

1989 CarswellOnt 494  
Ontario Divisional Court

Martini v. Toronto (City)

1989 CarswellOnt 494, 14 A.C.W.S. (3d) 66, 32 O.A.C. 52, 41 M.P.L.R. 220, 57 D.L.R. (4th) 481, 68 O.R. (2d) 73

**MARTINI v. TORONTO (CITY) et al.; MARCHESE v.  
HENDERSON et al.; HENDERSON v. MARTINI et al.**

Osler, Reid and Craig JJ.

Heard: January 18, 19 and 20, 1989

Judgment: February 14, 1989

Docket: Doc. Nos. RE2639/88, 1183/88, 44/89

Counsel: *Richard E. Shibley, Q.C.*, for Malcolm Martini.

*Gina S. Brannan* and *James M. Ayres*, for Tony Marchese.

*E.A. Ayers, Q.C.*, and *C.D. Bredt*, for Roy V. Henderson and the City of Toronto.

*Ronald J. Walker* and *Gerald L.R. Ranking*, for Michael Walker.

Subject: Public

APPEAL from a decision of Hawkins J. disputing procedure on recount in a municipal election and APPLICATION for judicial review of the recount.

**February 14, 1989. The judgment of the Court was delivered by Reid J.:**

1 In the municipal election conducted on November 14, 1988, the City of Toronto for the first time used voting machines called "vote tabulators". Four days later, the official results were declared. In Ward 16 Mr. Martini was elected alderman with 5,439 votes, three more than Mr. Walker's 5,436. In Wards 3 and 4, Mr. Marchese was elected to the office of Trustee for the Metropolitan Separate School Board with 1,797 votes, three more than Mr. Ezequiel Silva's 1,794. The total vote for all candidates for that office was 5,097.

2 At least one request was made for a recount, and almost immediately, Mr. Roy V. Henderson, the city clerk, recommended to city council that a general recount be conducted. His concern arose from the failure of the machines to "read" 1,409 of the ballots cast, a number he considered "unusually high". As city clerk, Mr. Henderson was also the returning officer, revising officer, and recount officer for the city. He felt "strongly that the integrity of the electoral process must be above question." The text of his recommendations follows:

In order to prepare the official statement of the municipal election results, I examined all of the polling subdivision statements, and noticed an unusually large number of 'unread' ballots (see attached Appendix) which has caused me some concern as to the complete accuracy of the results. An 'unread' ballot may be because the ballot has been defaced by the voter in some way, such as by a drawing or a signature. However, it may also be because the ballot was improperly produced by the printer, so that the voter's mark is not within the field which the optical scanning equipment in the vote tabulator is programmed to read. I have found several 'off register' ballots among those which were unused on Monday. If any of such 'off register' ballots were used in the voting and were properly marked, they may not have been counted. Since the ballots are now sealed, I cannot check to see if this is the case unless a recount is held.

I feel strongly that the integrity of the electoral process must be above question, and am therefore asking that Council pass a resolution under Section 86(b) of the *Municipal Elections Act*, requiring that I hold a recount of the votes cast in the election. In addition, as there was a question on the ballot in part of Wards 11 and 12, scrutineers could be appointed for that part of the recount in accordance with Section 88(5) of the Act.

**Recommendation:**

That City Council resolve that the recount officer for the City of Toronto be required to conduct a recount of the ballots cast in the municipal election held on November 14, 1988, and that Council determine whether it wishes to appoint scrutineers in respect of the sale of liquor question on the ballot in parts of Wards 11 and 12.

3 City council accepted Mr. Henderson's recommendation. Its concern over the use of the machines is reflected in its resolution, set out in its minutes of November 21, following:

Council had before it the following:

- report (November 18, 1988) from the City Clerk; and
- communication (November 20, 1988) from Robert L. Braun, Election Services Division, Business Records Corporation.

(Copies attached)

Council took the following action with respect to this matter:

1. Adopted the report (November 18, 1988) from the City Clerk, and appointed the following persons to act as scrutineers in respect of the liquor vote question on the ballot in Wards 11 and 12:

- Derwyn Foley, President, West Toronto Inter-Church Temperance Federation; and
- Sidney Solnik, Solicitor

2. Requested the City Clerk to conduct an informal count of the ballots, in the same manner as under the previous rules and regulations, when the computerized recount is done, and that the results of both be published.

3. Requested the City Clerk to do a formal and informal count of Ward 16 as soon as possible, or at the earliest time possible, in order that the candidates know the results quickly.

4. Scheduled an informal Valedictory Meeting of the outgoing Council to be held on December 12, 1988.

In addition, Council requested the incoming Council to establish an Election Task Force to examine any concerns of Members of Council and the general public with respect to the conduct of the municipal election held on November 14, 1988; such Task Force to give consideration to the following:

- (a) Concerns from all candidates in the 1988 municipal election about the process and the machinery used, and a report thereon from the City Clerk to such Task Force by March 1, 1989, on these concerns.
- (b) A recommendation that in the event any elections should be required in the interim, they be handled manually.
- (c) The rescission of Council's previous decision to use automated voting equipment in municipal elections.
- (d) A system be established whereby scrutineers of all candidates may be present during the transportation of ballot boxes before the vote tally.

4 The great task of conducting a city-wide recount was commenced on December 2 and completed on the 3rd, in accordance with elaborate procedures set down by Mr. Henderson. Mr. Martini and Mr. Walker both objected to or disputed 47 ballots during the recount (as was their right under the *Municipal Elections Act*, R.S.O. 1980, c. 308) out of which 10 had been counted for each, and requested Mr. Henderson to make an application to a Judge of the District Court, pursuant to s. 88c of the Act, for a further recount of the 47. That was done before the Honourable Judge Hawkins, who gave his decision on December 21, counting 12 of the disputed votes for Mr. Martini and 17 for Mr. Walker. Both Mr. Walker and Mr. Martini appeal from that decision. In addition, Mr. Martini brings an application for judicial review that questions the legality of the entire recount procedure. Until these proceedings are disposed of, the recount cannot be completed.

5 The recount also altered the result in Wards 3 and 4, Mr. Silva now had 1,878 votes and Mr. Marchese 1,841. The total rose to 5,278. Mr. Marchese appeals to this Court directly from the recount officer. In addition, Mr. Marchese applies for judicial review on the same grounds as Mr. Martini and with the same object of invalidating the entire recount.

6 At the commencement of the hearing, we directed that all proceedings be heard together, reserving our decision on the question whether we should entertain judicial review applications in light of the statutory appeals before us.

7 The Act provides for the use of voting machines, and leaves the decision on their adoption up to the municipalities. Section 42 of the Act provides for the passage of a by-law of the type passed by the city to authorize the use of voting machines. Subsections (2) and (4) read:

(2) In place of using ballot papers under this Act, the council of a municipality may, by by-law passed on or before the 1st day of April in an election year, authorize the use at elections of voting machines, voting recorders or other voting devices, and a copy of any such by-law shall be forwarded by the clerk of the municipality to the Minister forthwith after it is passed.

(4) Where a municipality authorizes the use of voting machines, voting recorders or other voting devices, the Minister shall, by order, provide for procedures which may be necessary to conduct the election by the use of such machines, recorders or devices and the provisions of the order shall be complied with.

[as am. S.O. 1982, c. 37, s. 7]

8 The order required by s. 42(4) is O. Reg. 562/87, as amended by Reg. 680/88. It contains the following provisions:

2. This Regulation applies to an election conducted by a municipality that has passed a by-law in accordance with subsection 42(2) of the Act and intends to use an optical scan system for tabulating the results.

.....

5.(1) The deputy returning officer shall deliver a secrecy folder to each person to whom a ballot paper is delivered at the same time as the ballot paper is delivered.

(2) After marking the ballot in the voting compartment the elector shall,

(a) insert the ballot into the secrecy folder;

(b) leave the compartment without delay; and

(c) deliver the secrecy folder containing the ballot to the deputy returning officer.

(3) The deputy returning officer or an official appointed under subsection 3(1) shall in the presence of the voter and without removing the ballot from the secrecy folder, verify the initials of the deputy returning officer and,

(a) where a vote tabulator is available in the poll, insert the secrecy folder containing the ballot into the feed area of the machine until the machine draws the ballot from the secrecy folder, in full view of the voter; or

(b) where a vote tabulator is not available in the poll, insert the ballot directly into the ballot box from the secrecy folder in full view of the voter.

.....

12.(2) Where any ballot on which the intention of the voter is clearly indicated is damaged or defective so that it cannot properly be processed by the vote tabulator,

(a) a true duplicate copy shall be made, clearly labelled 'duplicate' and bearing a serial number which shall also be recorded on the damaged or defective ballot;

(b) the duplicate copy shall be substituted for the damaged ballot and tabulated; and

(c) the damaged ballot shall be placed in a sealed envelope by the clerk or by a person appointed by the clerk.

(3) Where for any reason it becomes impracticable to count the ballot with the vote tabulator, the clerk may direct that the ballots be counted manually, following as far as practicable the provisions of the Act governing the counting of paper ballots.

.....

(6) If a recount of votes is directed or ordered under the Act, the ballots shall be recounted in the same manner in which they were conducted at the election.

9 Subsection 12(6), as re-en. O. Reg. 680/88, is particularly relied on by the applicant/appellants.

10 Section 59 of the Act provides for the actual procedure to be followed in the polling booth:

59. Upon delivery to him of a ballot paper by a deputy returning officer, the person receiving it shall,

(a) forthwith proceed into the compartment provided for the purpose and shall then and there mark his ballot paper with a cross or other mark with a pen or pencil within the circle or circular space to the right of the name of a candidate for whom he intends to vote;

(b) then fold the ballot paper so as to conceal the names of the candidates and the marks upon the face of it and so as to expose the initials of the deputy returning officer;

(c) then leave the compartment without delay, and without showing the face of the ballot paper to anyone, or so displaying it as to make known how he has marked it; and

(d) then deliver the ballot paper so folded to the deputy returning officer.

Section 71 reads, in part:

71.(2) In counting the votes, the deputy returning officer shall reject all ballots,

(a) that have not been supplied by him;

(b) that contain the names of candidates for one office only and in which votes have been cast for more candidates than are to be elected to the office;

(c) that are separate ballots submitting a by-law for the assent or a question for the opinion of the electors, and votes are cast for both the affirmative and the negative on the by-law or question; or

(d) upon which there is any writing or mark by which the elector can be identified, or that has been so torn, defaced or otherwise dealt with by the elector that he can thereby be identified,

but no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot voids it or warrants its rejection.

(3) Where a ballot contains the names of candidates for more than one office and votes are cast on such ballot for more candidates for any office than are to be elected to such office, such votes are void and shall be rejected, but unless such ballot is rejected under subsection (2), the votes for any other office in respect of which the elector has not voted for more candidates than are to be elected shall be counted.

(4) Where in a composite ballot,

(a) votes are cast for more candidates for any office than are to be elected to such office; or

(b) votes are cast for both the affirmative and negative on any by-law or question,

the votes for such candidates or with regard to the by-law or question, as the case may be, are void and shall be rejected but, unless such ballot is rejected under subsection (2), the votes for any other offices, by-law or question in respect of which votes are correctly indicated shall be counted.

(5) Where part of the votes cast in any ballot are rejected under subsection (3) or (4), the deputy returning officer shall note such fact on the back of the ballot and initial the note, and where all the votes on the ballot are rejected under either or both of such subsections, the ballot shall be treated as a rejected ballot.

Section 88b, as re-en. S.O. 1988, c. 33, s. 9, refers to recounts:

88b.(1) At the time and place appointed for the recount, and in the presence of those persons who are entitled to be present and who have attended, the recount officer shall add the votes from the statements returned to the returning officer by the deputy returning officers, or shall count the ballots received by the returning officer from the deputy returning officers and the number of votes counted at the election, or both, as the recount officer considers appropriate, and for this purpose shall open the sealed envelopes containing,

(a) the ballots that were not objected to and were counted;

(b) the ballots that were objected to but were counted;

(c) the rejected ballots;

(d) the cancelled ballots;

(e) the ballots that were used but were unmarked;

(f) the declined ballots; and

(g) the unused ballots.

(2) Subject to sections 88c and 88d, the recount officer, in conducting the recount, shall determine the validity of ballots, and shall verify or correct the statement of the vote for each polling subdivision.

11 Section 88b(2) is particularly relied upon by the city.

12 Objections and disputes on the recount are provided for in the following [as re-en. S.O. 1988, c. 33, s. 9]:

88c.(1) A candidate, a representative of the candidate or a scrutineer who objects to the validity of a ballot or to the counting of votes in any ballot may request that the recount officer make an application to a judge of the District Court for an order determining the validity of the ballot.

.....

(6) The judge, in the presence of the persons entitled to be present at the recount and who have attended the hearing, shall determine the validity of the ballot or to the counting of votes in any ballot and for this purpose shall open the sealed envelope containing the disputed ballots.

.....

(8) Upon completion of the hearing, the judge shall make an order determining the validity of the ballot and shall,

(a) advise the persons present of the order;

(b) except as provided by subsection (7), seal the disputed ballots in their original envelope; and

(c) return the envelope referred to in clause (b), along with any documents relating to the election that were examined during the course of the hearing, to the custody of the recount officer.

.....

88d. Notwithstanding section 88c, if a party to the recount requests the recount officer to do so, the recount officer shall write the number of the polling subdivision on the back of and initial any disputed ballots and seal them in a separate envelope clearly marked so as to indicate its contents.

13 Section 88c was the basis for the application to Judge Hawkins.

14 I have already noted that the appeals before us include appeals from the decision of Judge Hawkins by Mr. Martini and Mr. Walker. Mr. Marchese appeals directly from the recount officer. The appeals are founded in s. 88j, as re-en. S.O. 1988, c. 33, s. 9, which reads in part:

88j.(1) Any party may appeal to the Divisional Court from the decision of the judge on the application or of the recount officer on the recount, as the case may be, by giving written notice not more than five days following the completion of the hearing or the recount to the other parties concerned and to the judge or the recount officer and the notice may limit the appeal to specified disputed ballots.

.....

(7) One judge of the Divisional Court shall determine the objection pertaining to, or count again, the ballots or such of them as are the subject of appeal, or review the re-addition, as the case may be, and shall immediately certify in writing the decision of the court to the judge of the District Court or to the recount officer.

15 Subsection (7) is of particular relevance, for it is the basis for the city's objection to the judicial review applications. The city points out that the remedy available on appeal is much narrower than the invalidation of the entire recount process sought by way of judicial review.

### Was the Recount Process Invalid?

16 This is the fundamental question. Mr. Shibley and Mrs. Brannan submit that the only proper recount procedure is that set out in subs. 12(6) of the Regulation, i.e., that "the ballots *shall* be recounted *in the same manner* in which they were conducted at the election." They emphasize the words I have underlined. The mandatory tone of the Regulation and the Act is stressed. Section 42 of the Act, it will be remembered, is the only basis for the authority to substitute machine voting for manual voting, and it states in clear language that "the Minister *shall*, by order, provide for procedures which may be necessary to conduct the election by the use of such machines", and that "the provisions of the order *shall* be complied with". Again, I have emphasized the words on which the applicants place so much stress. According to this argument, the first step on the recount was simply to offer all the ballots, unexamined, back to the machines. The result reported by the machines would be the result of the recount.

17 The city and Mr. Walker rely on s. 88b(2) to justify the procedure adopted. It states that "the recount officer, in conducting the recount, *shall* determine the validity of ballots". Again, reliance is placed on the word "shall". Thus, according to that argument, the first step is to examine all the ballots to see if they are valid. Those that are not must then be subjected to a "validity determination" process, which may, or may not, lead to duplicate ballots being prepared for feeding to the machines.

18 The recount procedure was outlined at length and with particularity in written instructions entitled "Recount Overview and Recount Procedure" given by Mr. Henderson to the officials he appointed for the purpose. His authority to conduct the recount is not doubted, and is spelled out in detail in the Act. It should be observed here that although the city had only 250 machines located in as many polling stations, all of the ballots from all 731 polling stations had been fed into the tabulators on voting day. The ultimate object of the recount as carried out was to have all ballots, including duplicates, fed again into the machines. This is made clear from the following statements in the Recount Overview instructions, "The printed record tapes from the Vote Tabulator are the official result of the recount".

19 Mr. Henderson's procedure may be briefly summarized. A large number of Assistant Recount Officers ("AROs") were appointed to conduct the visual inspection of every ballot. They were to apply guidelines set out in Mr. Henderson's instructions, apparently for the purpose of segregating ballots reported by the machines as unread. Those instructions read, in part:

**Validity of Ballots**

The A.R.O. shall review all ballots one at a time in the presence of those entitled to be present for the purpose of identifying and setting aside ballots where:

- 1) Formalities not met (Not Official Ballot or Not initialed by D.R.O.)
- 2) Any writing on ballot
- 3) Marks on Ballot other than in target area
- 4) Ballots marked with a pen other than pen provided
- 5) Over votes
- (6) Ballots candidate/scrutineer wants to dispute (s. 88d)
- 7) Ballots candidate/scrutineer wants to object to (s. 88c)

Ward A.R.O.s will determine the validity of ballots identified as falling into one of the above categories. If a ballot does not fall into the above categories, is marked clearly with the pen provided, and is neither disputed (s. 88d) nor objected to (s. 88c), it is then considered valid and is placed back into the ballot box and is ready for the vote tabulator count.

All other ballots must be placed into 'Validity Determination' envelopes for validity determination by the Ward A.R.O. Once all the 'Validity Determination' ballots have been dealt with they will be put into the appropriate envelopes and placed back into the ballot box and the ballot box will be sealed.

Where the validity of ballot(s) is objected to under s. 88c, the recount for that office will be halted after ballot validity determination (but before the tabulator count begins) and an application made to the District Court for decision on the ballot(s) objected to.

An objection under s. 88c will halt the recount before the vote tabulator count commences for several offices because the objection could call into question the validity of the entire composite ballot. Where ballots are only disputed as

to validity under section 88d but not objected to per se under section 88c, those disputed ballots will be marked as required under section 88d and the recount will continue.

The ballots placed in validity determination envelopes were sent for inspection by Ward Assistant Recount Officers ("WAROs"), one of whom had been appointed for each of the 16 wards. Detailed and lengthy instructions were given to the latter to assist with the determination of the voter's intention, in accordance with the law. Those instructions provided, in part, as follows:

As a Ward Assistant Recount Officer (Ward A.R.O.) you will encounter certain situations where you will be called upon to decide the validity of a ballot. The following list is not intended to be exhaustive of all the possible ballot types you will encounter but is offered as a guideline to help you to determine the validity of ballots before you. It has been compiled using both the statutory requirements found in the *Municipal Elections Act* and decisions about ballots made by judges. The basic principles are that the voter's intention should be fulfilled if at all possible; however, the ballot must be a secret ballot and therefore rejected if marked by a voter with the intention of being identified.

Should you decide that a ballot ought to be rejected on the grounds of invalidity, you shall in red ink write on the back of the ballot 'rejected', the reason for the rejection and place it into the appropriate 'rejected' envelope.

Sections 59(a) and 71(2), (3) and (4) are the main provisions of the Act that deal with Validity of Ballots. They are attached.

The attachments included pages of references to the Act, particularly s. 71(2), decisions of the Courts in suits over the validity of ballots and a legal treatise on the subject (to which I shall refer later). On the basis of those instructions, duplicates of defective ballots were to be prepared. They were intended not only to express the intention of the voter but to be acceptable to the machines.

20 Other instructions were given on procedures for disputed ballots and ballots subject to objection, on the preparation of duplicate ballots, and on using the machines to count the ballots as the final step. The prospect that even duplicate ballots might defeat the machines was contemplated and dealt with by the preparation of duplicates of the duplicates.

21 This procedure obviously involved the exercise of considerable discretion by the officials conducting the recount, in particular the AROs in making the first determination of validity and the WAROs in making the second.

22 The entire process was carried out in the presence of the candidates and their representatives, including legal counsel, and was described in affidavits they filed. As already noted, some objections were registered to decisions of the recount officers.

23 At the heart of the problem lay the fact that the machines had merely reported some ballots as unread, and therefore uncounted, but had not segregated or identified them. Why they were unread would never be known if the law required them merely to be fed back into the machines on a recount. No one who was familiar with the operation of the machines and the way they were programmed could be very happy about that. In the first place, the machines reported as unread only ballots from which no vote at all could be extracted. Every section of the ballot would have to be spoiled for the ballot to be unread. It is not difficult to understand Mr. Henderson's concern when 1,409 ballots were reported as wholly ineffective. His first thought appears to have been that the ballots had been improperly cut by the printer. Some such explanation would easily spring to mind, rather than spoilage by the hands of individual voters. Because a composite ballot was used, 1,409 unread ballots could mean three times that many unread votes. A ballot, correctly marked, is shown in Appendix A.

24 Thus, if for some unknown reason, a ballot was unread, the vote for all offices was disqualified. While, as the cases show, voters sometimes make strange and unlikely marks on ballots, it is difficult to imagine 1,409 ballots wholly



disqualified through some act of 1,409 individual voters — hence Mr. Henderson's concern that there might have been some other cause.

25 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(2)(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. A striking example of such a vote is shown below. It is taken from the treatise furnished to the recount officers, written by Mr. W.D. (Rusty) Russell, Q.C., and published in the *Municipal World* for August 1988 under the title, "Is the Ballot Valid or Invalid? Update 1988".

{Graphic not reproduced}.

26 A converse example from Mr. Russell's fascinating article is the ballot that came under scrutiny in the case of *Re Dingley and McLean*, [1973] 2 O.R. 414, 34 D.L.R. (3d) 38 (Div. Ct.).

{Graphic not reproduced}.

27 Because the mark was placed outside the scanning area, this vote would not be read by the tabulators, yet it had held in that case to be valid.

28 The number of unread ballots was of interest because Mr. Henderson thought it to be unusually high, but the machines' failure to identify those unread meant that the report was of no assistance to the recount officers. The first object of the validation process was apparently to identify the unread ballots. The Recount Overview instructions to the AROs set out above reflected information from the manufacturer about what ballots the machines could not read, but they were not wholly based on the characteristics of the machines or their program. They were an amalgam of information from the manufacturer and the requirements of the Act, particularly the formalities set out in s. 71. Thus, item 4, in the instructions to AROs, "Ballots marked with a pen other than the pen provided", was clearly based on information from the manufacturer for, as we shall see, the scanner could read the black mark made by the pen provided in the polling booth but could not read the blue or red ink from a pen or pencil a voter might have taken from his or her pocket. There is, of course, no law that requires a special pen or pencil to be used. A guideline based on the requirements of s. 71 would be number 1, "Formalities not met (Not official ballot or not initialled by D.R.O.)", a defect the machines were not set up to detect. One common to both would be number 5, "Overvotes", for those were not only invalid under s. 71 but would be reported as unread by the machine.

29 The ballots placed in the validity determination envelopes were put before the Ward AROs who were to apply the elaborate set of directions already mentioned. These referred to ss. 59(a), 71(2), (3) and (4) as the "main provisions of the Act that deal with the validity of ballots", to a copy of the report of the decision of the Divisional Court in *Moss v. Blackburn* (1986), 53 O.R. (2d) 429, 26 D.L.R. (4th) 312, 12 O.A.C. 387 and to Mr. Russell's paper. A memorandum was included to point out, apparently as an afterthought, that, contrary to the instructions given to them and to the AROs, the lack of a District Returning Officer's ("DRO's") initials did not invalidate a ballot.

30 It is not necessary to describe the instructions further. It is sufficient to observe that they were not always clear, that they required the application of a good measure of individual discretion, and that decisions made by reference to them could easily vary with the decider. Moreover, there is evidence that they were inconsistently applied, as we shall see.

31 When all the ballots of a polling station had been reviewed for validity, those found valid were to be placed back in the ballot boxes. The object of "validity determination" was to create duplicates the machines would read expressing the intention of the voter. The last step in the process was to feed all the ballots back into the machines for a recount tabulation.

32 Had the machines been programmed and capable of segregating ballots they could not read, this process would have been greatly eased. That they were capable of rejecting unsatisfactory ballots is clear from the instructions contained in the Recount Overview under the heading "Vote Tabulator Count," which provides:

A.R.O.s will feed ballots into vote tabulator right side up and top of ballot first.

Ballots returned by Vote Tabulator (message on tape)

1) 'Misread Ballot Reinsert or Replace Problem Ballot'

Feed ballot into vote tabulator a second time. If vote tabulator accepts it continue on, if rejected again place in envelope marked 'Validity Determination' Ballots for Ward A.R.O. to review

2) '??Not Voted??' Return to Vote Review

Place in 'Validity Determination' envelope for Ward A.R.O. to review

Once all the ballots have been fed into the machine the A.R.O. must wait until the Ward A.R.O. has decided what to do with 'Validity Determination' Ballots, then the final printed record tape for that subdivision should be produced. All the ballots should be placed into the appropriate envelopes, and placed into the ballot box.

There will be three copies of the printed record tapes from each of the poll divisions. One will be placed in the ballot box. One will be posted for candidate/scrutineers to examine. One will be used for data entry and total vote calculation by the City's mainframe computer.

The printed record tapes from the Vote Tabulator are the official result of the recount.

33 A further instruction spoke of the machines "kicking out" rejected ballots. This indicates that the machines were reprogrammed for the recount. While rejection of a ballot at the poll on the occasion of the vote might be inappropriate as endangering secrecy, the segregation of unread or defective ballots in some way by the machine so that they could be examined by the DROs in the same way that they would be on a manually recorded vote would cure the problem of the machines registering invalid voters or failing to record valid votes and doing nothing more than report certain ballots as unread.

34 The whole recount process is strongly attacked not only as contrary to the legislation but as uncertain and confused. Indeed, Mrs. Brannan went so far as to describe it as "chaotic". There appears to be some basis for these epithets. A great number of people had to be enlisted and hastily instructed. The vagueness of the written instructions was amply demonstrated in argument. The inconsistency in the interpretation and application of the instructions was also demonstrated. At about 1:30 p.m. on December 2, the first day of the recount, Mr. Robert Braund appeared on behalf of the manufacturer of the machines and explained their capabilities. He said that he did not believe that they were capable of reading marks made in other than black ink with the pen provided in the polling booths. The AROs were thus instructed to set aside ballots marked in other inks. This instruction was somewhat surprising in light of directions to the same effect already given to both AROs and WAROs. It is clear that those instructions had not been consistently followed and that a number of ballots that should have been set aside for validity determination had already been placed back into the ballot boxes as valid. In an attempt to rectify this, the AROs were instructed to reopen the boxes they or the scrutineers could remember as containing such ballots. With contests won or lost by such narrow margins as three votes, such haphazard expedients are clearly undesirable.

35 The difficulties caused by the use of the machines and the strategies adopted in an attempt to deal with them are disquieting. It must be true that, when a vote is taken without machines, questions will arise over the validity of ballots. Yet there is a traditional procedure, dignified by law, available to deal with them. There has never been, to my knowledge, any general dissatisfaction with it. While it may be imperfect, it does not demand that the peculiar characteristics of a

machine or its program be met. It is devoted solely to the interpretation of a ballot so as to give effect, as far as possible, to the lawful intention of voters. It is not complicated by the necessity to create ballots that the machines will accept and read.

36 That brings us to the question whether the procedure adopted was valid and lawful and therefore must be accepted in spite of its defects. Counsel for the city and Mr. Walker urge its acceptance as the best means of determining the actual intention of the voters and thus having the contests resolved on that basis. With respect, this seems to me to be at odds with the city's position that when one accepts the machines one must accept their shortcomings, including the fact that they count invalid votes and fail to count valid ones. Why the intention of the voter is not the governing consideration on the vote but becomes the governing consideration on a recount is frankly beyond me.

37 We were asked at one point by applicants to interpret subs. 12(6) of the Regulation as "a complete code" governing the recount. Yet that would make a recount virtually meaningless. If the machines are running properly, and if nothing more is done than to feed the ballots back into the machines, in order that the recount will be done "in the same way as the vote," the recount should give the same result as the vote. Nothing will have been accomplished, and the unease felt by Mr. Henderson and the city council will remain unaddressed. Even Mr. Shibley appears to be unhappy with the prospect of simply offering the ballots in their original condition once again to the machines, and urges us to give directions that will assure the machines are properly programmed. To that I must say at once that I do not think myself sufficiently expert as to give such directions, even if I thought, which I do not, that this Court had the authority to do so.

38 We are faced with an awkward dilemma. Permitting the recount to stand, having been conducted on a different basis than the vote, as we are urged to by counsel for the city, is as unpalatable as requiring the ballots merely to be fed back into the machines with the knowledge that candidates may be elected contrary to the will of the people rather than in accordance with it. In my opinion, the answer lies in the Regulation. While subs. 12(6) provides that on a recount the ballots shall be recounted in the same manner as the election was conducted, subs. 12(3) clearly contemplates the prospect of that being impracticable. Because of deficiencies either in the machines or their programs, it was impracticable simply to put the ballots back into the machines. The clerk's instructions recognize that impracticability and that something more was required. The result was a hybrid procedure unknown either to the Act or the Regulation. In my opinion, Mr. Henderson should have directed that the ballots be counted manually, following as far as practicable the provisions of the Act governing the counting of paper ballots without the use of machine tabulators, in accordance with subs. 12(3) of the Regulation. That was a duty imposed on the clerk by the legislation, and the law is clear that a failure to perform a statutory duty may be corrected by a mandatory order of the court. While subs. 12(3) states that the recount officer "may" direct a manual recount, in my opinion, he has a duty to do so when resort to the tabulators is clearly impracticable. I do not read the clause as authorizing the recount officer knowingly to permit a patently impracticable procedure to continue. I read it as authorizing him or her to abandon a procedure that appears impracticable whether that appearance occurs before it is undertaken, or while it is occurring, or when it has been completed. No other interpretation makes any sense to me. It is trite that language which might on its face appear permissive may in the context be read as mandatory. I would direct that the recount officer conduct a manual recount pursuant to subs. 12(3) of the Regulation, in the electoral contests for alderman and school trustee challenged in these proceedings.

### **Does Judicial Review Lie?**

39 That brings us to the question whether such an order may be made, which in turn raises the question whether judicial review is available in light of the appeal provided under s. 88j. It is clear from the Act that the decision of a recount officer or judge from which the appeal is provided is not from the general process of recount but only from the determination of the validity of ballots or the counting of votes in a ballot under ss. 88b(2) and 88c. There is no reference to and no provision in ss. 88b(2) or 88c for the determination of the validity of the entire recount process by either a recount officer or the Judge, and it follows that an appeal under s. 88j must be confined to decisions on individual ballots. Thus, the function to be performed by this Court on appeal is confined to the determination of the validity of challenged ballots and/or to recount them as necessary. A challenge to the general validity of a recount based on a wholly invalid process must be made by some other means. This is, thus, not a case in which an appeal is an equally effective alternative

to judicial review. In the absence of some specific statutory procedure, such as an appeal wide enough to encompass the challenge and lead to an appropriate remedy, a challenge of the process can be launched only by way of judicial review. That judicial review is available to challenge the exercise of a statutory power cannot be questioned.

40 In my opinion, the order I have proposed should be made. In view of the difficulty that might be experienced in attempting to reconstitute the panel, I would invite written submissions on costs.

*Appeal and application allowed.*

#### **APPENDIX A**

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