1995 CarswellOnt 1045
Ontario Court of Appeal

Silva v. O'Donohue

1995 CarswellOnt 1045, [1995] O.J. No. 3868, 130 D.L.R. (4th) 334, 27 O.R. (3d) 162, 30 M.P.L.R. (2d) 162, 59 A.C.W.S. (3d) 902, 7 W.D.C.P. (2d) 46, 87 O.A.C. 161

# TONY O'DONOHUE v. MARIO SILVA, BOB ALLISAT, FERNANDO DIAS COSTA and BARBARA CAPLAN

Robins, Finlayson and Doherty JJ.A.

Heard: November 1-3, 1995
Judgment: December 14, 1995
Docket: Doc. CA C22083

Counsel: *John E. Callaghan* and *James M. Ayres*, for appellant.
*John A. Campion* and *Alan L.W. D'Silva*, for respondent Mario Silva.
*Thomas Wall*, for respondent Barbara Caplan.

Subject: Public

Appeal from judgment reported at (1995), 28 M.P.L.R. (2d) 9 (Ont. Gen. Div.), allowing appeal of judicial recount.

**The judgment of the court was delivered by *Robins J.A.*:**

1 This appeal concerns the question of whether certain ballots cast in the election held on November 14, 1994, for the office of City Councillor for Ward 3 of the City of Toronto are valid ballots under the provisions of the *Municipal Elections Act*, R.S.O. 1990, c. M.53 (the "Act"). A copy of the ballot is appended to these reasons [p. 177, post].

2 On election night, Mario Silva was declared elected to this office by a margin of 15 votes over Tony O'Donohue. He was found to have received 2,976 votes as against 2,961 votes for Mr. O'Donohue. A subsequent recount by a recount officer, conducted pursuant to s. 91 of the Act, produced a different result: Mr. O'Donohue received 2,942 votes and Mr. Silva received 2,933 votes, a margin of 9 votes in favour of Mr. O'Donohue.

3 The matter then proceeded to a judicial recount pursuant to s. 97(1) of the Act. This recount was conducted by Chief Judge Linden of the Ontario Court (Provincial Division). On the learned judge's view of the validity of the ballots in dispute, Mr. O'Donohue had 2,957 votes and Mr. Silva 2,951, a margin of 6 votes in favour of Mr. O'Donohue. Mr. O'Donohue was accordingly declared the winner of the judicial recount.

4 This decision was appealed by Mr. Silva to the Ontario Court (General Division) pursuant to s. 98 of the Act. The appeal was heard by Blenus Wright J., who, for reasons which are fully and carefully set out in his judgment dated June 5, 1995 [reported at (1995), 28 M.P.L.R. (2d) 9 (Ont. Gen. Div.)], disagreed with the result reached in the judicial recount. On Wright J.'s view of the disputed ballots, Mr. Silva had 2,979 votes as against Mr. O'Donohue's 2,969 votes. On this calculation, Mr. Silva would win the election by 10 votes.

5 Mr. O'Donohue now appeals to this court from the decision of Wright J. He contends, in essence, that Wright J. misinterpreted and misapplied the Act by failing to reject certain ballots that, by the provisions of the Act, he was compelled to reject.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

6 At the outset of the hearing before this court, the respondent Silva moved to quash the appeal. He argued that the Act creates a complete statutory scheme or code which governs all aspects of recounts in municipal elections. Section 98 specifically provides for an appeal to the Ontario Court (General Division) from a judicial recount. But there is no provision for any further appeal, and, the argument goes, the Act, read as a whole, should be interpreted as manifesting a legislative intention to exclude such further appeal. Since the procedures contemplated by the Act have run their course, in the respondent's submission, the matter is concluded, and the appeal ought not to be entertained.

7 The court rejected this argument, and dismissed the motion to quash. Section 6(1)(*b*) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, confers general supervisory jurisdiction on the Court of Appeal over final orders of judges of the Ontario Court (General Division), subject to certain exceptions referred to therein that are inapplicable to the present circumstances. Under this section, an appeal lies to the Court of Appeal from a final order of a judge of the Ontario Court (General Division).

8 In the absence of an express statutory exclusion of an appeal from a final order of a General Division judge sitting, as in this case, on appeal from a Provincial Division judge under a provincial statute, the legislature cannot be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(*b*). Wright J. was acting within his jurisdiction as a judge of the General Division when he made the final order in question, and it follows that an appeal from that order lies to this court. In reaching this conclusion, we were of the opinion that *Herman v. Canada (Deputy Attorney General)* (1979), 26 O.R. (2d) 520 (C.A.), a case in which the right of appeal was determined by federal legislation and not by the *Courts of Justice Act*, was not apposite to the situation at hand.

9 Turning to the issues in this appeal, it appears that 197 ballots were in dispute on the judicial recount, and on the proceedings by way of appeal. Of these 197 ballots, 128 were counted as valid in both courts. The remaining 69 ballots were rejected by Chief Judge Linden. On appeal, Wright J. determined that 40 of these previously rejected ballots were valid, and should be counted. The counting of these 40 ballots produced the different election result.

10 In the main, the appellant challenges Wright J.'s decision to count certain of the ballots that had been rejected by Chief Judge Linden. On the view I take of this appeal, we are not called upon to engage in a further recount, and repeat the vote-by-vote analysis performed by the judges below. The court's primary concern is whether proper principles were applied by the appeal court judge in determining the validity or invalidity of the disputed ballots. To determine whether proper principles were applied, it is necessary to consider and construe the relevant provisions of the Act. If ballots were accepted or rejected contrary to the meaning and intent of the Act, and the election result as it now stands could thereby be affected, I would remit the matter back to the appeal court judge to deal with in accordance with our reasons.

11 The ballots now in dispute are enumerated in the appellant's factum, and fall into three general categories. The first category is that in which electors placed a cross or other mark outside the circle or circular space to the right of a candidate's name. This is contrary to s. 65(*a*) of the Act, which says that electors are to "mark the 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 the candidate for whom he or she intends to vote." Section 77(3) deals specifically with ballots marked in this fashion. It states that:

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

12 In some of the impugned ballots, the mark was placed in the hatched-marked circle to the extreme right of the candidates' names. In others, the mark was placed to the left of the candidates' names. Although it is abundantly clear for whom the electors intended to vote, these ballots were nonetheless properly rejected. Section 77(3) dictates that result: a vote that is not marked within the circle or circular space to the right of the name of the candidate cannot be counted. Voters were directed by means of a statement appearing at the top of the ballot to the effect that they were to "mark ballots with an X in the circles provided below." That direction, however, in so far as it refers to the use of an "X," cannot

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved. 

be treated as mandatory. A ballot marked with a check, a line, or other mark in the circle to the right of the candidate's name is also acceptable. But a ballot marked somewhere other than in the circle is not.

13 The second category of ballots in issue involves seven ballots in which the elector marked the circle beside more than one candidate's name. This has been referred to as the "over-vote" issue. Under s. 77(5) of the Act:

> Where in a composite ballot,
>
> > (*a*) votes are cast for more candidates for any office than are to be elected to such office; ...
>
> . . . . .
>
> the votes for such candidates ... 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.

After inspecting each of these ballots, Wright J. concluded [at p. 19 M.P.L.R.] that in six of them, "the voter placed a mark in the circle for one candidate, changed his or her mind, and then put an X in the circle for another candidate." He found the candidate the voter intended to vote for to be clear, and, accordingly, accepted the six ballots. Wright J. pointed out that his decision to consider the intention of the voter in determining the validity of these ballots was consistent with the approach taken in the judicial recount, where eleven similar ballots were accepted.

14 The appellant submits that in this situation, the voter has effectively voted for two candidates, and Wright J. erred in taking the voter's intention into account. The appellant asks that these ballots, as well as those in the same category that were accepted on the judicial recount, be rejected under s. 77(5).

15 I cannot accept this submission. I am of the opinion 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 under s. 77(5). I think it clear on any reasonable examination of these ballots that the voter did not intend to cast his or her vote for more than one candidate. It is apparent, from looking at the ballot, that the voter meant to scratch out whatever mark he or she had placed in the wrong circle, and to cast a vote only for the candidate next to whose name the X was marked. Furthermore, there does not appear to be any rhyme or reason for accepting similar ballots on the judicial recount, but not in the appeal. As a practical matter, the breakdown of these votes is such that whether the entire category is included or excluded from the count, the election result will not be affected. I would not disturb Wright J.'s conclusion on this issue.

16 The third and most important category of ballots in issue are those that, although properly marked within the circular space to the right of the candidate's name, contain some other writing or mark that allegedly may identify the elector. The largest number of ballots rejected in the judicial recount fell into this category. However, on Wright J.'s approach, a majority of these ballots were held to be valid. The question is whether, as the appellant contends, Wright J. erred in counting these ballots.

17 Before referring more particularly to the extra marks or writings on the ballots in this category, it is important to have in mind the legislative provision that calls for the rejection of ballots with features that may identify the elector. Section 77(2)(*d*) of the Act states that:

> (2) In counting the votes, the deputy returning officer shall reject all ballots,
>
> . . . . .
>
> > (*d*) upon which there is any writing or mark by which the elector may be identified, or that has been so torn, defaced or otherwise dealt with by the elector that he or she may 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.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

18 Election statutes in this country have traditionally contained provisions of this nature. The intent is to ensure the secrecy of the ballot, and to prevent election fraud and bribery. Because candidates and their scrutineers are entitled to participate in the counting process, a ballot with identifying marks, defacement, tears, or other unusual characteristics may be a signal of a sinister purpose. The identification may be intended to confirm that an elector has voted for a particular candidate so that he might receive a benefit from the candidate in exchange for his vote (customarily, cash or liquor, or both). Section 77(2)(*d*) is designed to prevent this kind of fraudulent election practice, and ensure that votes are secret and not bought.

19 The section, it will be noted, 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*. What approach, then, should be taken in deciding, in any given case, whether an extraneous mark or writing can be considered such that it may identify the elector?

20 Wright J. was of the view [at p. 16 M.P.L.R.] that the approach to the validity of a vote should be "a liberal, purposeful approach to fulfil the purpose for voting: that the vote count for the candidate for whom the voter intended to vote." In his opinion [at pp. 16-17 M.P.L.R.]:

> The right to vote will have a hollow ring if the approach to the determination of the validity of the vote is so narrow and restrictive that voter intention is given virtually no meaning.
>
> . . . . .
>
> I decide that, for a ballot to be rejected under s. 77(2)(*d*), it must be proven on a balance of probabilities that the voter made the writing or mark, and that the writing or mark may identify the voter. Within the writing or mark, there must be a means of identification of the voter. It must be shown that it is more probable that the purpose for the writing or mark is to identify the voter, and that there is no other rational purpose for the writing or mark.

21 The appellant submits that the learned appeal judge erred in interpreting s. 77(2)(*d*) liberally, and in holding that voter intention should be taken into account in deciding whether a mark or writing may identify the voter. This section, the appellant contends, should be strictly construed so as to provide a clear and unambiguous guide for the counting of votes by Deputy Returning Officers ("D.R.O.s") on election night. The legislature's intent ought not to be overruled or ignored simply because more precise language could perhaps have been used. Furthermore, the argument goes, s. 77(2)(*d*) [R.S.O. 1980, c. 308, s. 71(2)(*d*)] was amended in 1990 by changing the phrase "*can* be identified" to "*may* be identified." Since "can" is defined as meaning "to be able to, have the ability, power or skill to," while, in contrast, "may" is defined as merely "expressing possibility," it follows that prior to the 1990 amendment, the D.R.O. was required to have greater certainty that the elector could be identified, because now, all that is required is that the elector might possibly be identified. The appellant says that the marks or writings on the ballots in issue (in this case, none of the ballots were torn or otherwise defaced) were such that they might identify the elector, and hence the ballots ought not to have been counted.

22 A number of judicial statements, admittedly in cases involving factual situations different than this, are advanced in support of the contention that the section should be strictly interpreted so that voter intention plays no role in determining whether a particular mark or writing may identify a voter. For example, reference is made to the statement of Idington J. in *Bennett v. Shaw* (1922), 70 D.L.R. 348 (S.C.C.), at p. 351:

> I observe Stuart J. regrets that Parliament could not have used language that would have settled the matter of marking ballots, without leaving it to Judges to cudgel their brains over (67 D.L.R. at p. 748).
>
> I am rather inclined to regret, with great respect, that some Judges in the past happened occasionally to be not satisfied with the common sense use and application of plain language, lest some perverse or stupid electors should by its application lose their votes.
>
> Common sense says the loss of such electors' votes is no harm to the country, and it happens generally, though not here, that they are equally distributed between or amongst the candidates.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved. 

23 Reference is also made to *Mills v. Reid* (1963), (sub nom. *Re Election of Reid)* 38 D.L.R. (2d) 472 (Man. C.A.), where Monnin J.A. said, at pp. 488-489:

> From an anonymous and inanimate ballot, a returning officer should not have to infer the intention of the elector who was unable to himself signify this intention by the simple task of placing one X only in the proper box square. Election officers and judicial officers should not have to review and assess the frailties of human individuals who have defectively marked ballots and attempt to assess the true intent therefrom. I realize that this may cause hardship to some, but far better it be that a firm and rigid pattern of marking ballots be enforced than a more flexible one with all its inherent disadvantages. On this aspect I can do no better than repeat what Mignault J. said in *In re West Calgary Election; Bennett v. Shaw, supra*, at p. 360 D.L.R. ...
>
>> The result is that the appellant, although a considerable majority of those who marked the disputed ballots evidenced the intention of voting for him, loses the election and the appeal he has entered against the decision of the Election Court. At this late day, it is strange that citizens of this country should not be familiar with the manner of voting. And however regrettable it may be that the will of the majority should not prevail, still that will must be expressed in the required manner. Otherwise it is of no effect.

24 With deference to the able argument of counsel for the appellant, I cannot agree that s. 77(2)(*d*) should be given the narrow interpretation he proposes. This Act is intended to obtain a fair expression of the preferences of duly qualified electors, and should be construed so as to further that basic purpose. The object of the Act is to ascertain the popular will, not thwart it. Section 77(2)(*d*) should be interpreted to qualify the basic purpose of the Act only to the extent needed to serve the aim of the section, that is, to prevent voter fraud.

25 Rather than adopt the restrictive approach taken in the cases to which reference has been made, I prefer the approach recently articulated by Cory J. in the Supreme Court of Canada in *Haig v. Canada (Chief Electoral Officer)* [1993], 2 S.C.R. 995. This approach better meets the realities of our contemporary multicultural society, where the first language of many citizens, particularly many citizens in Ward 3 of the City of Toronto, is a language other than English. While the Supreme Court was concerned, in *Haig v. Canada*, with the constitutionality of the right to vote in the context of a referendum, Cory J. affirmed the principle of enfranchising voters whenever possible, and limiting the scope of provisions which tend to disenfranchise voters. He stated at pp. 1058-1059:

> 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*. [Emphasis added.]

In my opinion, these principles are equally applicable to the interpretation of the franchise provisions at issue in this case, and s. 77(2)(*d*) should be viewed in this light.

26 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. A voter should, of course, merely place an X in the circle to the right of the name of the candidate for whom he or she intends to vote, and no more. However, a small number of voters, through haste, carelessness, misunderstanding, or ignorance, may not strictly adhere to the prescribed method of marking a ballot. When this happens, the departure from the norm must be tested for its validity or invalidity according to the provisions of s. 77. If, as I noted earlier, the departure is in marking the ballot somewhere other than in the circular space to the right of the candidate's name, s. 77(3) requires that the vote be rejected. If, on the other hand, the departure is in placing some mark or writing on the ballot, the ballot must be rejected under s. 77(2)(*d*) only if the mark or writing may identify the elector.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

27 The disputed ballots in this case illustrate that a wide range of writings or marks may, for one reason or another, appear on ballots. Whether any given writing or mark may be said to identify the elector is an issue that must be determined on the basis of objective considerations. The question is whether, viewed objectively, it can fairly and reasonably be concluded that the mark or writing on the ballot is such as to create a realistic possibility that it may identify the elector.

28 The determination of this question plainly involves an element of judgment on the part of those charged with the responsibility of counting or recounting ballots. They are compelled by the terms of the legislation to make a judgment call. In making the call, it would be unreasonable, and, in my opinion, contrary to the spirit of the Act, to say that most every mark or writing may contain within it the possibility of identifying, and thereby disenfranchising, a voter. One should be slow to impute an improper purpose for the marks or writing. Ballots should be counted rather than rejected unless there are compelling reasons for rejection.

29 I agree also with Wright J. that voter intention can be a significant factor in deciding whether extraneous marks or writings may identify an elector. If, on an objective examination of a ballot, there is a probable reason or rational explanation for the mark or writing, this can be taken into account in deciding the likelihood of the elector being identified by the mark or writing. A voter's intention in making the mark or writing, as manifested on the face of the ballot, is relevant to the resolution of the identification issue provided for in s. 77(2)(*d*). I agree with the statement of Laforme J. to this effect in *Lucas-Astley v. Barrie*, [1995] O.J. No. 255 (Ont. Gen. Div.):

> While there is no hard and fast rule as to the determination of when a ballot is vitiated by a mark or writing, it must continue to be the case that it is a matter of determining, to the extent possible, the intention of the voter. That is, did the voter intend to be identified by the mark or writing in question? In this regard, the amending of section 77(2) from "can be identified" ... to the present "may be identified" does not remove the necessity to assess the intention of the voter. At the very least, intention of the voter remains a part of the overall consideration to be given to the mark, writing, tear, or defacement.
>
> In my view, it cannot be said that the intention of the legislature in enacting this subsection is that any mark, tear, or writing, however inadvertent or accidental, and regardless of its size, should vitiate a ballot. Other factors, including intention, must be considered.

30 This brings me more specifically to the ballots in dispute under s. 77(2)(*d*). They were divided into five subcategories, and dealt with by Wright J. as follows:

1. Ballots that contained names or words which appeared to have no connection to the election. These were rejected. The names or words were found to be such that they may identify a voter. Counsel are agreed that these ballots were properly rejected.

2. Ballots in which the name or number of the candidate (i.e., the number appearing to the left of the candidate's name) for whom the elector had voted was written in the section of the ballot reserved for the election to the office of Metropolitan Councillor. Since this office was uncontested, the section was hatch-marked, and marked "Acclamation." Wright J. was of the view that these voters were simply acclaiming the candidate for City Councillor for whom they had voted by writing his name in the acclamation section. On the basis of voter intention, he ruled that these ballots should be counted.

3. Ballots in which writing or marks were placed in the referendum section. Seven voters did more than mark an X in the Option-Yes or Option-No circle in response to the question: "Are you in favour of eliminating the Metro level of government?" Some wrote "yes" or "no," or "this is my vote," or, in one case, changed a "yes" vote by scribbling over it, initialling the error, and placing a clear X in the Option-No. One voter crossed out the referendum section and marked "Review" in its place; another wrote "undecided" in the section. Two voters commented on or gave opinions about the referendum question. In validating these ballots, Wright J. held [at p. 21 M.P.L.R.] that the writing or

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved. 

mark in the referendum section of the ballots "should not wipe out a clear intention by a voter to vote in the City Councillor section." "In particular," he said, "any writing in the referendum section which is just an expression of an opinion should be disregarded when considering the weight to be given to voter intention, and whether a vote for a candidate should be counted."

4. Ballots in which initials were placed on the back of the ballots, under the words "Initial Here," in a box intended for D.R.O.'s initials. It appears that some of these ballots had one set of initials, others had two or three sets. There was some confusion as to whether the initials were those of the D.R.O. or his or her assistant, or the voter. Wright J. held, after examining the ballots individually, that the initials on five of these ballots may have been the initials of a voter, but decided that the ballots should be counted. In this respect, I may say that it appears to me that the initials on these five ballots can constitute "a mark by which the elector may be identified," and ought to have been rejected. However, even if Wright J. can be said to have erred in accepting these ballots, their breakdown in terms of the votes cast is such that the decision to count them could not have affected the result ultimately reached by him.

5. A miscellaneous group of ballots containing a variety of writings or marks in various places on the ballot which do not fit into the four above subcategories. The appeal judge carefully considered each of these ballots before accepting most of them. Without detailing the marks or writings, by way of example: one voter circled the number 9 to the left of the name of June Rowlands, for whom he had voted for Mayor; another wrote "yes" next to her name; and a voter, who cast no vote for any candidate for Mayor, placed a large X through the names of the candidates for that office, a question mark in the hatch-marked Acclamation section, and a diagonal line through the right side hatch-marked area.

31 All in all, there were 197 ballots in dispute before Wright J., of which 128 had been counted on the judicial recount and 69 had been rejected. Wright J. ruled that the 128 counted ballots would remain counted, and that 40 of the 69 previously rejected ballots would also be counted. Of these 40 ballots, 28 were cast for Mr. Silva, giving him a total of 2,979 votes, and 12 were cast for Mr. O'Donohue, giving him a total of 2,969 votes.

32 In reaching this result, Wright J. carefully examined each of the allegedly spoiled ballots, and comprehensively reviewed the prin ciples which he considered applicable to their validity or invalidity. He made no error in law in taking voter intention into account in deciding either the over-vote or the identification issue. In regard to the latter, he, in effect, did this for the purpose of determining whether the marks or writings were such as to create a realistic possibility that they may identify the voter. As I indicated earlier, the intention of the voter, as manifested on an objective view of the ballot, may provide a probable reason or rational explanation for the marks or writings, and can serve as a significant factor in assessing the likelihood of a voter being identified. In my opinion, Wright J. did not misinterpret the Act in adopting the approach he did in order to determine whether a particular mark or writing is one "by which the elector may be identified."

33 Nor, in my opinion, can it be said that he misapplied the Act or committed any reversible error in the conclusions that he reached with respect to the ballots in dispute under s. 77(2)(*d*). It must be borne in mind that as this section is framed, there is no hard and fast rule for determining when a ballot will be vitiated by a mark or writing. This is essentially a factual issue to be determined by the persons responsible for counting or recounting the votes. They are required to exercise their best judgment in making the determination. Whether a particular mark or writing may reasonably lead to voter identification is a matter upon which opinions may differ. In this case, another judge may have taken a different and equally supportable view of certain ballots than Wright J. This follows from a statutory provision that by its terms requires an exercise of judgment to determine a ballot's validity, and that was not intended to produce a definitive result.

34 As I said earlier, this court is not engaged in a recount. The usual principles of appellate review are applicable. Before the court may properly intervene, it must be shown that the appeal court judge's determination of the s. 77(2)(*d*) issue was affected by some palpable and overriding error, or that he exercised his discretion in making this determination on the basis of some wrong or inapplicable principle of law. That is not the case here. It cannot be concluded that Wright J. erred in law in the manner in which he tested the validity of the ballots. Nor can it be concluded that it was not open

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved. 

to him to make the findings he did on his assessment of the ballots, even though another view may have been taken of certain ballots. Accordingly, there is no warrant for this court's intervention.

35 In sum, for the reasons I have stated, I am of the opinion that Wright J.'s conclusions with respect to the three categories of ballots in dispute are in compliance with the provisions of ss. 77(3), 77(2)(*d*) and 77(5), respectively, of the Act, and the election result as determined by him must stand.

36 On the matter of costs, Wright J. ordered that the costs incurred by Tony O'Donohue and Mario Silva on the appeal before him, the recount before the Ontario Court (Provincial Division) and the recount before the City Clerk, be paid by the City of Toronto on a solicitor and client scale. The City, through the City Clerk, who is a party to these proceedings, seeks leave to appeal this order. The City asks that the award be reduced to one of costs payable on a party and party scale.

37 This matter can be disposed of briefly. Section 100 of the Act provides as follows:

> 100.(1) Unless a court otherwise orders, the costs, including the costs of the candidates, of a recount under this Act whether conducted by a recount offer or a judge shall be borne by the municipality, school board or local board to which the recount relates.
>
> (2) Despite subsection (1), if a court finds that an application or appeal is frivolous or vexatious, the court may order that the costs of the application or appeal be paid by the person who made the application or appeal.
>
> (3) Nothing in subsection (2) limits or restricts the discretion of a court in awarding costs.

38 The appeal court judge is clearly vested with a discretion to award costs against the municipality under these provisions, and is entitled to determine to what extent the costs shall be paid by the municipality. It cannot be concluded that the judge was guilty of any error in law or in principle in the manner in which he exercised the discretion. Accordingly, there is no ground upon which this court may interfere with the award. While I would grant leave to appeal costs, I would dismiss the appeal.

39 The appeal before this court is not an appeal "under the Act" as provided for by s. 100(1), and the costs of these proceedings are not covered by s. 100. In all the circumstances of this matter, I am of the opinion that at this stage, the parties are on their own, and no further award of costs should be made against the City.

40 In the result, I would dismiss the appeal, the motion to quash, and the City's appeal as to costs, all without costs.

. . . . .

*[Graphic not Reproduced]*

*Appeal dismissed.*

**End of Document** Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.