

Election law's substantive approach applies to judicial recounts

Litigation

24 December 2020

appeal in *Lukaszuk v. Kibermanis*, 2005 ABCA 26 (CanLII) wherein it was stated at paragraph 25 that “[v]oting is the lifeblood of democracy and courts should be very slow to disenfranchise voters on the basis of a technical non-compliance with voting instructions. Restrictions on that right should be narrowly interpreted and strictly limited.”

Application the substantive approach to the ballots in dispute

Accordingly, Justice Crerar determined that ballots marked in the example as set out above should be counted because the intention of the voter was clear. At paragraph 230, His Honour described that in ordinary parlance an “X” meant “no” or “wrong”, while a “√” meant “yes” or “right”.

His Honour also accepted a ballot where an elector after writing the name of a candidate on a “write-in ballot” described the candidate as being from the Liberal Party of Canada rather than the BC Liberal Party. Again, but for the misdescription regarding the candidate’s party affiliation, the intention of the voter was clear. There would only have been ambiguity if the candidate had been identified as being affiliated with, for example, the “BC Green Party”.

His Honour also found that if the leader of a party had been inserted on a “write-in ballot” that such a ballot should be counted because electors now identify with party leaders rather than simply local candidates. Thus, while the insertion of the name of another local candidate would result in the rejection of the ballot, the inclusion of the leader’s name was confirmatory of an elector’s intention to vote for the party and thus the local party’s candidate.

Ballots that were marked with initials or apparent signatures were also accepted since in Justice Crerar’s view the initials were non-unique and any signatures were indiscernible. Based on the provisions of the BC election statute, rejection of a ballot where it was marked with initials or an apparent signature was only to occur where the voter could be reasonably identified as a practical rather than a theoretical matter.

Similarly, votes marked with words or other markings were not easily rejected by the Court.

Lastly, and a very important issue in this case, 35 mail-in ballots which were “write-in ballots” rather than “ordinary ballots” were counted. Although technically under the election rules the voters ought to have received “ordinary ballots”, Justice Crerar noted that the error had originated with election officials who simply handed the voters the wrong ballot. While Elections BC and the BC Liberal Party contended that the 35 ballots should not be counted because of specific statutory sections and for purposes of consistency with other electoral districts, the Court found, among other things, in the circumstances, counting the ballots did not impact the integrity of the vote, that any unfairness that might arise out of being provided the wrong ballot affected all candidates equally, and that any potential impact of a potential inconsistent application between electoral districts was minimal and hypothetical. The problem with the handing out of the wrong ballots was viewed as unusual because it had not been caught before the final count.

Conclusion

The substantive approach in election law is obviously here to stay. Although it is foreseeable that party officials and scrutineers will continue to squabble every election over whether certain ballots should or should not be counted, it is becoming clearer that the substantive approach in election applies to recounts and

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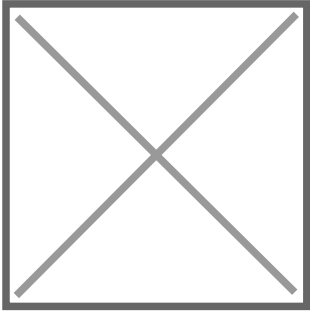
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that removing a validly cast ballot from an election box will only be confined to very rare instances.

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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