Judicial Recounts: An Inside View

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Canada's 41st general election was held on May 2, 2011. There were bitter disputes over the results in some ridings after certain candidates won their seats with razorthin margins. To determine once and for all who won and who lost, judicial recounts were ordered in four ridings: Montmagny–L'Islet–Kamouraska–Rivière-du-Loup, Etobicoke Centre, Nipissing–Timiskaming, and Winnipeg Centre. This article looks at the history of judicial recounts, the process that was used to examine the ballots in Montmagny–L'Islet–Kamouraska–Rivière-du-Loup, and Mr. Justice Gilles Blanchet's rulings on the disputed ballots.

Judicial recounts involve having a judge review the ballots to determine the election results in a riding. The process first appeared in federal electoral legislation in 1878[1] shortly following the introduction of the secret ballot.[2]

The House of Commons Debates reveal little except that Hector Cameron, Member for Victoria North, once called for the right to a recount to be limited to cases where the margin was 50 or fewer votes; he pointed out that in Ontario, the right to a recount was limited to cases where the margin was fewer than 30.[3]

However, nothing came of it, and for almost 125 years judges were at liberty to order a judicial recount on the affidavit of a credible individual that the returning officer or deputy returning officer improperly counted or rejected any ballot papers or improperly added up the votes.[4] This changed in 2000 with the passage of new electoral legislation.[5]

There is now an automatic judicial recount "[if] the difference between the number of votes cast for the candidate with the most votes and the number cast for any other candidate is less than 1/1000 of the votes cast …."[6] In that case, it is up to the returning officer, within four days after the results are validated, to make a request to a judge who sits in the electoral district where the results are validated.[7]

As well, when the margin between the top two candidates is equal to or greater than the margin resulting in an automatic recount, any elector may apply to a judge for a judicial recount. To be accepted, the elector must satisfy the judge, through an affidavit of a credible witness, that

1. a deputy returning officer has incorrectly counted or rejected any ballots, or has written an incorrect number on the statement of the vote for the votes cast for a candidate; or
2. the returning officer has incorrectly added up the results set out in the statements of the vote.[8]

Automatic or not, a judicial recount may take one of the following forms, depending on the conclusions sought by the applicant: either the judge examines, allocates or dismisses, if necessary, each ballot and counts them to determine the election results in a riding; or the judge adds up the number of votes again based only on the statements provided by the deputy returning officers.[9]

When the judge must examine and count each ballot, both valid and rejected ballots, the judicial recount may be time-consuming and span several days. For example, in 1963 it took Justice Paul Sainte-Marie four days to examine the 17,028 ballots cast in the federal riding of Pontiac–Témiscamingue.[10] Following the Quebec provincial election of November 15, 1976, the judicial recount of the 30,536 ballots in the riding of Hull began on November 22; since it was entangled with several other motions before the court,[11] the recount was not completed until December 22.[12]

During the judicial recount in the federal riding of Montmagny–L'Islet–Kamouraska–Rivière-du-Loup in the wake of the election of May 2, 2011, everyone wanted it to be completed as early as possible. The judge had a full agenda that did not allow him, in the short term, to spend more than three days on the recount; the Conservative candidate hoped to overturn the five-

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ballot margin between him and his main challenger so he could potentially be given a ministerial portfolio;[13] and the NDP candidate was eager to consolidate his victory.

The number of ballots to recount made it impossible for the judge to personally count, following the customary procedure, all 48,225 ballots within a very short timeframe. Spending an average of five seconds to unfold each ballot, examine it and show it to the candidates' officials would have taken the judge roughly 66 hours to complete; given an eight-hour day, this would have taken over eight days.

It was therefore decided that the recount would be modelled largely after what was done a few years earlier for the judicial recount in the Ontario ridings of Parry Sound in 2006[14] and Kitchener–Waterloo in 2008,[15] although there was acknowledgment by both parties that the *Canada Elections Act* could be interpreted as requiring the judge to examine and count all the ballots personally.[16]

In granting the motion for a judicial recount, Justice Gilles Blanchet presented a 36-point outline of the process to be followed, stating that it may be useful or necessary to make changes or accommodations.[17]

The judicial recount took place at the Rivière-du-Loup courthouse. For the sake of openness and transparency, the task of examining the ballots was given to 15 teams based on the established polling station model. Each team had four members: a deputy returning officer and a poll clerk (one chosen by the Conservative Party and the other by the NDP, switching roles between morning and afternoon), and a Conservative representative and an NDP representative.

Basically, the deputy returning officer's job was to open the ballot boxes, take out and open the envelopes, handle the ballots, show them to both party representatives, and place them on the table in separate piles for each candidate.[18] Contrary to the decision-making role provided by the *Canada Elections Act* on election day,[19] the deputy returning officers were not given the task of ruling on the validity of the ballots. As for the polling clerks, they were responsible for numbering the disputed ballots and preparing the ballot box recount reports.[20]

The role of the officials representing both candidates was to oversee the recount, examine but not touch the ballots, and raise any objections as to how the ballots were accounted for.

As well, each candidate had a mobile team made up of a lawyer and three paralegals; their role was to assist their representatives.[21]

The teams began by opening the ballot boxes containing the special ballots[22] and examining these ballots. Then each of the other ballot boxes was opened. The team looked at the envelope of rejected ballots first, then the envelope of each successive candidate in alphabetical order. The envelope containing the spoiled ballots was left unopened, although the judge could have decided to have it opened if, for example, it was suspected that it may contain rejected ballots placed in the incorrect envelope.[23]

Decisions regarding ballot validity were taken collectively by each team using the criteria set out in the Act. For instance, there should be no writing or marks on a ballot that could identify an elector, nor should there be marks in more than one of the circles to the right of the candidates' names.[24]

If a team disagreed whether a ballot was valid or should be rejected, mobile teams appeared at the request of one of the candidates' representatives. If there was still a disagreement, the disputed ballot was set aside for later decision by the judge himself.[25]

By the end of the first day of the recount, the ballots of 95 out of 255 polling stations had been recounted and 118 ballots had been set aside for the judge's decision. Considering the day's results, Justice Blanchet recommended that the attorneys meet to sift through the disputed ballots to resolve some of the disputes, which was done. The following morning, only 26 disputed ballots remained. By the end of the second day, there were an additional 26 disputed ballots.

After three full days, the 15 teams finished their work. The number of disputed ballots set aside for the judge's review and final decision was 33.

The attorneys made their representations on each disputed ballot and the judge retired to deliberate. After a few hours, he returned to issue his ruling on the ballots submitted for his consideration, not before setting out his guiding principles in that, like the Supreme Court of Canada, the court must favour a broad and liberal interpretation of any legislation guaranteeing citizens the right to vote, including how the rules on voting are applied.[26] He then ruled on the disputed ballots, which he placed under five categories.

Ballots marked for more than one candidate

Five ballots were rejected because they showed valid marks in two circles, making it impossible to know with certainty the elector's intent, while there was

nothing to suggest that the elector had clearly intended to cross out one mark for another.[27]

In contrast, four other ballots with marks in two circles, one of them crossed out, were deemed valid. Judging by one of the marks, it was clear that the elector had intended to vote for only one of the two candidates.[28] Another ballot that was accepted was clearly marked for one candidate and had a tiny mark visible in the circle for another candidate, caused by hesitation or carelessness, without anything being able to identify the elector.

Ballots that could identify the elector

Two ballots were rejected because they showed distinctive markings that could identify the elector; one was marked with an X together with the initials RC and CR;[29] and on another was marked with the first name "Anne," which did not belong to any of the candidates. A third ballot with a very distinctive mark showing two eyes with no nose or mouth was rejected. The judge said, "This was not one of those signs we see today, such as a 'smiley' or 'heart,' and in fact no other elector in the riding used it."[30]

However, 16 ballots with marks looking like an X, a bracket or other scribbles within a single circle were deemed valid. As well, a heart and a "smiley,"[31] widely used today, especially by young people, and the words "Yes"[32] and "Conservative"[33] were not considered markings that could identify the elector.

Ballots marked elsewhere than in the voting circles

Two ballots in support of a candidate where the mark was outside the voting circles were rejected. Despite the fact that it was clear for whom the elector intended to vote, Justice Blanchet stated that it had been agreed by the candidates' attorneys during a pre-recount preparation meeting that ballots with markings outside the voting circles would be rejected. As well, the Act clearly says that "[i]n examining the ballots, the deputy returning officer shall reject one … that has not been marked in a circle at the right of the candidates' names."[34]

A ballot marked with "Spoiled" on the back

The judge deemed that this ballot had been mistakenly placed in the ballot box and should have been in the spoiled ballot envelope instead. A spoiled ballot is a ballot inadvertently spoiled by an elector marking it incorrectly; in such a case, it is to be handed over to the poll clerk in exchange for a new ballot that the elector marks and places in the ballot box.[35] A spoiled ballot may also be one that is misprinted, torn, stained or marked in a way that it could be identified and therefore does not protect ballot secrecy.

A special ballot with an error in a candidate's name

According to the *Canada Elections Act*, the elector marks the special ballot "by writing the candidate's given name or initials and surname. If two or more candidates have the same name, their political affiliation shall be indicated."[36] In the case referred to here, the elector had indicated the desired candidate by the family name and the first name of another candidate. However, the elector took the step of writing "Conservative," which in the judge's view cleared up any doubt as to the elector's intent, and so the ballot was allowed. According to the Act, "No special ballot shall be rejected for the sole reason that the elector has incorrectly written the name of a candidate, if the ballot clearly indicates the elector's intent."[37]

By the end of the judicial recount, only 10 of the 33 disputed ballots resulted in a different decision by the judge. Five ballots that the deputy returning officer had originally not counted were deemed valid and therefore allocated to a candidate. Four ballots that the deputy returning officer had counted were deemed invalid. Lastly, a valid ballot had been allocated to another candidate. Following the recount, the NDP candidate's lead went from five to nine votes.

Even today, the *Canada Elections Act* could require judges to recount all the ballots personally when conducting a judicial recount. This was certainly appropriate at a time when the number of ballots to recount was less than 5,000.[38] During the 2011 federal election, an average of 48,128 ballots were cast in each riding; in a number of ridings there were over 60,000, and one riding had over 90,000.[39] For the sake of expediency, the requirements of the Act were overlooked during the most recent judicial recounts, particularly the one in Montmagny–L'Islet–Kamouraska–Rivière-du-Loup, in favour of a more streamlined approach already tried a few years before. Based largely on the Act, the process that was used guaranteed transparency, meaning that the spirit, if not the letter, of the Act was followed. Parliament may be urged to review the relevant provisions of the Act in the near future.

Justice Blanchet's decisions regarding the disputed ballots were in keeping with the tendency of Canadian courts, following the enactment of the *Canadian Charter of Rights and Freedoms*, one that was clearly more liberal than the one previously taken by the Supreme Court of Canada.[40]

Lastly, it is still unfortunate that two ballots were rejected even though they were clearly marked for the Conservative candidate, although not in the circle to

the right of the candidate's name. However, in light of the Act, the judge's decision was the right one. Using ballots similar to the ones in Quebec[41] and Ontario,[42] where the circular spaces and the names of the candidates are the natural colour of the ballot paper and the rest in black, would prevent such a situation.

Notes

1 *An Act to amend the Act respecting the Elections of Members of the House of Commons,* S.C. 41 Vict. (1878), chap. 6, s. 14.

2 *An Act respecting the Elections of Members of the House of Commons*, S.C., 37 Vict. (1874) chap. 9, s. 26.

3 *Commons Debates*, April 18, 1878, p. 2076.

4 *Canada Elections Act*, R.S.C., 1985, c. E-21, s. 177(*a*).

5 *Canada Elections Act*, S.C., 48-49 Eliz. II, c. 9.

6 *Idem*, s. 300 (1).

7 For Quebec and Ontario, section 2 of the *Canada Elections Act* defines a "judge" as a superior court judge.

8 *Canada Elections Act*, s. 301.

9 *Canada Elections Act*, s. 304.

10 *Le Droit*, April 26, 1963. During a Quebec provincial election, a judicial recount involving 16,000 ballots in L'Assomption took five days. *La Presse*, July 15, 1960.

11 *Villeneuve-Ouellette c. Charron*, [1977] C.A. 73 (Rodolphe Paré J.).

12 *Le Devoir*, December 23, 1976.

13 Given the number of Conservative MPs elected in Quebec, this is not far-fetched; in fact, Prime Minister Harper waited until the judicial recount was completed before announcing his cabinet appointments.

14 *Re: Judicial Recount Arising out of the 39th General Election in the Electoral District of Parry Sound Held on January 23, 2006*, March 8, 2006, Ontario Superior Court of Justice, (Poupore RSJ), 2006 CanLII 6914 (ON S.C.)

15 *Re: Judicial Recount arising out of the 40th General Election in the Electoral District of Kitchener-Waterloo, October 14, 2008*, October 21, 2008, Ontario Superior Court of Justice, C-658-03 (Gordon RSJ), 2008 CanLII 64382 (ON S.C.)

16 *Couillard (Re), jugement sur requête en dépouillement judiciaire*, 2011 QCCS 2617 (CanLII), para. 12, subpara. 36.

17 *Idem*, para. 12, subpara. 35.

18 *Idem*, para. 12, subpara. 12.

19 *Canada Elections Act*, supra note 6, subs. 286(2): "The deputy returning officer shall decide every question that is raised by an objection …."

20 *Couillard (Re),* supra note 16, para. 12, subpara. 13.

21 *Ibid*.

22 *Idem*, para. 12, subpara. 10. Special ballots may be used by Canadian Forces electors, electors temporarily residing abroad and incarcerated electors.

23 *Idem*, para. 12, subpara. 17.

24 *Canada Elections Act*, supra note 6, s. 284(*d*) and (*e*).

25 *Couillard (Re),* supra note 16, para. 12, subpara. 13.

26 *Couillard (Re),* ruling regarding a judicial recount, 2011 QCCS 2618 (CanLII), paras. 10 and 11. These principles were recently reaffirmed in *Opitz* v. *Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 and in *McEwing* v. *Canada (Attorney General)*, 2013 FC 525 (CanLII).

27 To the same effect see *Janigan* v. *Harris*, 70 O.R. (2d) 5, 14.: "Nothing in the […] Act suggests that a 'cross' or 'other mark' is to be preferred. Both the mark for Mr. Harris (X) and the mark for Mr. Janigan (/) are valid marks. Having put two marks on the ballot, one for each of two candidates, I cannot find that the elector intended to vote for one of those candidates over the other. Consequently, I find that the ballot has been double-marked, is invalid and should be rejected."

28 Ssee *Oppermann* v. *Brown et al*., 2010 MBQB 280. (Hanssen J.); *O'Donohue v. Silva*, 1995 CanLII 623 (ON CA).

29 To the same effect see *South Newington Municipal Election Petition*, [1948] 2 All. E. R. 503.

30 *Couillard (Re),* supra note 27, para. 17.

31 See *Janigan and Harris et al*., 70 O.R. (2d) 5, 11.

32 *Couillard (Re),* supra note 27, para. 17.

33 *Ibid*. To the same effect see *Ruffle* v. *Rogers*, Law Reports, Queen's Bench, 1982, 1220. The elector had written "Ruffle Liberal" on the ballot.

34 *Canada Elections Act*, supra note 6, para. 284(1)(*b*). There are no provisions in Great Britain's electoral legislation for rejecting ballots on such grounds; see *Woodward* v. *Sarsons* (1875) L.R. 10 C.P. 750; *Pontardawe Rural District Council Election Petition* [1907] 2 K.B. 313. In *Levers* v. *Morris et al*., [1971] 3 All. E. R. 1300, a ballot with "a cross over the name of the candidate instead of being opposite to the name" was deemed valid.

35 In *Re Ford*, 106 Nfld. & P.E.I. and 334 A.P.R., Justice Halley wrote that "The difference between a spoiled ballot and a rejected ballot is that the spoiled ballot is intercepted before it goes into the ballot box while a rejected ballot is actually deposited in the ballot box but is not counted by the Deputy Returning Officer because it does not conform with the requirements of the (Election) Act."

36 Subsections 227(2) and (3).

37 *Canada Elections Act*, supra note 6, subs. 269(2).

38 In 1900, the average number of valid and rejected ballots per riding was 4,472.

39 In the Ontario riding of Oak Ridges–Markham, the total number of valid and rejected ballots during the 2011 election was 90,890.

40 See *Hawkins* v. *Smith*, 8 S.C.R. 676; *Bennett* v. *Shaw*, 64 S.C.R. 235.

41 *Election Act*, R.S.Q., c. E-3.3, s. 320, and Schedule III.

42 *Election Act*, R.S.O. 1990, c. E.6, subs. 34(5).