

THE GR COURT DOCKET

October 15, 2021

Incorrect Counting of Unused Ballots Results in Judicial Recount

By Stephen Thiele

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An election is not officially over until all of the ballots are counted and the results are certified by the Chief Electoral Officer. This includes the counting of all of the ballots cast by electors and all of the unused ballots that were never cast.

Indeed, as recently demonstrated in [Bravo v. Chief Electoral Officer, 2021 ONSC 6707 \(CanLII\)](#) arithmetic errors in the counting of unused ballots significantly contributed to the ordering of a judicial recount in the Toronto riding of Davenport.

In the recent federal election in Davenport, Liberal candidate Julie Dzerowicz eked out a 76 vote victory against second place finisher, Alejandra Bravo, the NDP candidate. Given the small margin of victory, Ms. Bravo brought an application for a judicial recount under [section 301](#) of the *Canada Elections Act*.

Under this section, a judge is mandated to order a recount, if it appears that:

(a) an election officer has incorrectly counted or rejected

any ballot, or has written an incorrect number on the statement of the vote for the votes cast for a candidate; or

(b) the returning officer has incorrectly added up the results set out in the statements of the vote.

Based on the language of the provision and findings rendered by the court in [Koloski v. Merasty, 2006 SKQB 60 \(CanLII\)](#) and [Maynard v. Kania, 2008 CanLII 54978 \(ONSC\)](#), the order for a recount is mandatory and the threshold of proof is low.

Under [section 301](#), the benchmark is accuracy in the counting process.

Ms. Bravo provided evidence that there were many errors in the counting process related to the counting of unused ballots which fell within [section 301\(2\)\(a\)](#) of the Act, i.e. that an election officer had incorrectly counted or rejected *any* ballot.

By failing to properly count unused

ballots, the precision or accuracy of the vote is put in issue, and therefore, without a recount, it can never be known whether mistakes are mistakes in counting the number of unused ballots or some other counting mistakes.

While the lawyer for Ms. Dzerowicz argued that the words “any ballot” should be narrowly construed to votes cast for a candidate (be they valid or rejected), this argument, which the lawyer had previously made in [Maynard](#), had already been rejected.

The lawyer further contended that unused ballots did not have to be recorded on the Statement of the Vote based on [section 283\(3\)\(c\)](#). However, the prescribed form of the Statement of the Vote, which was mandated by [section 287](#) of the Act, clearly required an election official to include the number of unused ballots and other numbers and totals on the Statement. In general, the Statement of the Vote is supposed to record the number of: (i) votes cast for each candidate; (ii) rejected ballots; (iii) unused ballots; and (iv) unused ballots. The form is also supposed to record the number of voters on the list who voted and the total ballots supplied.

Where numbers do not match, election officials are instructed to write a note on the Statement of the Vote explaining why the numbers do not match.

The evidence showed, among other things, that unused ballots were not counted at a number of polling stations.

In some cases inaccurate totals were recorded on the Statements of the Vote. For example, the total number of votes cast, spoiled ballots and unused ballots did not match the number of ballots that had been supplied at the particular poll.

Under [section 283\(3\)\(d\)](#) of the Act, the numbers are to be added to ensure that all ballots that are provided by the returning officer are accounted for.

In some Statements of the Vote, the total number of electors who voted was greater than the total number of votes cast.

Lastly, the evidence showed that in a number of instances the total number of ballots supplied was not an increment of 50 ballots. The returning officer testified that the total number of ballots supplied to each poll usually was a multiple of 50 because ballot books issued to election officers each contain 50 ballots. The returning officer testified a number of times that the number of ballots supplied that were reported on certain Statements of the Vote did “not make any sense” because the numbers were not a multiple of 50.

The court found that this evidence met the low threshold.

Although Ms. Dzerowicz’ lawyer argued that a higher threshold of evidence was required, the court rejected the imposition of a higher threshold for a judicial recount on the grounds that this was contrary to the language of [section 301](#) of the Act. The court noted that if a higher threshold was to be imposed, then Parliament should amend the section to either include a materiality threshold or to limit the kind of counting errors to be considered to certain types of ballots rather than “any ballots”.

This case demonstrates that election officials bear a significant burden in ensuring that votes are accurately counted and that all ballots are properly reconciled during a count. In close elections, these kinds of errors will be magnified and will lead to judicial recounts to determine



the ultimate winner and loser in an election. Although it can be expected that election officials will make mistakes in an election given the enormity and logistics of organizing an election, which include securing polling stations and hiring and training multiple election officials in a short period of time, mistakes in the counting of ballots can never be tolerated. To hold otherwise would erode the integrity of the election process and give voters less confidence in our electoral system.

The court ordered that the judicial recount was to commence on October 12, 2021. At the time of this writing, the results of the judicial recount are not known.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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