
When Courts Decide Elections

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Investigations into voter irregularities in the 2011 federal election have led to some court challenges. While it is unusual for courts to overturn the result of an election and order a new one, it is even more rare for a judge to declare one candidate elected in place of another. However, this did occur in three cases discussed in this article.

In 1872, Quebec's legislators made the courts responsible for ruling on the validity of Legislative Assembly elections. The Superior Court and subsequently the Magistrate's Court, the Provincial Court and the Court of Quebec each had the task of deciding contested elections.¹

The court deciding a legislative election can confirm the election of a member of the legislature if it concludes that the allegations are unsubstantiated or the irregularities it identified did not affect the results of the election.²

The results can be deemed invalid if the election involved fraud³, if the irregularities are greater than the winning margin of the victorious candidate⁴ or if the winner is determined to have been ineligible.⁵ The courts have declared about fifty elections void for these reasons, mostly in the 19th century.

In addition, one candidate can be awarded a seat in the place of another. This happened in the Québec elections in Montmagny in 1881 and in l'Assomption in 1960. A similar situation happened in the Bristol South East election in Great Britain in 1961.

Montmagny

Louis-Napoléon Fortin was elected as the Liberal Member of the Legislative Assembly (MLA) for the riding of Montmagny in a by-election on November 30, 1876, and was re-elected in the general election of 1878. On October 29, 1879, he joined the Conservative Party with four of his colleagues, leading to the fall of Joly de Lotbinière's Liberal government. The floor-crossers were nicknamed the "five sheep" or the turncoats. Fortin was Turncoat Number Five.⁶

Fortin ran for office again in Montmagny in the general election of December 2, 1881, this time as a Conservative, against Liberal candidate Nazaire Bernatchez. Under Joseph-Adolphe Chapleau's leadership, the Conservatives elected 50 MLAs while the Liberals were left with 15.

In Montmagny, the returning officer's definitive count of the votes from all ballot boxes gave a 16-vote majority to the Liberal, Bernatchez.⁷ Fortin asked for a judge to count the ballots again. Judge Auguste-Réal Angers reviewed each ballot and rejected 27 from one of the two boxes in the parish of Saint-François.

Fortin was declared elected with a four-vote majority. Even if fraud is suspected, the role of the judge overseeing a recount is limited to reading, attributing or rejecting ballots, as the case may be, and counting them to establish the election results.

Bernatchez filed a petition to contest the election within the statutory deadline, demanding that the rejected ballots be accepted and that he be given back the mandate Fortin took from him. Although the matter was before the courts, Fortin could be sworn in as an MLA and sit in the Legislative Assembly until the final decision on the contested election was issued.⁸

The case was heard by three judges of the Superior Court, Adolphe-Basile Routhier, Marc-Aurèle Plamondon and Auguste-Réal Angers. Deliberations focused on the 27 ballots rejected during the judicial recount.⁹ The rejected ballots were of two kinds: six bore marks identifying voters, contravening the *Quebec Election Act*, and 21 were not initialled by the deputy returning officer as the Act required.

The evidence presented to the court clearly established that the identifying marks on the six ballots were not present when the deputy returning officer counted them at the Saint-François polling station. It

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appeared that these ballots “were rendered invalid by marks and indications made later by an unknown hand”.¹⁰

In concluding that these six ballots should be reinstated to Bernatchez, the court laid some of the blame on election staff: “It [the fraud] would have been difficult to accomplish if the returning officer and his deputy had taken the precautions they should have taken”.¹¹

There remained the question of the 21 ballots rejected because they were not initialled by the deputy returning officer. Although it was virtually irrelevant since Bernatchez had a two-vote lead on his opponent with the six votes restored to him, the court still gave its opinion after considering the following alternatives: “either the deputy returning officer forgot to add his initials to the ballots or the unknown hand that altered the other six ballots substituted the 21 ballots before us for those previously counted”.¹² The judges decided that Bernatchez should not suffer because of the deputy returning officer’s negligence or be an innocent victim of fraud. In either case, the 21 ballots must be reinstated in his favour.¹³

On January 5, 1883, the Superior Court ruled that Bernatchez “obtained a majority of 23 lawful votes and was and is indisputably elected”.¹⁴

L’Assomption

On June 22, 1960, Liberal leader Jean Lesage and his powerhouse team won the general election and ended the reign of the Union Nationale. In the riding of L’Assomption, the initial results showed that Frédéric Coiteux, the Liberal candidate, had lost to the incumbent MLA, Victor Chartrand, by 14 votes.

Given the narrow majority of the Union Nationale candidate, the Liberals went to court to seek a judicial recount, which took place at the old courthouse in L’Assomption, Judge Honorius Michaud of the Magistrate’s Court presiding. The ballots were examined carefully for a full five days, and on July 14, 1960, Chartrand was declared the winner by a single vote.¹⁵

Two voters petitioned the Magistrate’s Court within the deadline imposed by the Quebec *Contested Election Act* and asked it to declare that Chartrand was not elected by a majority of L’Assomption voters, that Frédéric Coiteux had received a majority of votes and that, therefore, the seat should be given to him.¹⁶ Alternatively, if the first two points were rejected, they asked that Chartrand be found guilty of fraudulent acts and tactics, and that his election be overturned.

It was established in court that fraud had been perpetrated. First, seven illegal votes for Chartrand were cast by “floating voters,” people who impersonated registered voters. Second, a truck driver with the provincial roads department cast an illegal vote after being threatened with losing his job if he did not vote for the Union Nationale candidate. Third, three illegal votes were the result of voter corruption; specifically, voters were paid to vote for Chartrand.

On March 16, 1961, Chartrand resigned without waiting for resolution of the contested election, perhaps realizing that his mandate was in danger.

On July 12, 1961, André Régnier, Gérard Denis and Antoine Lamarre of the Magistrate’s Court issued their decision.¹⁷ Pursuant to section 388 of the *Election Act*, of Chartrand’s total of 8,000 votes, they rejected 11 illegal votes involving fraud, leaving him with a total of 7,989, 10 fewer than Coiteux. The judges concluded that Chartrand did not commit fraud but his supporters had and, as a result, he was improperly declared elected. The judges also ruled that Coiteux must be declared the new MLA for L’Assomption.

Bristol South East

Tony Benn was elected to the British House of Commons as the Labour MP for Bristol South East in a by-election held November 30, 1950. His constituents placed their trust in him again in the 1951, 1955 and 1959 elections.

His father, William Wedgwood Benn, was made a peer in 1942 and died on November 17, 1960. Because the eldest son had been killed in combat during World War II, Tony Benn inherited the title of Viscount Stansgate and a seat in the House of Lords. On November 29, 1960, he asked a committee of the House of Commons if he could take his seat as an MP. Despite Benn’s several attempts to renounce the succession, both before and after his father’s death, his seat was declared vacant subsequent to the report by the Committee of Privileges and a motion to that effect adopted by the House of Commons on April 13, 1961.

A by-election was held on May 4, 1961. Benn again ran for office and was elected with a majority of 13,044 votes over his only opponent, Conservative Malcolm St. Clair. The latter contested the election on the grounds that Benn was ineligible for the seat and claimed that the seat should go to him. The evidence presented to the election court showed that St. Clair had used all effective means to inform voters of Benn’s situation. A notice sent to all voters in the riding advised them that Benn did not have legal standing to be a candidate because he was a member of the House

of Lords and that any votes for him would be rejected. The same notice was published in the local papers and posted near almost every voting place. Moreover, St. Clair explained the situation in his speeches and statements.

Consequently, in accordance with the decision in *Beresford-Hope v. Lady Sandhurst*,¹⁸ the court concluded that all votes for Benn, an ineligible candidate, must be rejected and St. Clair declared elected without a return to the polls.

As the court found in a decision made nearly a century earlier:

...it is plain that if a elector knows as a fact that the candidate for whom he is about to vote is disqualified, and yet persists in voting for him, the elector's vote is as utterly thrown away as if he had voted for a dead person, or for the man in the moon.¹⁹

Stripped of his victory, Benn continued his campaign to be allowed to renounce his peerage outside Parliament. The Conservative government finally agreed to his demands, and the *Peerage Act* was passed by the British Parliament on July 31, 1963.²⁰ A few minutes after the Queen gave it Royal Assent, Benn renounced his title.

St. Clair had committed not to defy the will of the people if Benn eventually became eligible once again. He therefore resigned his seat and did not run against Benn, who nonetheless faced three opponents. Benn handily won the by-election of August 20, 1963, taking 79.7% of the vote.

Conclusion

At the end of the process for contesting an election, the court has the legal authority to declare elected a candidate other than the one declared the winner after the votes were counted. However, it can hand down this decision only when the petition before it seeks such an outcome. Moreover, the candidate claiming the seat on the grounds that ballots were invalidated by fraud or irregularities must convince the Court that without the irregularities he or she would have obtained the most votes. When the opponent's eligibility is called into question, the court must be convinced that a vast majority of the riding's voters were clearly and fully aware that the candidate was legally disqualified from running for office.

Notes

1 See *The Controverted Elections Act of 1872*, S.Q., 36 Vict., c. 5, *An Act to amend the Controverted Elections Act*, S.Q., 1952-53, c. 3, s. 3, *An Act to amend the Courts of Justice Act*, S.Q., 1965, c. 17, *An Act to amend the Courts of Justice Act*

and Other Legislation to Establish the Court of Quebec, S.Q., 1988, c. 21.

2 For example, *Hamelin v. Houde*, R.L. 1971, 257 (C.S.); conf. [1972] C.A. 777.

3 For example, the most recent cases in Quebec: *Thérien v. Pellerin*, [1997] R.J.Q. 816-845 (C.A.); *Maltais v. Saint-Laurent* [1971] C.A. 233.

4 *Wrzesniewskij v. Attorney General (Canada)*, 2012 ONSC 2873 (CanLII). The case was heard by the Supreme Court of Canada on July 10, 2012.

5 No known cases in Quebec. However, Great Britain has had three since the 1950s. In *Re Fermanagh & South Tyrone Election Petition*, *Grosvenor v. Clarke*, *The Table* 1955, p. 59, and *Re Mid-Ulster Election Petition*, *Beattie v. Mitchell*, *The Table*, 1955, p. 65, the candidate with the most votes was declared ineligible because he had been sentenced to a 10-year prison term. The other precedent, *Re Parliamentary Election for Bristol South East*, [1961] 3 *Weekly Law Reports*, 577, is discussed later in this article.

6 *Les renégats du 29 octobre*, pamphlet attributed to Louis Fréchette.

7 *Report of the Clerk of the Crown in Chancery on the General Elections of 1881*, Quebec City, Presses à vapeur d'Augustin Côté, 1882, p. 51.

8 Elected as the MLA for Saguenay in the by-election of October 5, 1964, Pierre-Wellie Maltais was re-elected in 1966. That election was contested, and the final decision was not issued until 1971, allowing him to sit through the entire 28th Legislature and stand for re-election again in the 1970 election, in which he was defeated.

9 See also *Bernatchez v. Fortin et Lépine*, 8 R.J.Q. 49 (January 23, 1882, Judge Angers) and *Regina v. Huot*, 8 R.J.Q. 57 (December 31, 1881, Judge Angers).

10 *Bernatchez v. Fortin*, Q.L.R. (1883) p. 89 (C.S.).

11 *Id.*, p. 90.

12 *Id.*, p. 92-93.

13 *Ibid.*

14 *Id.*, p. 95.

15 *La Presse*, July 15, 1960.

16 *Paquet et Rochon v. Chartrand*, Magistrate's Court, District of Joliette no. 25963 and District of Montreal no. 1149, July 12, 1961, Judges André Régnier, Gérard Denis and Auguste Boyer.

17 Being absent, Antoine Lamarre did not sign the decision; *Journals of the Legislative Assembly*, January 9, 1962, p. 9.

18 *Beresford-Hope v. Lady Sandhurst*, *Law Reports 1889*, 23 Queen's Bench Division, 79.

19 *The Queen v. The Mayor of Tewkesbury*, *Law Reports* (1867-68) 3 Queen's Bench, 629, 634. In this case a candidate was declared ineligible because of his status as mayor and election scrutineer, and his election was annulled. The seat was not awarded to this rival because of his ineligibility and the consequences were not known to the voters.

20 *United Kingdom Statutes*, 1963, c. 48.