s. 60(1) and (3) in order to allow counsel for the parties to make submissions. They did so by telephone

conference held on consent of all parties on April 13, 2007. I have also had the benefit of their written suggestions received on April 16, 2007 by fax.

[2] The relevant portions of s. 60 of the *Municipal Elections Act* read:

60(1) A recount under section...58 shall be conducted in the same manner as the original count, whether manually or by vote-counting equipment, subject to subsection (3).

(2) A recount shall be conducted in accordance with the prescribed rules, subject to subsection(3).

(3) If the judge who orders a recount under section 58 is of the opinion that the manner in which the original count was conducted caused or contributed to the doubtful result, he or she may, in the order, provide that the recount shall be held in a different manner and specify the manner.

[3] In my judgment of April 11, 2007, I found that the manner of the original count caused the doubtful result. Because of the way the vote tabulating machines (VTMs) were programmed, some 1,656 under and over voted ballots were not considered at all for their validity and intent. The margin of the leading candidate was 90 on election night and 94 after the municipal recount. The problem was compounded on the recount by the failure to allow inspection of the actual ballots in question. There is no evidence that the VTMs counted inaccurately or malfunctioned on the final count either on election night or the municipal recount; they simply were not programmed to identify the over and under votes, which capacity they do have. Therefore it is open to me pursuant to s. 60(3) to specify the manner of the recount. None of the parties questioned the statutory authority of this court to do so in these circumstances.

### **THE PARTIES' POSITIONS**

[4] Each of the parties have proposed differing recount procedures. In the following exposition of their positions, "the candidate" should be taken to include his or her counsel or designated representative for purposes of the recount.

[5] The applicant, Michael Di Biase, proposes that the recount begin with a visual inspection by the candidates of all ballots in order to determine voter intention in accordance with the rules in the *Municipal Elections Act*, 1996 and Ontario Regulation 101/97 as amended. The VTMs are to be tested and programmed as they were on election night. Ballots which are not disputed by either candidate shall be counted by the VTMs. For ballots disputed by either candidate, voter intention shall be determined by the clerk pursuant to the provisions of the *Act* and O. Reg. 101/97, only after hearing submissions by the candidates. The votes as determined by the clerk should be manually added to the total votes counted by the VTMs. Voter intent is to be determined from the ballot as a whole, whether or not a mark is found within the designated voting space for a candidate.

[6] The respondent, Linda Jackson, proposes that the VTMs shall be programmed as they were on election night, except that they will be programmed and tested to return all over and under votes. All ballots are to be entered into the VTMs in the manner as on election night. Each returned ballot will then be visually inspected by the candidates. For any disputed ballots, the candidates shall make submissions to the clerk who shall determine voter intent pursuant to the *Municipal Elections Act* and O. Reg. 101/97. Any ballot which is not disputed to contain a valid vote for either the applicant or the respondent Jackson, shall be counted for that candidate. For disputed ballots, no vote shall be counted where the voter did not mark inside the voting space provided for either candidate in accordance with O. Reg. 101/97. However, where a voter placed a mark inside the designated voting space for two or more candidates, voter intent is to be determined by reviewing the ballot as a whole and, if it is ruled a vote for either the applicant or the respondent Jackson, it shall be added to the total vote of the tabular count.

[7] The respondents, City of Vaughan and the City clerk, proposed that only marks contained in the designated voting spaces should be considered in determining voter intent; other marks on the ballot, including tears or defacement whereby a voter could be identified, shall be ignored. The results of the decisions by the clerk on disputed ballots are to be added to the total votes according to the VTMs from the previous recount and announced as the final results. Otherwise, the City and the clerk took no position on the issues raised by the candidates, and undertook to take all steps necessary and appropriate to implement the court's decision as expeditiously and co-operatively as possible.

[8] I thank counsel, the candidates, and the city and clerk for their thoughtful suggestions. In particular, on behalf of the court, I appreciate the respondent City of Vaughan's statement of acceptance and expeditious co-operation.

### **ANALYSIS AND DIRECTIONS FOR RECOUNT**

[9] It is my conclusion that the recount should not begin with a visual inspection of all ballots, as suggested by the applicant. The *Municipal Elections Act* contemplates the use of electronic tabulation equipment and provides that where there is a recount, it should be conducted in the same manner of counting ballots that was used for the original count, unless a judge orders otherwise (section 60(1)). Corbett J. of the Superior Court stated in *Burton v. Town of Oakville et al.*, [2004] O.J. No. 453, at p. 780 that "it is not appropriate for a Judge to order otherwise because he or she is of the view that a manual recount is more accurate or better reflects the intentions of the voters. That is a choice, in the first instance, for the legislature and the municipality." I agree with that statement in the circumstances here where machine accuracy in tabulation is not a problem.

[10] Any recount should thus proceed by way of VTMs first, and a visual inspection of potentially problematic ballots second.

#### **i. Ballots with no mark in designated space**

[11] The *Act* provides for the marking of a ballot "within the space designated...to the right of the (candidate's) name" (s. 52(3)(a)). It requires rejection from the count of votes that do not

comply with the prescribed rules. O. Reg. 101/97 under the *Municipal Elections Act* prescribes the rules. It provides that a vote not marked inside the space provided for marking the ballot shall be rejected from the count. Section 29(2) of the *Interpretation Act* provides that the word “shall” must be construed as imperative and not permissive. Such imperative language denotes that any ballot with no mark in a designated space to the right of the candidate’s name shall be rejected.

[12] For example, Poupore J. in *Clement and Mitchell (Re)*, [2006] O.J. No. 896 (S.C.J.) considered the validity of a mark on a ballot in a judicial recount of ballots. The voter marked an X next to the name of a candidate, outside of the designated space. There were no other marks on the ballot. It was rejected as an invalid vote. As Poupore J. stated “...although it may be argued that the ballot in question clearly indicates the voter’s intention, I am satisfied that I am bound by the statute to reject the ballot”. While this case was decided under the *Canada Elections Act*, S.C. 2000, c.9, s. 151(1)(b) of that *Act* similarly states that an elector must “mark the ballot with a cross or other mark in the circular space opposite the name of the candidate of his or her choice” and s. 284(1)(b) of the same *Act* provides that “in examining the ballots, the deputy returning officer shall reject one that has not been marked in a circle to the right of the candidates' name. These provisions are thus substantially similar to s. 52(3) of the *Municipal Elections Act* and O. Reg. 101/97.

**ii. Ballots with marks in designated spaces and markings outside designated spaces**

[13] The Court of Appeal has stated that the official or judge conducting a recount must strive to give effect, if possible, to a voter’s intention. The determination of this intention “plainly involves an element of judgment on the part of those charged with the responsibility of counting or recounting ballots.” *O’Donohue v. Silva*, [1995] O.J. No. 3868 at para. 28. Where a ballot has a mark in a designated space provided for a candidate, reference may be made to the voter’s intent in casting the vote.

[14] Therefore, where a voter marks the ballot in the space designated for two candidates, the clerk may consider the ballot as a whole to determine the “clear intention of the vote”. *Clement and Mitchell (Re)*, supra. Similarly in *O’Donohue v. Silva*, supra, the Court of Appeal considered the validity of a ballot where the voter marked the space for more than one candidate. The Court concluded “that in deciding whether a given mark amounts to the “casting” of a vote, the voter’s intention as manifested by the nature of the mark is a relevant consideration to be taken into account in determining whether the vote must be rejected.” While *Silva* was decided under the former *Municipal Elections Act*, R.S.O. 1990, c.E.6 the wording of the relevant provisions regarding the validity of ballots is the same in substance as the provisions under the 1996 *Act*. The *Silva* reasons have also been referred to in other post-1996 decisions (i.e. *Clement and Mitchell*).

[15] Similarly, where a ballot has a marking in the designated space provided for a candidate and additional marking(s) outside the designated spaces, the clerk may consider the ballot as a whole to determine the voter’s intent. While s. 3(2)(ii) of O. Reg. 101/97 provides that ballots may be rejected where they contain writings or marks that may identify the elector, the Court of

Appeal in *Silva* noted that s. 77(2)(d) (a provision substantially similar to s. 3(2)(ii) of the regulation), does not say that any extraneous writing or mark will necessarily spoil a ballot. The ballot will be spoiled only if the writing or mark may identify the elector. The Court of Appeal further states that “in enacting s. 77(2)(d), the legislature clearly cannot have intended that any extraneous writing or mark, no matter how obviously accidental or inadvertent, must invalidate a ballot. By its terms, the section recognizes the possibility of human error”. (*Silva*, supra at para. 26)

[16] In making this finding, the court relies on the principles articulated by Cory J. of the Supreme Court of Canada in *Haig v. Canada*, [1993] 2 S.C.R. 995 at p. 1058-9:

The right to vote is of fundamental importance to Canadians and to our Canadian democracy.

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.

Conversely every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

[17] Accordingly, I direct that the recount shall be conducted in the manner specified in Schedule “A” annexed hereto.

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Howden J.

**Released:** April 17, 2007

**Schedule A**  
**Recount Procedures**

The participants in the recount of ballots cast in the municipal election shall be bound by the following procedure.

1. The recount shall commence within 15 days after the clerk receives a copy of this order;
2. Those present at the recount shall be consistent with Section 61 of the *Municipal Elections Act, 1996*.
3. The programming of the Vote Tabulators will be the same as on the day of the election except that the Tabulators shall be programmed to return any over votes and any under votes for the position of Mayor for hand inspection.
4. All ballots for the position of mayor shall be entered into the Vote Tabulators in the same manner as on the day of the election.
5. All ballots that are either returned or refused by the Vote Tabulators shall be visually inspected to determine voter intention in accordance with the provisions of the *Municipal Elections Act, 1996* and its regulations.
6. Where the designated representatives of both candidates agree as to the voter intent on a ballot that is visually inspected, that ballot shall be added to the count and any such ballot shall not become disputed.
7. Where there is not unanimous agreement between both of the designated representatives of the candidates as to the voter intent of a visually inspected ballot that ballot shall be set aside as a disputed ballot.
8. All disputed ballots shall be reviewed by the designated representatives of both candidates and the clerk. The clerk shall not make a final determination as to voter intent until both candidates, or their designated representatives, have been provided with an opportunity to make submissions, in the presence of the other candidate's designated representatives, on the voter intent with respect to the ballot. The clerk shall make a final determination as to voter intent for those ballots and record them as set out in the *Municipal Elections Act, 1996*.
9. Voter intent on any disputed ballot shall be determined in accordance with the *Municipal Elections Act, 1996* and O. Reg. 101/97. No vote shall be counted where a ballot is not marked inside the designated space to the right of a candidate's name. However, where there are mark(s) for one or more candidates, then voter intent shall be determined by reviewing the ballot as a whole.

10. The clerk shall announce the result on the completion of the recount in accordance with s. 62 of the *Municipal Elections Act*, 1996.