

Jaswal v. Ontario (Chief Electoral Officer), [2018] O.J. No. 3574

Ontario Judgments

Ontario Court of Justice

H.S. Amarshi J.

Heard: June 14, 2018.

Judgment: June 18, 2018.

[2018] O.J. No. 3574 | 2018 ONCJ 432

Between Harjit Jaswal, Applicant, and Greg Essensa, Chief Electoral Officer of Ontario, Malcolm Scott Ching, Returning Officer for the Electoral District of Brampton Centre, Linda Galloway, Election Clerk for the Electoral District of Brampton Centre, Andrew R. Hosie, Sadafar Hussain, Mehdi Pakzad, William Oprel, Binder Singh, Sara Singh and Laila Sarah Zarrabi Yan, Respondents APPLICATION UNDER sections 69 and 71 of the Election Act, R.S.O. 1990, c. E.6, as amended

(63 paras.)

Case Summary

Government law — Elections — Contested and controverted elections — Basis — Invalid or illegal votes — Substantial irregularities — Recounts — Judicial recount — Procedure — Application by candidate in provincial election for recount in subject riding dismissed — Even if non-citizens were permitted to vote, their votes could not be identified and removed, so recount would not assist — Discrepancies between Scrutineer's Form and Official Tabulation Form were explained by inclusion of declined ballot data in latter — Irregularities in Bingo Sheet had no bearing on official results — Evidence of scrutineer's assistant about discrepancy in ballots counted was based on what he heard at busy polling station so was subject to mistake — Number of ballots rejected by machine and manually was consistent.

Application by a candidate in the provincial election for a recount in the subject riding. Elections Ontario certified the official result, including the subject riding in which the applicant came in second place, losing by only 89 votes. The applicant deposed he and his team observed non-citizens being allowed to vote, there were discrepancies between the Scrutineer's Form and Official Tabulation Form, bingo sheets showed voters improbably arriving in sequential order, his friend and assistant of the scrutineer observed a discrepancy in the number of votes counted, and the automatic voting machines rejected more ballots than were rejected manually.

HELD: Application dismissed.

Even if non-citizens had been permitted to vote, this could not support a recount order. Votes cast by non-citizens could not be identified and removed, so a recount would serve no meaningful purpose. At first glance, discrepancies between the Scrutineer's Form and Official Tabulation Form were concerning and seemed to suggest scrutineers were given different totals than those declared at the end of the night. However, the Returning Officer gave credible evidence explaining the discrepancy was the result of the inclusion of declined

ballot data in the official tabulation form, which was not in the scrutineer's form. This was consistent across other forms and documents received from a cross-section of polls. The Returning Officer's explanation was accepted and, even without it, a recount would not have been justified, because the Scrutineer's Form was not used to tabulate the final result. The bingo sheets were used to circle voter's numbers as they arrived, so one would expect a random selection of numbers being circled, as voters would not arrive in numerical order. However, the irregularity was explained by a lack of training and understanding of the purpose of the form, and the bingo sheets were a useful tool for candidates to track supporters but had no bearing on the final results. The applicant's friend testified he was told by the Deputy Returning Officer that there were 392 ballots cast at the poll but the official results showed 302. This evidence lacked reliability because it was based on an oral declaration made at a busy polling station, so was subject to being misspoken or misheard, and much of the friend's testimony were not comprehensible. The evidence showed the ballot rejection percentage by machine and person was both small and consistent. The applicant failed to establish a prima facie case for a recount.

Statutes, Regulations and Rules Cited:

Election Act, *R.S.O. 1990, c. E.6, s. 69*, s. 71(1)

Counsel

J. Etienne and N. Waheed, Counsel for the Applicant.

J. Ayres and S. Lemke, Counsel for Elections Ontario.

M. Atkinson, Counsel for the Ontario New Democratic Party.

DECISION ON APPLICATION FOR JUDICIAL RECOUNT

H.S. AMARSHI J.

Background

1 On June 7, 2018, a provincial election was held in Ontario. In Brampton Centre there were seven candidates on the ballot.

2 After the polls closed on election night, Sara Singh, a candidate for the Ontario New Democratic Party was elected as the winner of the riding with a vote total of 12,892. Harjit Jaswal, a candidate for the Progressive Conservative Party of Ontario received 12,803 votes. The margin was slim -- 89 votes separated both candidates. The total number of valid votes cast in Brampton Centre was 33,599.

3 On June 9, 2018, Elections Ontario officially certified the provincial election results, including the result in Brampton Centre.

4 The *Election Act*, *R.S.O. 1990, c. E.6*, provides that a candidate may bring an application for a recount. That application must be brought and heard within four days of the official tabulation, excluding a Sunday.¹

5 The recount application must be brought in front of a judge of the Ontario Court of Justice in the jurisdiction where the vote has taken place.²

6 In the early afternoon of June 14, 2018, I was alerted by the Trial Co-ordinator in Brampton that an application under sections 69 and 71 of the *Election Act* would be brought by the applicant Harjit Jaswal. The application was assigned to my court.

7 I received the applicant's materials at 4:30 p.m. and I commenced court at 5 p.m. In attendance were counsel for Elections Ontario, James Ayers and Scott Lemke. Given the late notice of the application, they had not prepared responding materials and sought time to commission affidavits from Malcolm Scott Ching, the Returning Officer for Brampton Centre, and Linda Galloway, the Election Clerk for Brampton Centre.

8 Dhananjai Kohli, a staff member at the Ontario New Democratic Party, was also in attendance. Mr. Kohli addressed the court and requested the matter be adjourned to the next day in order for Ms. Singh to retain counsel and for an opportunity to formally respond to the applicant's materials.

9 Although I was sympathetic to the concerns raised by Mr. Kohli, a plain reading of the relevant section of the *Election Act* makes it clear that a hearing must not only be commenced within four days of the official tabulation, but a decision also rendered by the end of the fourth day.

10 In this present case, the fourth day would end at midnight on June 14, 2018 at which point the application would be mute. Accordingly I denied the request. There was a sufficient public interest given the closeness of the final vote that the matter should be heard before the statutorily imposed deadline elapsed.

11 Given that Ms. Singh would be directly impacted by a decision to order a recount in Brampton Centre, I advised Mr. Kohli that I would be willing to hear submissions, even absent responding materials, at any point over the course of the evening.

12 Fortunately, I was advised after a short recess that the Ontario New Democratic Party had been able to retain counsel on very short notice. In the circumstances, I agreed that the matter would commence once all of the parties that had an interest in the application could be present in the courtroom.

13 Argument on the application did not commence until 7:30 p.m. and concluded at 11 p.m. just prior to the statutory deadline. I rendered short oral reasons just after 11:30 p.m. I indicated that written reasons were to follow shortly thereafter.

14 This was hardly an ideal situation and one that could have been avoided had the application

been brought in a timely manner. Mr. Jaswal was aware of the result on election night. He would have recognized that the slim margin between candidates would potentially give rise to an application for a recount. Mr. Jaswal waited until the evening of June 13 to retain counsel. What followed could only be described as a mad scramble by multiple parties to retain counsel, prepare materials and attend for the application. There is an inherent unfairness in forcing responding parties to act on limited notice, especially in a matter that engages the broad public interest such as this case.

15 I appreciate these applications are rare, but this is hardly a template example of how these applications are to be brought before a court. Section 69 of the *Election Act* requires recount applications be made "forthwith." It is arguable that the applicant failed to meet this standard. It lies within the discretion of the hearing judge to summarily dismiss such applications if it does not meet this threshold for immediacy or without delay, notwithstanding the fact that an application has been brought within four days of the official tabulation.

16 Although the application was heard under less than ideal circumstances and with a looming deadline, I want to commend counsel for the Applicant and Respondents, for their professionalism and the thoughtful manner in which they conducted this hearing. It was clear in the submissions that all parties were deeply respectful of the democratic process and had a meaningful desire to ensure the public's will was accurately reflected in Brampton Centre.

17 The court clerk and reporter are also to be commended for their hard work and diligence in what turned out to be a long evening.

Relevant Legal Principles

18 In *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at paragraph 1, Chief Justice McLachlin observes, "The right of every citizen to vote, guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms*, lies at the heart of Canadian democracy."

19 As a corollary to that statement, voters must have confidence in the final result. Specifically, that the democratic will is fairly and accurately reflected in the legislature and that the candidate garnering the highest number of votes is the one who is duly elected.

20 The *Election Act* addresses circumstances where a party raises a concern over the accuracy of the vote and provides that a candidate may bring an application for a judicial recount. That application must be brought and heard within four days of the official tabulation, excluding a Sunday.

21 The relevant provision of the *Election Act* states:

Section 71(1)

For the purpose of determining the candidate who obtained the highest number of votes and within the four days, Sunday being excluded, following the official tabulation made by the returning officer, a judge may appoint a time and place to recount the votes cast at the election in the electoral district upon the application of a candidate or elector if it is made to appear by affidavit that,

- (a) a deputy returning officer has improperly counted any ballot or improperly rejected any ballot or made an incorrect statement of the number of ballots cast for any candidate; or
- (b) the returning officer has improperly tabulated the votes

22 In situations where the margin is less than 25 votes the Returning Officer must bring an application for a judicial recount.³

23 The onus is on the applicant to establish one of the grounds set out in Section 71(1).⁴

24 The key phrase in section 71(1) is "made to appear." The Ontario Court of Appeal interpreted these words in *Swanson Election*, [1963] 2 O.R. 525, as requiring the applicant to establish a *prima facie* case.⁵ The threshold is therefore low. The presiding judge has to look at the facts objectively and consider whether or not the *prima facie* threshold has been met.⁶ Merely stating a belief that something has occurred without *some* basis a court can reasonably rely upon to draw conclusions from the affidavit evidence, will fail to support this standard.

25 Although the standard is modest, some limited weighing of the evidence is permitted and the judge has discretion to give no weight to evidence that is determined to be unreliable.⁷

The Applicant's Position

26 The applicant made five main arguments in support of a recount order. Evidence was adduced though a combination of documentary evidence including copies of various tabulation forms, affidavit and viva voce evidence.

(I) Non-Citizens Voting

27 Harjit Jaswal swore a lengthy and detailed affidavit outlining a number of irregularities in the voting procedure and tabulation process. A significant portion of his affidavit was devoted to instances observed either personally or by members of his team of either non-Canadian citizens voting or voters casting ballots who resided outside of Brampton Centre. Either status would be a bar to casting a vote in the riding.

28 The applicant argued that this number was significant and that election staff at multiple polling stations disregarded the law that only allows Canadian citizens to vote in our elections. The right to vote is one of the privileges of Canadian citizenship and there is a significant public interest in ensuring the integrity of the voting process.

29 The applicant argues that Elections Ontario central staff were aware that this was a potential issue, especially in ridings with large numbers of new arrivals to Canada, which would include Brampton Centre. As part of the applicant's materials is a memo issued by Deborah Danis, the Chief Administrative Officer of Elections Ontario, instructing Returning Officers not to accept "Permanent Resident Cards" as identification. An indication that this may be a potential issue on election day.

30 I dismissed this argument. There may have indeed been a substantial number of non-citizens that voted in the riding, I make no conclusion either way. What is apparent however is that this argument, even substantiated, cannot support an order for a recount.

31 At the outset, all of the parties agreed that evidence on this application must be sufficient to support a *prima facie* case that the outcome of the result *may be different* if a recount were to be ordered. Although not explicit, it is an implied condition in a reading of section 71 of the *Election Act*. It would be a futile exercise that ballots in a riding be recounted if the outcome could not change.

32 The number of recount cases in Canada is sparse, but I am guided in my analysis by the court's decision in *Goos v. Saskatchewan (Chief Electoral Officer)*, [1986] S.J. No. 810, a Saskatchewan Court of Queen's Bench decision involving a disputed count in a riding in Regina. The court states at paragraph 27:

Justice and equity to all concerned are the essentials. Common sense is the approach. Whether the matters raised by the applicant might affect the results of the election particularly if all such matters be found in the applicant's favour, is an important consideration ... Recount proceedings will not be ordered as a matter of course. It is the duty of the court to prevent unnecessary proceedings.

33 That is indeed an important consideration in this case. The vote is secret. There is of course, no way to identify votes cast by non-citizens in Brampton Centre and discard them from a re-tabulation of the ballots cast. A recount ordered on this basis would serve no meaningful purpose.

(II) Discrepancies Between Forms

34 The applicant tendered as documentary evidence copies of a number of forms from election day. They relied on two forms in particular: Unofficial Ballot Count for Scrutineers and the Vote Totals from Official Tabulation.

35 The Unofficial Ballot Count for Scrutineer's form, (hereinafter referred to as the "Scrutineer's Form") is a document that is provided to a candidate's scrutineers from each of the polling stations in the riding. As the name suggests it is an unofficial tally of the total votes from a particular poll. It assists the candidates in tracking the voting results as election day unfolds. The form contains numerous boxes which include: poll number, a box for each candidate, one box for rejected ballots and one for unmarked ballots.

36 A ballot can be rejected for a number of reasons, but the usual cause is that a ballot contains multiple markings and the voters' intention is unclear. An unmarked ballot is just that -- there is no visible indication on the ballot of the voters' intention. The Scrutineer's Form is signed by the Deputy Returning Officer and is dated. It is filled in by hand by the Deputy Returning Officer and provided to the candidate or a party scrutineer.

37 The Vote Totals from Official Tabulation (hereinafter "Official Tabulation Form") is a computer generated document that contains information from multiple polls. It contains the same information from the Scrutineer's Form with one key addition -- it also includes a separate category for declined ballots. A declined ballot is one that is returned to a Polling Clerk by the voter and not placed in the ballot box.

38 The applicant argued that there were discrepancies between the Scrutineer's Form and the

Official Tabulation Form. Polls 411 A and B were specifically at issue, although there seems to have been discrepancies between these two forms from a number of different polls. At first glance this is a concern and it seems to suggest that the scrutineers were being given different totals than those declared at the end of the night.

39 The Returning Officer for Brampton Centre Malcolm Scott Ching provided affidavit evidence in order to explain the different vote tallies. Given the short notice in this matter, his affidavit was quickly prepared, and as a result was relatively sparse and lacked key details. It was agreed in the circumstances, that Mr. Ching would provide viva voce evidence to supplement the affidavit and be made available for cross-examination.

40 Mr. Ching is an experienced Elections Ontario official. He supervised voting in Brampton Centre in 2003 and then the riding of Brampton Springdale in 2007, 2011 and 2014. For 2018 as a result of redistricting, Brampton Springdale was renamed Brampton Centre (reverting to the riding name from 2003). Mr. Ching struck me as knowledgeable and thoughtful. He not only had a strong understanding of the voting and tabulation process, but he also possessed unique knowledge specific to Brampton Centre given his experience in the riding. I attached weight to his evidence.

41 The discrepancy according to Mr. Ching is the addition of the "declined ballot" data in the Official Tabulation Form. That information is not captured on the Scrutineer's Form and as a result there will almost always be a discrepancy between the numbers on both forms. There are times it is included in the "unmarked" box in the Scrutineer's Form, at other times not. By way of example, Poll 400 has one rejected vote and one unmarked vote as indicated on the Scrutineer's Form. On the Official Tabulation Form, there is one rejected ballot and 0 unmarked ballots. Clearly there is a discrepancy between forms. However, on the Official Tabulation Form there is another box - declined ballot where the total is one. Mr. Ching testified that the unmarked ballot in poll 400 was in fact a declined ballot. Because the Official Tabulation Form captures more information, it was migrated into that box to more accurately reflect why that ballot was not counted.

42 This was a consistent pattern in the other documents and forms I reviewed from a cross-section of polls.

43 Given that this was reasonable and logical explanation for these discrepancies, I rejected the applicant's argument on this issue as a basis to support a recount order.

44 Even if I did find that there was *no* reliable explanation for the discrepancies between the forms, I still would not have accepted the applicant's argument. According to Mr. Ching, the Scrutineer's Form is not relied upon by polling staff to collect and tabulate vote totals, it is simply a tool for candidates and political parties to track their vote at various polls in the riding. If this court's jurisdiction under section 71 of the *Election Act* is to be engaged, the analysis must be focused solely on whether the Deputy Returning Officer improperly counted any ballot or improperly rejected any ballot or made an incorrect statement on the number of ballots cast for a candidate. The Scrutineer's Form does not assist in this analysis. It is not a document used to tabulate the final result. It plays no role in the accuracy of the vote tally.

45 I am not suggesting this type of documentation can play no role if it were to be utilized as documentary evidence in a future count dispute -- there may be a context, that I have not anticipated where it may be probative, but in this particular analysis I find it of limited utility to

support the applicant's case.

(III) "Bingo Sheets"

46 The applicant drew my attention to form FO528 Electors Who Voted on Polling Day. It is aptly described as and commonly referred to as "Bingo Sheets". It is a numbered document from 1-1000 on a single sheet of paper that is specific to each poll in the riding. Every time a voter is identified and given a ballot, a number on the Bingo Sheet is circled by a Polling Clerk. The Bingo Sheet does not indicate the voters' choice of candidate, but merely the fact they have attended at the polling station and exercised their franchise.

47 The Bingo Sheet is a tool for the candidates and political parties to track which of their supporters have voted. It is also used to identify which of the candidates' known supporters have not cast a ballot. This information is used by campaign volunteers to reach out to supporters and encourage them to vote before the polls close.

48 This is a well-established and important tool for candidates. The Bingo Sheets tendered as part of the applicant's case were largely in consecutive numerical order. This should be a highly improbable result. One would expect the Bingo Sheet to have a random distribution of numbers circled corresponding to voters as they showed up to cast their ballot. This is clearly a puzzling result.

49 The explanation seems largely due to a lack of training on the use of this specific form by local staff. Elections staff at the riding level are predominantly temporary workers, hired specifically for election day. According to Mr. Ching, local polling staff were likely using the Bingo Sheet to tally the total number of voters who attended at that polling station, a fundamental misunderstanding of the form's purpose. For example, at Poll Number 407, which was adduced as part of the applicant's materials, between 9:30 and 10 a.m. -- 19 electors attended the poll and cast ballots. They are all indicated on the Bingo Sheet in corresponding increasing numerical order (1-19). Poll Number 405 in contrast, has what looks like a random distribution of numbers: 46, 67, 82 and 109 are circled. Each number corresponds to the identity of a voter.

50 Part of the challenge with Mr. Ching's evidence is that he did not personally observe this activity or have any specific knowledge of this practice in Brampton Centre. He came to this conclusion based on his experience as a Returning Officer over multiple elections.

51 I need not make a factual finding or come to any conclusions in regards to this issue, although, I accept Mr. Ching's evidence that this is the likely cause of the unexpected results on the Bingo Sheets. The Bingo Sheets are solely a tool for the candidates to track whether their supporters or likely supporters have attended a poll. They play no role in the final tabulation and would not shed any light on the issue this court must be focused on, that is, whether there is credible affidavit evidence that the Deputy Returning Officer improperly counted or rejected ballots or incorrectly counted ballots.

52 Although it is not lost on this court for the real need for Elections Ontario to ensure that temporary elections staff are adequately trained on the use and purpose of the forms contained at polling stations. In this case, the Bingo Sheets as completed by elections staff and reviewed by this court would be useless as a tool for candidates attempting to track whether their

supporters have actually attended at a polling station.

(IV) The Evidence of Rupinder Bhatti

53 Rupinder Bhatti testified in support of the application. Mr. Bhatti is a friend of the applicant Harjit Jaswal and assisted as a scrutineer on election day. He initially provided affidavit evidence where he recounted an incident at poll 411 A and B. At a time near poll close at 9 p.m. the Deputy Returning Officer told Mr. Bhatti that the total number of votes cast at the joint poll was 392 ballots. However, the Official Tabulation Form indicated 302 total votes for the same polling station. This is a significant inconsistency -- 90 votes were reputed to have gone missing.

54 It was agreed by the parties that Mr. Bhatti should provide additional detail that was not contained in his affidavit. He provided brief viva voce evidence and was cross-examined.

55 I found Rupinder Bhatti to be an honest witness, but ultimately had concerns over the reliability of his evidence. It was an oral declaration made to Mr. Bhatti at a busy polling station near the close of voting. There was significant activity at the poll. It is reasonably conceivable in the circumstances that either the polling clerk misspoke or Mr. Bhatti misheard the total number of votes. Further, there were portions of Mr. Bhatti's testimony as to what occurred that evening at the polling station that I could not understand, which further cast doubt on his evidence.

56 Although a *prima facie* threshold is modest, it is still a meaningful one. A court considering this type of application must be able to draw conclusions based on some measure of reliable evidence. Mr. Bhatti's evidence did not meet this threshold.

(V) Manual vs Automatic Counting

57 There were 48 polling stations in Brampton Centre in use on election day. Of that 14 were manual polls and the votes were counted by hand. The remaining 34 polling stations were automated and the ballots counted via an electronic voting machine. The June 2018 vote was the first election that the electronic voting machines had been in widespread use across the province. The machines had been tested during previous by-elections.

58 The applicant contends the rejection rate for ballots was significantly higher via the electronic voting machines as compared to the manual count. Ballots are not counted if they are unmarked or contain multiple markings and the voters' intention is unclear. The rates of rejection provided by the applicant was 2.8 percent for manual voters and 6.8 percent for automated voting.

59 On the face of it this is a significant difference between the two counting methods. The applicant argued the electronic voting machines were rejecting ballots that human review would have counted and included in the final tabulation. In this context a four percent difference is a substantial gap.

60 However, after further evidence was provided by the respondent and a re-calculation completed, it was determined that in fact the opposite was the case. The rejection rate of ballots fed into the electronic voting machines was less than one percent in Brampton Centre. The manual rejection rate was also lower and close to one percent. The rates were similar utilizing either method.

61 Given the modified numbers I dispensed with a legal determination of whether a difference in rejection rates could be a basis for exercising jurisdiction under section 71(1) and ordering a recount.

Conclusion

62 For these reasons, the applicant has failed to establish a *prima facie* case in support of the order being sought. The application to order a recount in Brampton Centre as it relates to the June 7, 2018 provincial election is dismissed.

63 No costs are to be awarded. This matter engaged a sufficient public interest and there was a reasonable basis given the closeness of the vote and potential irregularities for the applicant to seek this remedy.

H.S. AMARSHI J.

1 *Election Act, R.S.O. 1990, c. E.6, s 71(1)*

2 *Ibid* s 70

3 *Ibid* s 67(2)

4 *Rafferty v. Mauro*, 2007 ONCJ [2007] 573 at para. 13

5 *Swanson Election*, [1963] 2 O.R. 525 at para. 16

6 *Racco v. Essensa*, 2014 ONCJ 498 at para. 41

7 See discussion: Justice David M. Paciocco & Lee Stuesser, *The Law Evidence*, seventh edition (Toronto: Irwin Law, 2015)