

NOVA SCOTIA COURT OF APPEAL

Citation: Warrington v. Lunenburg (Municipality), 2006 NSCA 78

Date: 20060628

Docket: CA 257717

Registry: Halifax

Between:

Gordon E. Warrington

Appellant

v.

Gordon Pettipas, Clerk of the Municipality of Lunenburg,
Chris McNeill, Clerk of the Region of Queens Municipality and
Returning Office for the Africa Nova Scotia Member of the South Shore Regional
School Board, Sandra Vernon, Candidate for the African Nova Scotia member of
the South Shore Regional School Board, Ken Smith, Clerk of the Town of
Bridgewater, Bea Renton, Clerk of the Town of Lunenburg, Pamela Myra, Clerk
of the Municipality of the District of Chester and Kyle Hiltz, Clerk of the Town of
Mahone Bay

Respondents

Judges: MacDonald, C.J.N.S. and Bateman and Fichaud, JJ.A.

Appeal Heard: June 6, 2006, in Halifax, Nova Scotia

Held: Appeal is allowed and election voided, per reasons for
judgment of Fichaud, J.A.; Bateman and Hamilton, JJ.A.
concurring.

Counsel: Brent H. Silver, for the appellant
Nobody appearing for the respondents

Reasons for judgment:

[1] On October 16, 2004 voters on the South Shore elected their school board. Sandra Vernon won election as the African Nova Scotia member of the South Shore Regional School Board. Gordon Warrington was the defeated candidate. Mr. Warrington points to irregularities in the vote. He asked the Supreme Court for an order that the vote was void. Justice Stewart agreed that 45 of the 96 cast ballots were invalid. But she held that the election was conducted in accordance with the principles of the legislation and that the deficiencies did not affect the results of the election. These are the saving conditions in s. 164 of the *Municipal Elections Act*. Justice Stewart upheld Ms. Vernon's election. Mr. Warrington appeals. The issue is whether the judge erred by ruling that the election, with such deficiencies, was conducted in accordance with the saving conditions of s. 164.

1. Background

[2] Section 42A of the *Education Act* S.N.S. 1995-96, c. 1, as amended S.N.S. 2000, c. 11, s. 7 and S.N.S. 2003, c. 9, s. 45, provides for the election of an African Nova Scotian ("ANS") to each regional school board. One ANS member is to be elected by "African Nova Scotian electors" in each school region. Section 42A(1) defines "African Nova Scotian" as "a person who is African Nova Scotian or a black person", and defines "African Nova Scotian elector" as a person qualified to vote in a school board election who is either an African Nova Scotian or the parent of an African Nova Scotian. Section 42A(4) says that the election of the ANS member is to be held at the same time as the regularly scheduled election of the school board. Section 45A(10) permits an ANS elector to vote for either an ANS member or a non-ANS member, but not both.

[3] Section 42A(5)(c) states how an elector is identified at the polling station as an ANS elector.

(c) where a person intends to vote in an election of an African Nova Scotian to a school board, that person shall not be required to take an oath or make an affirmation in a form attesting to that person's status as an African Nova Scotian elector, but shall be required to confirm the person's status as an African Nova Scotian elector as defined in the Education Act and, where a person wishes to provide the confirmation, the person may provide the confirmation by requesting the ballot to vote for the African Nova Scotian elector and that request constitutes the confirmation;

Section 42A(8) says that such a confirmation in good faith is “conclusive evidence that the person is an African Nova Scotian elector”.

[4] On October 16, 2004, during a municipal election, electors for the South Shore Regional School Board voted for an ANS member. There were two candidates - the respondent Sandra Vernon and the appellant Gordon Warrington. Eight ballots were rejected, leaving 96 cast votes: 61 for Ms. Vernon and 35 for Mr. Warrington. The recapitulation sheet lists these 96 cast votes:

<u>POLLING STATION</u>	<u>MS. VERNON</u>	<u>MR. WARRINGTON</u>
1. Polling station 1 (Milton)	5	5
2. Polling station B (Little Tancook Island)	16	1
3. Polling station 30B (Midville)	18	8
4. All other polling stations	22	21

[5] Justice Stewart ruled that all the ANS ballots at the Little Tancook Island and Midville polling stations were invalid. That is because the poll workers gave the ANS ballot to every elector, without a request by the elector for an ANS ballot. Under s. 42A(5)(c) of the *Education Act*, a request for an ANS ballot is the qualifying condition for an ANS elector. That condition was not satisfied for those ballots. The judge found that two persons who cast ANS ballots at the Milton polling station had not made the request required by s. 42A(5)(c), and that their votes were similarly invalid. There was no evidence whether these two Milton individuals had voted for Ms. Vernon or Mr. Warrington. On the appeal nobody disputed the judge’s ruling that these votes were invalid.

[6] In the Supreme Court Mr. Warrington challenged other ballots. Justice Stewart dismissed those challenges, and Mr. Warrington’s appeal does not contest that aspect of the ruling.

[7] The result is that 17 votes at Little Tancook, 26 votes at Midville and 2 votes at Milton, totalling 45 of 96 cast votes, were invalid.

[8] Section 42A(9) of the *Education Act* says that the *Municipal Election Act* RSNS 1989, c. 300 applies to the election of ANS members to school boards.

[9] Sections 158(1) and 164 of the *Municipal Elections Act* state:

158 (1) Where an election or a vote of the electors for the determination of any matter that the council has directed be put before the electors ***has not been conducted in accordance with this Act, a court may, upon application, declare the election or the vote to be void.***

164 No election shall be declared invalid

(a) by reason of any irregularity on the part of the clerk or the returning officer or in any of the proceedings preliminary to the poll;

...

(d) by reason of non-compliance with the provisions of this Act as to the taking of the poll, as to the counting of the votes or as to limitations of time; or

if it appears to the judge that the election was conducted in accordance with the principles of this Act and that the irregularity, failure, non-compliance or mistake did not affect the result of the election.

(Emphasis added)

I have italicized the phrases that impact the issues on this appeal.

[10] After the judge concluded her analysis of Mr. Warrington's challenges to the validity of ballots, she said:

Being satisfied that the election was conducted in accordance with the principles of the *Municipal Elections Act* and that the deficiencies raised by the applicant with respect to each of the three polling stations, specifically, Little Tancook Island's 17 ballots, Midville Branch's 28 ballots, and the 2 ANS School Board ballots cast in Milton have not affected the results of the election, I declare the election of ANS member of SSRSB not to be invalid.

The judge's reference to 28 Midville ballots included 2 rejected ballots plus the 26 cast ballots on the recapitulation sheet.

[11] Mr. Warrington appeals to this court under s. 162(1) of the *Municipal Elections Act*.

2. Issue

[12] Mr. Warrington's factum lists five points that I consolidate to one basic issue. Did the judge misapply s. 164 of the *Municipal Elections Act* by ruling that the election "was conducted in accordance with the principles of the *Municipal Elections Act* and that the deficiencies . . . have not affected the results of the election"?

3. Standard of Review

[13] The standard of review is that for civil appeals: correctness for extractable issues of law and palpable and overriding error for both issues of fact and issues of mixed fact and law with no extractable legal error. *Housen v. Nikolaisen* [2002], 2 S.C.R. 235 at ¶ 8, 10, 19-25, 31-36. There is no dispute as to the facts. They are set out in uncontested affidavits, were accepted by the judge and are not challenged on this appeal. The issue is whether the judge misapplied s. 164 to those facts. That is an extractable issue of law to which I will apply correctness.

4. Section 164 of the Municipal Elections Act

[14] The judge held that 45 of the 96 cast ballots on the recapitulation sheet were invalid. Under s. 158(1) of the *Municipal Elections Act*, these deficiencies entitled the judge to void the election - unless s. 164 saves the election. Section 164 applies:

. . . if it appears to the judge that the election was conducted in accordance with the principles of this Act and that the irregularity, failure, non-compliance or mistake did not affect the result of the election.

[15] The judge relied on s. 164 to save the election. But she did not explain her conclusions that (1) the acceptance of the 45 invalid ballots accorded with the principles of the *Act* and (2) the 45 invalid ballots did not affect the result. Her conclusions appear to rest upon the following reasoning. At the Little Tancook

and Midville polling stations all the cast ballots were invalid. This left Ms. Vernon with 27 votes and Mr. Warrington with 26 votes from the remaining tallies, including Milton, on the recapitulation sheet. At Milton there were 2 invalid ballots, but there was no evidence how these persons voted. Without evidence that both voted for Ms. Vernon, Mr. Warrington had not proven that he received more valid votes than did Ms. Vernon. So Mr. Warrington had not satisfied an onus to prove he had the majority of the valid votes that were cast in accordance with the principles of the *Act*. Accordingly Ms. Vernon's election satisfied the principles of the *Act* and the 45 invalid votes did not affect the result.

[16] In my view, the judge's conclusion and this reasoning misapply s. 164 of the *Municipal Elections Act*.

- (a) The reasoning and conclusion assume that, to void an election, the challenger must establish how each unqualified elector voted. If the irregularity had been to deny a qualified elector the opportunity to vote, the challenger would have to prove how each such individual would have voted. To void a vote it would be necessary to prove that someone other than the declared winner actually received or would have received the highest number of valid votes. The challenger effectively would have an onus to establish a recount by affidavits of electors. This would make it virtually impossible to successfully challenge a deficient election. The ballots are to be secret, as directed by s. 101 of *Municipal Elections Act*. A challenger cannot feasibly obtain an affidavit from each elector waiving ballot privilege, and swearing how the elector voted or would have voted.
- (b) The approach would defeat the purpose of ss. 158(1) and 164. Those provisions do not enact a recount process to declare another candidate as elected. A separate recount process is governed by ss. 130-136 of the *Municipal Elections Act*. Sections 158(1) and 164 void an election, leading to a new election. There would be no reason for a new election if the challenge under ss. 158(1) and 164 resulted in an effective recount.

[17] The judge did not review authorities governing s. 164 and, in fairness, from the transcribed submissions it appears that no case law was cited to her by the various counsel in attendance. The wording of s. 164 has antecedence in the

common law and in election legislation in the United Kingdom. In *Morgan v. Simpson*, [1975] 1 Q.B. 151 (C.A.), at pp. 161-4, Lord Denning reviewed the history and interpretation of the English provision. Wording similar to s. 164 appears in s. 218 of the *Elections Act*, R.S.N.S. 1989, c. 140, and in provincial election legislation elsewhere. Canadian jurisprudence on the matter has followed a winding path that I will not retread. See Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (looseleaf), Thomson Carswell, vol. 1 ¶ 31.10, 31.11. But I will summarize the elements of the approach that derives from s. 164 and the case law.

[18] **First:** Section 158(1) is the affirmative authority to void the election. Section 164 is abrogative, and directs the judge not to exercise her discretion under s. 158(1).

[19] **Second:** Section 164 says that no election shall be voided “if it appears to the judge” that the two conditions exist. The onus to satisfy the judge is on the party who relies on s. 164 to save the election: *Re Hickey and Orillia (Town)*, (1908) 17 O.L.R. 317 (Div. Ct.), at pp. 327-28 *per* Anglin, J. *Hickey* has been cited in many subsequent decisions. To the same effect: *Baxter v. White* (1997), 167 N.S.R. (2d) 161 (S.C.), at ¶ 24 *per* Haliburton, J. In *Pollard v. Patterson* (1974), 50 D.L.R. (3d) 542 (MQB) at p. 556, affirmed (1974), 53 D.L.R. (3d) 215 (C.A.) at pp. 217, 219, leave denied (1975), 53 D.L.R. (3d) 215N (SCC), Justice Wright considered the practical effect of the onus:

For, given the many improper additions to the voters’ list (because not properly sworn or vouched for), how can the Court declare itself to be satisfied that the votes so counted did not materially affect the result of the election? For it is no answer to say that, of those votes, because there is no way to establish in whose favour they were cast, therefore it cannot be said, with certainty, that the result would be different if they were set aside. That view of the case, propounded in *Smith v. Baskerville*, *supra*, was rejected by our Court of Appeal in the later case of *Nuytten v. Strutynski*, *supra*, and see too *Lamb v. MacLeod*, *supra*. And so, the election must be set aside.

I am aware that some authorities have cast the onus on the challenger to the election: e.g., *Camsell v. Rabesca*, [1987] N.W.T.R. 186, 1987 CarswellNWT 17 (S.C.) at ¶ 55. For the reasons discussed earlier (¶ 16), the approach of *Hickey*, *Baxter* and *Pollard* is more consistent with the structure and purpose of ss. 158(1) and 164.

[20] **Third:** To save the election, both conditions in the concluding passage of s. 164 must exist. If the respondent fails to prove either that (1) the election was “conducted in accordance with the principles of this *Act*” or that (2) the irregularity “did not affect the result”, then s. 164 is inapplicable. See *Morgan*, p. 164; *Hickey*, at p. 342 *per* Riddell, J. and at pp. 327-8, *per* Anglin, J.; *Wright v. Koziak* (1981), 114 D.L.R. (3d) 549 (A.C.A.), at p. 558; *Pollard* (Q.B.), at p. 546.

[21] **Fourth:** Section 158(1) permits the Court to declare an election void if the election “has not been conducted in accordance with this *Act*”. The first saving condition of s. 164 is that the election “was conducted in accordance with *the principles of this Act*”. The semantic distinction recognizes that the irregularities may just be technical non-compliance with procedures in an election that, overall, complied with the principles of the legislation. Section 164 aims to save that election, provided that the irregularities did not change the result. *Morgan* at p. 164; *Pollard* (Q.B.) at pp. 544-6; *Hickey* at pp. 341-2. So the court must decide whether the irregularities are serious enough to offend the governing principles in the electoral legislation. Without attempting an exhaustive list, there are two such principles, drawn from the authorities, that are relevant to this case.

- (a) The recipient of the most votes of qualified electors wins the election. A serendipitous result, where nobody knows who received the most votes, is without any principled basis. *Wright* at p. 559 and *R. v. Clay*, [1945] 4 D.L.R. 424 (Alta D.C.) at pp. 431-2. This means that irregularities that could not place the result of the election at risk may not offend the principles of the *Act*. But irregularities of a nature or number that could have altered the result should not occur in any election that is conducted in accordance with the principles of the electoral legislation. In *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C. *in banco*) at p. 351 MacDonald, J. said:

There is abundant authority for a court declaring an election void because of the casting of ballots by unqualified persons to an extent making it impossible to determine what candidate was elected, and that it is not necessary (as indeed it is impossible under the law) for it to be shown that the illegal ballots form part of the successful candidate’s majority (*Nuytten v. Strutynski*, [1939] 3 D.L.R. 311).

A typical statement of this rule is to be found in the Headnote to *Lamb v. MacLeod No. 5*, [1932] 3 W.W.R. 596, that where on a trial of an election petition:

“It is proved that unqualified persons voted and that the number thereof was more than the majority by which the successful candidate was declared elected, the election must be declared void, since the law will not permit the secrecy of the ballot to be violated even in the case of such voters by ascertaining for which candidate they voted, and therefore it cannot be said any candidate received a majority of the qualified votes.”

In *Blanchard*, at p. 320 Chief Justice Ilesley expressed similar views. To the same affect *O'Brien v. Hamel* (1990), 70 D.L.R. (4th) 466 (Ont. Div. Ct.), at pp. 472, 474; *Pollard* (Q.B.), at pp. 546, 551, 556; *Marion v. Hebert*, [1937] 3 D.L.R. 585 (MCA) at p. 588; *Lamb v. McLeod (No. 5)*, [1932] 3 W.W.R. 596 (SCA) at pp. 601, 603. If the irregularities are such that the result may have been affected, the party relying on s. 164 must prove that the result was not affected. If he does so, then he will satisfy both conditions of s. 164. Otherwise, he will satisfy neither condition.

- (b) If the deficiency involves a substantial breach of a statutory requirement, then the election was not “conducted in accordance with the principles of this *Act*”. It does not matter whether or how the deficiencies affected the result. Section 164 does not operate, and the election will be declared void. *Hickey*, at p. 328; *Pollard*, (Q.B.), at pp. 544-6, 551, 555-6; *O'Brien*, p. 473. As Lord Denning said in *Morgan*, p. 164:

If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

[22] With those principles in mind, I will consider the election of October 16, 2004. In my view, the ANS election cannot be saved by s. 164. The election was not conducted in accordance with the principles of the *Act* on each of the two bases described above.

- (a) There was widespread irregularity that could have changed the result. At the two major polling stations, Little Tancook and Midville, all the ANS ballots were invalid. The successful candidate received 26 more

votes than did Mr. Warrington. Forty-five of the 96 cast ballots were rejected. After the 43 invalid ballots at Little Tancook and Midville are expunged, Ms. Vernon would lead by one vote. It is possible that the two invalid ballots in Milton were cast for Ms. Vernon. If so, then removing these two invalid Milton ballots would change the result, leaving Mr. Warrington with a majority of one. The respondents did not prove that either of these two Milton votes was cast for Mr. Warrington.

- (b) Under ss. 42A(5) and (8) of the *Education Act* the electors are only qualified to cast a ballot for an ANS candidate if they have confirmed their status as an ANS elector by requesting ballot. Section 42A(9) adopts the *Municipal Elections Act* process, which dovetails the eligibility condition of s. 42A(5) and (8) with “the principles of this *Act*” in s. 164 of the *Municipal Elections Act*. Eligibility qualifications of electors are a cornerstone principle of the elections legislation. The polling officers systemically ignored this statutory principle at the two largest polling stations. The election was not conducted in accordance with the legislation, and the effect on the result is immaterial.

5. Conclusion

[23] In my respectful view, the judge erred in law in her application of s. 164. The election was not conducted in accordance with the principles of the *Act*, and cannot be saved by s. 164. I would allow the appeal without costs and order that the election of Ms. Vernon as the ANS member of the South Shore Regional School Board is void under s. 158(1) of the *Municipal Elections Act*.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bateman, J.A.