

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sadler v. Town of Gibsons*,
2009 BCSC 138

Date: 20090210

Docket: S088874

Registry: Vancouver

Between:

Brian Sadler, David Croal,
Agnes Labonte and Barrie Reeves

Petitioners

And

Town of Gibsons

Respondent

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the petitioners

R.W. Millen

Counsel for the respondent

R.E. Young
P. Hardwick

Date and Place of Hearing:

January 9, 2009
Vancouver, B.C.

I. The Petition

[1] The petitioners apply for a declaration that the election of councillors to the council of the Town of Gibsons (the “Town”) held on November 15, 2008 (the “election”) is invalid, due to substantial and material non-compliance with the *Local Government Act*, R.S.B.C. 1996, c. 323 (the “Act”).

II. Facts

(1) The Petitioners

[2] Each of the petitioners was an elector in the election, and two of the petitioners were candidates, as follows:

- (a) Mr. Brian Sadler is an elector in Gibsons and was a candidate in the election;
- (b) Mr. David Croal is an elector in Gibsons and was a candidate in the election;
- (c) Ms. Agnes Labonte is an elector in Gibsons; and
- (d) Mr. Barrie Reeves is an elector in Gibsons.

(2) The Election

[3] The election was held on Saturday, November 15, 2008. Electors were entitled to vote on three matters: the office of the mayor; four councillors; and a water meter referendum. This petition concerns the election of councillors.

[4] The primary voting station was in the council chambers, at the Town Hall.

[5] Electors were provided with pencils to mark their choices on the ballot. Electors could vote for up to four of the ten candidates. Some electors made only one, two or three selections.

[6] The Chief Election Officer was Mr. James Gordon. The Deputy Chief Election Officer was Ms. Wendy Gilbertson.

(3) The Election-Night Ballot Count

[7] Ballot counting began soon after the polls closed at 8:00 p.m.

[8] Ms. Gilbertson supervised the counting of the votes. There were numerous scrutineers present, including Ms. Donna Hobbs and Ms. Suzanne Smart, scrutineers for candidates Croal and Sadler, respectively. In her affidavit, sworn December 15, 2008, Ms. Hobbs deposed as follows:

6. Ballots were to be counted in the Town Council meeting room. The Council ballots were counted in a separate area from those of the Mayoral election, and the Water Meter Referendum.

7. Over the course of the next two hours, I observed the counting of the ballots for Council. I positioned myself behind, between and over the shoulders of two vote counters on one side of the table and carefully monitored as they recorded on tally sheets the votes cast. Once 25 ballots had been recorded on a tally sheet, the ballot counters stapled those ballots to the tally sheet, and subtotaled each candidate's votes at the bottom of each tally sheet.

8. I alternated between the two sides of the table. I and other scrutineers caught some missed or incorrectly entered votes.

9. Wendy Gilbertson was the elections official in charge of the Council vote count. I did not hear her give any kind of instruction or overview of the plan of how the process would be carried out. From what I could tell, the actual vote counters did not seem confident in the process.
10. As the votes were being counted, all ballots that were not marked at all or considered spoiled were piled in three piles in the middle of the table. One pile was for spoiled ballots, one for unmarked ballots and one for questionable ballots. When it was suggested that they should be voided in some way, this was dismissed by Ms. Gilbertson.
11. As the counting proceeded, Ms. Gilbertson alternated between entering votes on tally sheets and gathering up already-completed tally sheets with ballots attached, and manually adding up the sub-totals by placing one bunch on top of another and keeping a running total on the bottom line of each successive sheet.
12. After some time, someone (I do not recall who) suggested to Ms. Gilbertson that she use a calculator, which she began using, but it did not have a tape, and actually appeared to be malfunctioning upon checking the addition function.
13. By this time, approximately 10 pm, the Mayoral vote count was completed on the other side of Council chambers. As a result, there was lots of noisy celebration and heightened pressure to complete the Council vote count. Mr. Gordon announced that he wanted to complete the vote count quickly so as to issue the results.
14. During this time, I observed that someone involved in the Mayoral vote appeared to be sending text messages using their cell phone.
15. At some point during the Council vote counting process, I believe that Ms. Gilbertson began to transfer the subtotals from the tally sheets (to which ballots were attached) onto new tally sheets (without allots attached).
16. At this point, Ms. Gilbertson quickly gathered up a handful of papers, which I believe were the new tally sheets, proceeded out of chambers, across the lobby, through the Town Office, behind the counter, to the far corner desk where there was a calculator with a tape function. Suzanne Smart and I followed her and stood behind the counter, at least 8 – 10 meters away. Although we could see Ms. Gilbertson across the room, we could not scrutinize her conduct of the process at this point. She did not invite or allow us to join her.
17. Ms. Gilbertson entered numbers into the calculator for about five minutes, and then came over to the counter where a number of people had now gathered. I suggested to her that perhaps the tape should be checked and attached. That was not done.
18. At that point, Ms. Gilbertson provided the results to Mr. Gordon, so he could release them.
19. At this point, I observed other people sending text messages and making phone calls on cell phones.
20. Mr. Gordon ushered the group back towards the lobby of the Town Hall and I saw the ballot boxes being transferred from the Council chambers to a back office. Because I had followed Ms. Gilbertson into the Town office, I did not see what was in the ballot boxes or if they were sealed or locked. Nor did I know where the ballots and various tally sheets had gone.

21. Overall, my impression of the counting of the Council ballots was that it was done hastily, and without adequate opportunities for the scrutineers to observe the process.

22. After the preliminary results were released, I left the Town Hall.

23. I was not contacted later by Mr. Gordon, Ms. Gilbertson or anyone from the Town, nor by Mr. Croal, to observe any further count of the ballots.

[9] In her affidavit, sworn December 15, 2008, Ms. Smart deposed, as follows:

4. Upon request by Mr. Sadler, I agreed to be his scrutineer for the purposes of the election. As scrutineer, I understood that it was my job to watch the conduct of the ballot counting process, and ensure that it was done properly and accurately.

5. At approximately 7:55 pm on election day, November 15, 2008, I arrived at the Town Municipal Hall, located at 474 South Fletcher Road.

6. Chief Election Officer Jim Gordon greeted me at the reception area and gave me an information sheet entitled "Candidate Representatives, Scrutineers and Official Agents" to read while I waited in the reception area with other scrutineers for the polling station to close at 8:00 pm.

7. At approximately 8:10 pm I was allowed into the polling station (the Town Council Meeting room), which was divided into three separate ballot counting stations with tables. One station was for counting the ballots for the Mayoral race; one station for counting ballots for Councillors; and one for the Water Meter Referendum.

8. Since I was scrutineering a candidate for Council, I spent most of my time observing the Councillor station and ballot counting table.

9. I observed one of the polling station staff lifting the Councillor ballot box onto the Councillor ballot counting table. The ballot box was locked and sealed with wide scotch tape.

10. The ballot box was then unlocked, and the sealing tape removed.

11. There were approximately six women assigned to counting ballots for Councillors at this table. Each person had a small box for ballots and ballot tally sheets. Deputy Chief Electoral Officer Wendy Gilbertson supervised and was involved with the counting.

12. Ballots were removed from the ballot box and distributed to the boxes of the women tallying the ballots.

13. I walked around the table, stopping periodically to observe the counting and tallying of the ballots by each ballot counter. I estimated that it took approximately 15 seconds for one ballot to be removed from the box of each counter and the vote noted in the appropriate column of the ballot tally sheet.

14. There were four Councillor positions to be elected, so voters could vote for up to four candidates. I observed that a number of ballots had only one, two, or three votes marked.

15. On two separate occasions, I personally witnessed a ballot counter checking the selected choices on the ballot and noting them in the wrong column on the ballot tally sheet. When I or another scrutineer advised the ballot counter of the error, she corrected it. However, I did not see all of the ballots being recorded so I do not know whether other errors occurred during the recording process.
16. Once 25 ballots were recorded on a tally sheet, the ballot counter recorded the total number of votes for each candidate on the tally sheet, stapled the ballots to the tally sheet and set it aside.
17. At the end of the ballot counting process, there were a number of tally sheets completed, with the applicable ballots stapled to each tally sheet by each individual counter. I would estimate that each ballot counter had approximately 8 – 12 tally sheets with ballots attached.
18. At that point, I saw one of the ballot counters quickly gather up the tally sheets off the table, and hand them to Ms. Gilbertson.
19. Using a small, hand-held calculator, Ms. Gilbertson sat at one end of the table and proceeded to add up the numbers in each column and check totals at the bottom of each tally sheet.
20. I was standing directly behind Ms. Gilbertson and remember asking her if she had collected all the tally sheets. She did not answer.
21. I asked again to scrutineers standing around, “do we have all the sheets?”, to which one of the scrutineers answered, “yes, I think she’s got them all.”
22. There were several (approximately six) scrutineers hovering around her observing Ms. Gilbertson as she quickly did her number crunching on the calculator.
23. During Ms. Gilbertson’s adding process, scrutineers pointed out to her on two separate occasions that her totals were wrong. I understood from Ms. Gilbertson’s comments in response that there might have been something wrong with the calculator.
24. After a couple more attempts, Ms. Gilbertson then got up, gathered up the tally sheets and went out of the ballot counting room and into the Town Hall reception area, apparently to look for another calculator. I and the other scrutineers waited in the ballot counting room for her return. From where we were, I could not see what Ms. Gilbertson was doing.
25. After a couple of minutes, one of the other scrutineers, Donna Hobbes, asked me if I knew where Ms. Gilbertson had gone and whether she was coming back. I answered that I did not know what was going on and that I thought that she had gone to look for another calculator in another room.
26. At that point, Ms. Hobbes and I went into the reception area to locate Ms. Gilbertson. We saw her sitting at one of the desks, behind the reception area, calculating the tally sheets on another calculator. We stood behind the reception counter, and could not oversee the tabulations Ms. Gilbertson was doing at the desk behind the counter. So, we waited there until Ms. Gilbertson was finished.
27. Eventually, more scrutineers started to gather behind the reception counter, waiting for Ms. Gilbertson to finish calculating the ballot tally sheets at the desk behind the counter. Approximately 10 minutes later she presented the total numbers to us.

28. I wrote down the results and then went back into the ballot counting room to thank those who were involved in the ballot tallying process, and left the Town Hall.

29. Based on my experience as a scrutineer that night, I was concerned that the vote count had not been conducted properly and transparently. I had been unable to oversee the tallying of the votes, and I could not be certain that Ms. Gilbertson had properly totalled the votes for the various Council candidates.

(4) The Preliminary Results and the Recount

[10] Ms. Gilbertson and Mr. Gordon filed affidavits setting out their evidence about the process used to count the ballots, the release of the preliminary results, the recount and the declaration of the official election results.

[11] In her affidavit sworn December 31, 2008, Ms. Gilbertson deposed, as follows:

4. After the close of the polls, ballots were counted in groups of twenty-five, and the numbers of votes for each Councillor of each group of twenty-five ballots were recorded on a "tally sheet" signed by the election official who conducted the count of those ballots. The ballots (except for questionable ballots) were, once counted, returned to the ballot box in bundles of twenty-five.
5. I retained the signed tally sheets.
6. Ballots that the election officials considered questionable were placed in a separate pile – not counted – and were reviewed at the end of the count. They were either rejected or allowed and there were no objections as to any of those determinations.
7. In respect of the tally sheets that I retained, I kept them in sequence, and added a running total for each Councillor at the bottom of each successive tally sheet.
8. I kept the running totals firstly by adding without a calculator. Later I used a handheld calculator, but it proved to be erratic. Subsequently near the end of the evening I took the tally sheets only – no ballots – to our adding machine across the foyer in City Hall to check the running totals. Some scrutineers followed me and watched over the counter as I checked the addition on all of the tally sheets and the running totals on all of the tally sheets.
9. At some time prior to the preliminary announcement of results, the tally sheets became out of sequence with the result that the last tally sheet in fact was not the correct tally sheet in sequence. Thus the running totals on it were not the final running totals, but they were the totals I provided to the Chief Election Officer.
10. At no time were any tally sheets lost or misplaced. The problem was one of the order and sequence of the tally sheets when I recorded what I then believed to be the final totals for each candidate for Councillor.
11. After the preliminary announcement of results on election night, Saturday, November 15, 2008, the ballot boxes with ballots in them were sealed and moved into a locked room along with all other election material. Mr. Gordon had the only key.
12. Mr. Gordon and I had arranged to do a check of the tally sheets and addition on Monday, November 17, 2008, as a prelude to his formal declaration of results.

13. On Monday, November 17, 2008, as I was reviewing the tally sheets, I discovered the sequencing error, and also discovered an error in addition on the tally sheets for one of the advance polls. These errors in addition account for the substantial change in the count after the preliminary announcement and prior to the official determination and declaration.
14. On Tuesday, November 18, 2008, I advised Mr. Gordon of the arithmetical error and went through the tally sheets with him. We agreed on the arithmetic errors discovered on the tally sheets.
15. I did want to go behind the tally sheets and count the Councillor ballots referable to each tally sheet to make sure the count was true. I prevailed upon Mr. Gordon to allow me to review the ballots for the Councillor election on Tuesday night, November 18, 2008.
16. Upon my review of the ballots for Councillor, I found them to be in accordance with the now corrected tally sheets with two exceptions – I found two ballots that in my view ought to have been rejected. I brought these two ballots to the attention of Mr. Gordon and he agreed that they should be rejected. One of the ballots had an “x” in five boxes when only four were to be elected, and the other had no markings in any box, but had squiggly pencil marks on it.
17. The rejection of these two ballots did not materially alter the results between those elected and those not elected. The difference in votes between the last elected and the first runner-up being 27 votes.
18. On Wednesday, November 19, 2008, I met with candidate Kenan MacKenzie and advised him of the corrections in the results, and of his right to a judicial recount.

[12] In his affidavit, sworn December 31, 2008, Mr. Gordon deposed, as follows:

3. I am fully satisfied that the election results for Councillor officially declared by me on November 19, 2008, pursuant to Section 136 of the *Local Government Act*, are accurate and reflect a true result.
4. The differences between preliminary counts of ballots for Councillor announced on Saturday, November 15, 2008, the night of the election, and my final declaration on November 19, 2008, were the result of two substantial arithmetical errors which were discovered on Monday, November 17, 2008, and of the result of the rejection of two ballots by me subsequent to the preliminary count.
5. In respect of the two ballots referred to in paragraph 4 of this Affidavit, one ballot had no Councillor boxes marked at all, but had squiggly lines throughout the ballot without passing through any box. The other ballot marked had “x’s” in five boxes (only four to be elected).
6. No Petitioner or affiant has suggested any lack of good faith or integrity in the conduct of the election, and Mr. MacKenzie, the only Councillor candidate materially affected by the correction of the arithmetical errors in the count, specifically states in paragraph 10 of his affidavit: “I do not question the integrity of Ms. Gilbertson or Mr. Gordon, but I cannot help but wonder how the final results could have been so different from the preliminary results”.

7. Mr. MacKenzie and the other candidates were made aware by me of the right to a judicial recount, but no person running for election and no elector requested a judicial recount.
8. I did err in not notifying candidates pursuant to Section 135(2) of the *Local Government Act* that they could be present for my final determination (which revealed the arithmetical errors). This was my oversight and the irregularity was an error made in good faith.

[13] In her second affidavit, sworn January 7, 2009, Ms. Gilbertson deposed, as follows:

2. The impact of the sequencing error with the tally sheets from the election day resulted in the vote count for each candidate changing from the preliminary results to the results reported as the official results on November 19, 2008.
3. The impact of the addition error on the tally sheets for the November 7, 2008 advance poll was only on candidate Kenan MacKenzie's results, whereby his vote count went from 46, as reported in the preliminary results, to 32 as reported in the official results.
4. The tally sheets attached to Kenan MacKenzie's Affidavit #2 as Exhibit "A" are worksheets from November 18, 2008, when I re-reviewed the election ballots under the direction of Mr. James Gordon, the Chief Election Officer, and not the original tally sheets from the election day, which remain with the election material. I confirm that these working tally sheets mirror the election results for Councillor officially declared by Mr. Gordon on November 19, 2008.
5. The only other circumstance that impacted the preliminary results was that on the morning of November 19, 2008, Mr. Gordon rejected two ballots that had previously been accepted, but in fact should have been rejected. I confirm that the status of all other ballots (i.e. accepted or rejected) remained the same.

(5) Changes between the Preliminary and Official Election Results

[14] Addressing the changes between the preliminary and the official election results, the petitioners note:

- (a) many of the vote counts changed, including on the advance polling days as well as on election day;
- (b) the totals changed quite substantially for all candidates;
- (c) candidate Curry went from receiving 525 votes on election night to 627 votes in the revised results, a difference of 102 votes, or 19.4%;
- (d) candidate MacKenzie was recorded as receiving 576 votes on election night, and 610 votes in the revised results, a difference of 34 votes, or 5.9%;
- (e) the changes in the vote totals of candidates Curry and MacKenzie meant that, on election night, candidate MacKenzie had been declared elected as the fourth (and final) elected councillor, with candidate Curry fifth by a margin of 51 votes;

- (f) candidate Curry's gain of 102 votes between the preliminary and official results was more than twice that of the next-highest number of votes gained (a 48 vote increase for candidate Barringer);
- (g) the total increase in votes (for all candidates) between the preliminary and official results was 327, of which 102 (31%) were attributed to candidate Curry; the remaining nine candidates accounted for the remaining 69% of the increased votes.

[15] The petitioners assert that such discrepancies and changes in the numbers of votes on a recount are very unusual, and caused them significant concern.

[16] In his affidavit, sworn December 15, 2008, candidate MacKenzie deposed, as follows:

5. I learned of the preliminary results of the election that night, when I received a telephone call from Deputy Chief Electoral Officer Wendy Gilbertson. I understood from Ms. Gilbertson that I had won the fourth and final spot on Council, by a margin of 51 votes over the next closest candidate, Bob Curry.

6. My next contact with Ms. Gilbertson was early on the afternoon of Tuesday, November 18th, when she called me and informed me that there had been a mistake in the preliminary results, and in fact I was not elected to Council. I understood from Ms. Gilbertson that she had rechecked the tally sheets, and that she had made a mistake in compiling the preliminary results, and that her review indicated that Bob Curry had won the final Council position instead of me.

7. I told Ms. Gilbertson that I thought she was trying to pull a practical joke, because the Town's Corporate Officer and Chief Electoral Officer Jim Gordon was running the election and would release the official results.

8. I then called Jim Gordon to try to find out what he knew about this change in the results. I understood from my conversation with him at the time that he did not know anything about Ms. Gilbertson's recount, or the change in position between Mr. Curry and myself. Mr. Gordon phoned me back a couple of times over the next short while and thought that he was part of a joke and I was part of it. I told him I was not part of any joke and that I was getting quite angry about it carrying on. Finally, Mr. Gordon called me again at approximately 5:30 p.m. on November 18, 2008, and I understood that it appeared that I was not elected after rechecking the tally sheets.

9. On Wednesday, November 19, 2008, I met with Ms. Gilbertson to try to determine what had occurred. Based on my conversation with her, I understood that at some point after she rechecked the tally sheets, she also recounted the Council ballots. I understood that during her recount, some of the ballots that had been initially rejected on election night as being invalid votes were added back in and counted as valid. I could not confirm that anyone else was present during the recount. I understood that based on that recount, I would not be declared elected.

III. Issues

[17] The petitioners submit that the following questions are at issue in this proceeding:

- (a) Did the Town violate the provisions and/or principles of the *Act* in its conduct of the election?

- (b) If the Town violated the provisions and/or principles of the *Act*, did those violations materially affect the results of the election?

[18] The petitioners submit that the uncontested facts demonstrate that these questions must be answered affirmatively, and therefore the election of councillors must be declared invalid.

IV. The Petitioner's Argument

[19] Subsection 145(3) of the *Act* provides direction on when a court may issue a declaration of invalidity for non-compliance with the provisions of the *Act*, as follows:

The court must not declare an election invalid by reason only of an irregularity or failure to comply with this Act or a regulation or bylaw under this Act if the court is satisfied that

- (a) the election was conducted in good faith and in accordance with the principles of this Act, and
- (b) the irregularity or failure did not materially affect the result of the election.

[20] Once non-compliance with the *Act* has been demonstrated, the burden of proof shifts to the municipality, as held by this Court in *Giesbrecht v. Chilliwack (District)* (1982), 18 M.P.L.R. 27 (B.C.S.C.), at para. 5:

The burden of establishing irregularities or failures to comply with the provisions of the Act and that there has been a disregard – not merely trivial but important, not merely of the letter but of the substance – of the statutory provisions intended to regulate the conduct of polling, rests upon the petitioners. Where such disregard has been shown, those supporting the election are still permitted to satisfy the Court, if they can, that notwithstanding any irregularity or failure to comply with a provision of the Municipal Act, the election was conducted in accordance with the principles laid down in that Act and that such irregularity did not materially affect the result of the election; but the onus of satisfying the Court upon that point rests upon the respondent.

[21] Accordingly, it is up to the petitioners in the case at bar to demonstrate that the Town's conduct of the election violated the *Act*. This, the petitioners submit, is apparent from the Town's concession that Mr. Gordon failed to notify the candidates of the recount in contravention of s. 135(2) of the *Act*, as well as the substantial evidence of other breaches provided by the petitioners.

[22] The petitioners also submit that given the multiple violations of the provisions and principles in the *Act* (in particular, the principles of transparency, oversight and formality), and the significant effect of the Town's misconduct upon the results of the election, the Town cannot discharge its burden, and therefore the election must be declared invalid.

[23] Turning first to the alleged breaches, the procedure for the conduct of an election is set out in ss. 123 – 137 of the *Act*. The petitioners argue that the Town's conduct of the election violated numerous of these provisions.

- (1) **Ms. Gilbertson conducted counting proceedings alone**

[24] The Town violated ss. 124(1) and (2) of the *Act* on two separate occasions. These subsections provide as follows:

124(1) A presiding election official and at least one other election official must be present while counting proceedings are being conducted.

(2) Candidates in an election are entitled to be present when counting proceedings for the election are being conducted.

[25] The petitioners note, first, that on election night Ms. Gilbertson took the tally sheets out of the council chambers where the election proceedings were being conducted under the supervision of scrutineers, into a separate area. At that point the scrutineers could not oversee her activities. The petitioners say that this conduct violated ss. 124(1) and (2).

[26] Second, on the Monday or Tuesday following the election, Ms. Gilbertson recounted the ballots alone, further violating this section of the *Act*.

[27] Moreover, neither Mr. Gordon nor Ms. Gilbertson notified the candidates of their right to be present during the recount, making it impossible for them to exercise their rights under s. 124(2).

(2) Ms. Gilbertson opened the ballot box alone

[28] The petitioners say that the Town appears to have violated s. 126(1) of the *Act*, which provides as follows:

126(1) As the first step in the counting of the votes on ballots in a ballot box, the ballot box is to be opened by an election official in the presence of at least one witness.

[29] The petitioners contend that Ms. Gilbertson opened the ballot box without a witness.

(3) Ballots not placed where persons present could see them

[30] The Town violated s. 128(2) of the *Act*, which provides as follows:

128(2) As each ballot for an election is considered, it must be placed in such a manner that the persons present at the counting are able to see how the ballot is marked.

[31] Given that Ms. Gilbertson was alone when recounting the ballots, no one else could see how they were marked.

(4) Invalid ballots not marked void; included as valid in recount

[32] The Town violated certain provisions of ss. 128 and 130 of the *Act*, which provide, *inter alia*, as follows:

128(3) Unless rejected under section 129(4), a mark referred to in section 129(1) on a ballot for an election must be accepted and counted as a valid vote.

...

128(5) The presiding election official must endorse ballots to indicate the following as applicable:

- (a) that the ballot was rejected under section 129 in relation to an election;
- (b) that the rejection of the ballot was objected to under section 130;
- (c) that a mark on the ballot was accepted as a valid vote but the acceptance was objected to under section 130.

...

128(6) An endorsement under subsection (5) must be made at the time the presiding election official considers the ballot and in such a manner that it does not alter or obscure the elector's marking on the ballot.

...

130(1) A candidate or a candidate representative may object to a decision to accept a vote or reject a ballot, with the objection recorded in accordance with section 128(5) and (6).

[33] The petitioners assert that ballots that were considered invalid on election night were not marked as such, violating s. 128(5) and s. 128(6).

[34] They also assert that, during Ms. Gilbertson's recount of the ballots, she counted as valid ballots that had been considered invalid on election night, contrary to s. 128(3), and Mr. Gordon rejected as invalid two ballots that had been considered valid on election night, without giving the candidates or their representatives the right to see the ballots, contrary to s. 130(1).

(5) Tally sheets not placed in ballot box

[35] The Town violated ss. 133(1) and (2), which provides in relevant part, as follows:

133(1) After the ballot accounts are completed and the sealed ballot packages prepared, the following must be placed in ballot boxes from which the counted ballots were taken:

- (a) the sealed ballot packages, if these are not ballot boxes themselves;
- (b) the copy of the ballot account prepared under section 131(3);

...

(2) The ballot boxes from which the election materials are placed must be sealed in accordance with section 111 and must not be opened until after the declaration of the results of the election under section 111 and must not be opened until after the declaration of the results of the election under section 136 except by the chief election officer for the purposes of section 135(4).

[36] The petitioners allege that Ms. Gilbertson retained the tally sheets rather than return them to the ballot box, violating s. 133(1). Alternatively, if she sealed the tally sheets in the ballot box, it appears she violated s. 133(2) by opening the box to obtain the tally sheets. Further, she advised candidate

MacKenzie of her redetermination of the results before Mr. Gordon was even aware of it; presumably, say the petitioners, he did not open the ballot box as required by s. 133(2).

[37] This complaint relates to the concession by the Town that Mr. Gordon violated s. 135(2), which provides, as follows:

135(2) The chief election officer must notify the candidates in an election of the date, time and place when the determination is to be made and the candidates are entitled to be present when those proceedings take place.

[38] The petitioners argue that each of these violations of the *Act* is substantive and serious, negating the integrity of the electoral process, and hence its validity. They submit that, cumulatively, these violations reveal a pattern of behaviour on the part of the Town that lacks the requisite level of transparency, and reflects a lack of seriousness and commitment to the principles underlying the electoral process.

[39] In determining the principles of the *Act*, the petitioners submit that guidance may be taken from a review of the various provisions in the *Act* addressing the conduct of elections.

[40] The petitioners say that the relevant principles of the *Act* are clear, and in this case were grossly violated. First and foremost is the principle of openness: all aspects of the counting of ballots and tabulation of results must be conducted in the open. Candidates must be notified of their right to be present or have representatives present to scrutinize the process. During the process, those candidates and scrutineers present must be given full access. When votes are counted and tabulated, the scrutineers must be able to observe exactly how the process is conducted.

[41] The petitioners submit that the provisions governing a judicial recount are also indicative of the legislature's emphasis on transparency. Section 139(2) provides that the applicant for the recount as well as candidates and their counsel may be present during the recount. Section 139(9) further provides that the ballot boxes must be resealed during any recess or adjournment of a judicial recount.

[42] The petitioners submit that all of these provisions emphasize the need for openness and transparency in the conduct of the electoral process.

[43] The petitioners also say that transparency ensures that mistakes are caught and corrected. For example, scrutineers noted and corrected numerous mistakes in the conduct of the ballot counting process on election night. Given that there were no witnesses present to observe Ms. Gilbertson's recount of the ballots, the petitioners cannot know if mistakes were made.

[44] Most fundamentally, argue the petitioners, openness ensures that candidates and the public can have confidence in the results determined during the vote count. In this case, the election-night results were tabulated beyond the oversight of the scrutineers, and those results were then revised following a recount at which not even the Chief Election Officer was present. In such circumstances, the petitioners say that it is unsurprising that candidates and electors alike now question the validity and legitimacy of the process and results.

[45] A second principle which the petitioners say is apparent from the *Act* is the need for a formal, careful process. The *Act* is highly prescriptive and detailed. For example, s. 128(5) of the *Act* prescribes how election officials must endorse invalid ballots. Section 129 provides further rules concerning marks

that must be accepted as valid votes. Sections 132 and 133 prescribe a specific manner by which the ballots are to be packaged, sealed, and returned to the ballot boxes. Section 135 specifies how the Chief Election Officer must determine the results of the election.

[46] The petitioners argue that the Town's conduct of the election failed to accord with the seriousness, formality and carefulness which should be the hallmarks of a democratic election. Ballots deemed invalid on election night were not voided. Some of those invalid ballots were later counted as valid, during Ms. Gilbertson's unwitnessed recount. Ballots considered valid on election night were later reconsidered and rejected, without candidates being notified or present. Tally sheets were retained by Ms. Gilbertson, rather than being sealed and locked with the ballots.

[47] In short, the petitioners insist that the Town's conduct was at times sloppy, and at other times misguided. Overall, they say, the Town's conduct of the election indicated a cavalier attitude toward what should have been a serious and carefully controlled affair. As a result, the electoral process has been demeaned, and the outcome has been tainted.

[48] On the issue of whether the Town's violations of the *Act* materially affected the outcome of the election, the petitioners submit that given the disparity between the preliminary results and the official results, the Town's numerous violations of the procedures and principles of the *Act* clearly had a material affect on the outcome of the election. Indeed, they claim, the final outcome of the election was founded upon violations of the *Act*.

[49] The petitioners submit that the Town's explanation as to how the change occurred simply does not accord with the facts. In his affidavit, Mr. Gordon refers to two "arithmetical errors", and two ballots which he rejected. The petitioners say that there are far more than two differences between the preliminary results and the official results.

[50] The petitioners also submit that Ms. Gilbertson's explanation of her recount is equally dissatisfying. On her recount, Ms. Gilbertson attributed candidate Curry with an additional 102 votes, out of a total of 327 additional votes attributed to all candidates. They contend that, if true, that would mean one candidate, candidate Curry, received nearly one third of all of the additional votes, while the remaining nine candidates shared the other two thirds of the additional votes. This, they say, is statistically highly improbable, particularly when candidate Curry gained less votes overall than at least three other candidates.

[51] The petitioners also contend that Ms. Gilbertson's explanation of tally sheets that were overlooked or out of order also does not explain the revised results. The revised results attributed 102 additional votes to candidate Curry, and 34 additional votes to candidate MacKenzie. Based on the tally sheets Ms. Gilbertson provided to candidate MacKenzie, and taking those pages which record the greatest number of votes allotted to candidate Curry over those allotted to candidate MacKenzie, the petitioners submit that there is no possible combination of tally sheets that verifies the Town's version of events. They say that taking a random sample of the tally sheets (as would be most likely, if some were simply overlooked), one would expect that candidates MacKenzie and Curry would have received a relatively similar number of votes, as reported on election night.

[52] According to the petitioners, candidate Curry's 102 vote gain in the revised results is also statistically unlikely when one considers that the next highest number of votes gained in the revised results was by candidate Barringer, who was allotted 48 additional votes.

[53] The petitioners argue that these facts demonstrate that the Town's misconduct had a substantial and material affect on the election results. The key point of their argument is that the official results changed from the preliminary results in the context of several breaches of the *Act* and, therefore, the only appropriate remedies are a declaration that the election of councillors is invalid or, in the alternative, a declaration that the election of candidate Curry is invalid.

V. The Respondent's Argument

[54] In respect of an application for a declaration of an invalid election, the *Act* provides, *inter alia*:

143(5) An application may be made only on one or more of the following bases:

...

- (b) that an election should be declared invalid because it was not conducted in accordance with this Act or a regulation or bylaw under this Act;

...

- (6) As a restriction on subsection (5)(b), an application may not be made on any basis for which an application for judicial recount may be or may have been made.

[55] The Town submits that whatever the speculation or the incredulity expressed by the petitioners as to the changes between the preliminary and the official election results, no elector or candidate exercised their statutory right to a judicial recount.

[56] The Town notes that an application for a judicial recount under s. 138 of the *Act* may be made on one or more of the following bases:

- (a) that votes were not correctly accepted or ballots were not correctly rejected as required by the rules of section 129;
- (b) that a ballot account does not accurately record the number of valid votes for a candidate;
- (c) that the final determination under section 135 did not correctly calculate the total number of valid votes for a candidate.

The Town argues that each of these provisions arises repetitively in the petition, and in the affidavits in support of it, and that many of the concerns expressed are based on hearsay contained in a newspaper article reporting on the election count.

[57] The Town submits that, as the affidavits of Ms. Gilbertson and Mr. Gordon show, the official election results were different from those announced in the preliminary results because of corrected arithmetical errors on the tally sheets. Additionally, two spoiled ballots were discovered and ultimately rejected. Other than the two spoiled ballots, no count change to the actual ballots, as opposed to the tally sheets, was involved.

[58] The Town concedes that in making his final determination of the count, Mr. Gordon failed to comply with s. 135(2) of the *Act* which provides:

135(2) The chief election officer must notify the candidates in an election of the date, time and place when the determination is to be made and the candidates are entitled to be present when those proceedings take place.

However, the Town submits that Ms. Gilbertson did meet with the only candidate affected by the correction of the tally sheets. At that meeting the nature of the arithmetic corrections was explained, and the candidate's right to a judicial recount was made clear.

[59] Turning to the petitioners' allegations of breaches of the *Act*, the Town submits:

1. In answer to the charge that on election night Ms. Gilbertson conducted counting proceedings beyond the oversight of the scrutineers, the Town says that there was no ballot tabulation or ballots involved. Rather, there was merely the addition of votes recorded on tally sheets and this task was undertaken in view of the scrutineers.
2. In answer to the allegation that ballots that were rejected as invalid during election night were not voided, the Town submits that ballots rejected are not "voided", they are required to be dealt with pursuant to s. 132 of the *Act*. The Town says the petitioners lead no evidence that rejected ballots were not dealt with as required by s. 132.
3. In answer to the assertion that Ms. Gilbertson retained tally sheets used to record votes rather than sealing them in the ballot box, the Town says that the tally sheets were not retained by Ms. Gilbertson, they were secured with the ballot boxes. In any event, the Town argues that tally sheets are work sheets and have no statutory status. Only ballots and "ballot accounts" (s. 131, *Act*) and the other specific materials set out in s. 133(1) of the *Act* are to be subsequently resealed in ballot boxes.
4. The petitioners submit that after the release of results on election night, Ms. Gilbertson reviewed the tally sheets and recounted the ballots in secret, without knowledge or oversight of candidates or their scrutineers and without direct participation or oversight by Mr. Gordon. The Town replies that the final determination under s. 135 of the *Act* was not "secret" in any nefarious sense; as noted by the Town, tally sheets are not protected election material, but work sheets. Moreover, Mr. Gordon authorized the recount, and directed the same to deal with the initial arithmetical errors involving the tally sheets.
5. The petitioners contend that ballots that had been counted as valid were rejected during the "second secret count", while ballots that had been rejected as invalid during elections night count were considered valid in the second count. The Town says that this allegation is incorrect. Two ballots were rejected on review by Mr. Gordon (s. 135 *Act*). No ballots previously rejected were counted, nor did any other ballots have their status changed.

[60] With respect to the issue of whether the conceded irregularity affected the result of the election, the Town submits that the final count is sound and unchallenged. The failure of Mr. Gordon to notify candidates of the date, time and place of his final determination of the count did not and does not alter the count, and there was no material change in the election result caused by the omission to notify candidates of the date, time and place of the determination.

[61] The Town notes that it is clear from s. 145(3) that not every irregularity or failure to comply with the *Act* will lead to invalidity. The Town argues that there is no evidence that the election was conducted in other than good faith. The Town also argues that the principles of the *Act* were not violated, nor did the irregularity cause a material change in the outcome.

[62] In *Rose et al v. the City of Cranbrook*, (1982) 133 D.L.R. (3d) 474 at 478, 18 M.P.L.R. 131 (B.C.S.C.), a case considering s. 176 of the *Municipal Act*, McLachlin J. (as she then was) stated as follows:

The onus of establishing significant irregularities or failure to comply with the provisions of the Act rests on the petitioners. However, if error is established, the onus of showing that the irregularities did not materially affect the result lies on the respondents.

[emphasis added]

[63] Section 176 of the *Municipal Act* provided:

176. The election of a member of council shall not be declared invalid by reason only of an irregularity or failure to comply with a provision of this Act if it appears to the Court that the election was conducted in good faith and in accordance with the principles laid down by this Act, and that the irregularity or failure to comply did not materially affect the result of the elector.

[64] In *obiter dicta*, the Court considered eight irregularities including one headed #7 and described by the Court as:

Failure to examine ballots and count the votes upon notice to and in the presence of the candidates as required by s. 156.

[65] Section 156 of the *Municipal Act* provided:

156(1) The returning officer shall arrange to examine the ballot accounts and, where necessary, to count the votes in the presence of the candidates or their agents as soon as practicable after the close of the poll.

...

(3) He shall, where necessary, give notice in writing of the time and place of the examination and, if necessary, the count to the candidates' agents appointed to attend the examination of ballot accounts and the count of the votes.

[66] Her Ladyship found that there was no failure to adhere to this section, but stated at p. 485:

Alternatively, if there was an error or omission in this respect, I am satisfied that it was not material for the reasons set out above (point No. 3) ...

[67] Point #3 was an irregularity headed: "*Failure to prepare a proper ballot account as required by s. 154*". On this point, Her Ladyship found that there had in fact been a failure to comply with the legislation, but stated:

The petitioners have presented no ground for concluding that a ballot account or accounts in the proper form would have changed the outcome of the election. On the other hand, the returning officer swears that the count was carried out in a “scrupulous manner”, that any irregularities - including the failure to prepare a proper ballot account, which is admitted – did not materially affect the result of the election. In these circumstances, I find that the respondents have discharged the onus on them of establishing that the failure to comply with s. 154(1) did not materially affect the result of the election.

[68] In *Van Horne v. Nanaimo (Regional District)*, [1980] B.C.J. No. 1555 (B.C. County Court), where five voters were found not to be entitled to vote as not being residents, and two voters found to be not entitled for failure to have their registration to vote witnessed, the Court noted that the difference in votes for the Regional District Director’s office was 5 votes between the winning candidate and the runner-up. After making a finding as to the irregularities the Court then considered whether it should declare the election invalid, at para. 14:

As the plurality of the successful candidate was five votes and the number of persons who were allowed to vote improperly total seven, I can only conclude that the irregularity and non-compliance did materially affect the result of the election within the meaning of Section 118.

[69] Section 118 at the time provided:

No election of a member of Council shall be declared invalid by reason only of any irregularity or non-compliance with a provision of this Act if it appears to the Judge that the election was conducted in good faith and in accordance with the principles laid down by this Act, and that such irregularity or non-compliance did not materially affect the result of the election.

[70] In *MacDonald v. Invermere*, (1986), 30 M.P.L.R. 25 (B.C. County Court), the successful candidate for mayor had distributed blank registrations to voters already pre-witnessed by himself to persons he had never met, and did not meet. Fifty-nine ballots were thus involved in a serious breach of the *Municipal Act* relating to eligibility to vote.

[71] The Court found that this was a serious irregularity, and then at p. 30 went on to consider the saving provision:

However having found that these irregularities did occur, have these irregularities materially affected the result of the election? The onus is upon the respondents to show that it has not so affected the results and in that regard, I find the respondents have not discharged that burden.

Some 59 votes were improperly cast and the difference between the elected person and the other was only 19 votes.

[72] Thus, argues the Town, the courts have not set aside electoral processes unless the irregularity established is found to be a serious or significant breach of the legislation which materially affected the election result.

[73] The Town submits that, in the case at bar, the omission to notify the candidates of the date, time and place of the determination of the official election results by Mr. Gordon, was the only irregularity. Despite this, the Town says the election was conducted in good faith, and the ballot count on election night and all procedures leading up to it were fully open and transparent.

[74] The Town argues that the omission to notify the candidates is not an omission or irregularity that impacted on the election results. The official election results were arrived at properly, and the presence or absence of candidates at the final determination process did not materially affect the election result whatsoever.

VI. Decision

[75] In my opinion, the petition must be dismissed.

[76] First, I find that, with the exception of the violation of s. 135(2) of the *Act*, which the Town conceded, the Town did not violate the provisions of the *Act* in its conduct of the election as alleged by the petitioners.

[77] I accept the evidence of Ms. Gilbertson that on election night, near the end of the evening, she took the tally sheets only and not the ballots to an adding machine in another part of the Town Hall to check the running totals, and that while she performed this task there were scrutineers watching her as she checked the numbers on the tally sheets. Although they claim that they could not see the actual tabulations, the evidence of Ms. Smart and Ms. Hobbs is consistent with the evidence of Ms. Gilbertson that she was conducting her work on the tally sheets in plain view of the scrutineers. In my view, Ms. Gilbertson's conduct does not amount to a breach of s. 124 of the *Act*.

[78] Further, there is no evidence to support the allegation that Ms. Gilbertson opened the ballot boxes on her own. I take from her evidence that she prevailed on Mr. Gordon to allow her to review the ballots on November 18th. It is far from clear who in fact opened the ballot boxes on that occasion.

[79] Ms. Gilbertson's evidence is that the ballots that the election officials considered questionable were not counted and were reviewed at the end of the count when they were either rejected or allowed. There were no objections raised at the time with this procedure. Thus, I reject the allegation that the Town violated ss. 128 and 130 of the *Act*.

[80] The Town conceded that the tally sheets are important. However, the fact remains that they are not included in the provisions of ss. 131-133. In any event, Ms. Gilbertson deposed that the tally sheets remained with the election material. I do not think the petitioners have established a breach of these sections of the *Act*.

[81] I turn then to the single breach which I think is at the crux of the petitioners' application.

[82] In his affidavit, Mr. Gordon conceded that he did err in not notifying the candidates of the date, time and place of his determination of the official election results as required by s. 135(2). Clearly, this error on his part compromised the transparency of the election proceedings. However, was this breach so egregious in the circumstances to warrant a declaration that the election was invalid? I think not.

[83] First, I am satisfied that the election was conducted in good faith. Certainly there is no allegation by the petitioners that there was any conduct on the part of Ms. Gilbertson or Mr. Gordon that amounts to a lack of integrity in carrying out their duties under the *Act*. I accept Mr. Gordon's evidence that his failure to notify the candidates was an oversight.

[84] Secondly, I am satisfied that the irregularity did not materially affect the result of the election. I accept Ms. Gilbertson's evidence that no tally sheets were lost or misplaced; that the ballot boxes with ballots in them were sealed and moved into a locked room along with all other election material; that she

arranged to do a check of the tally sheets on November 18th with Mr. Gordon; that on November 18th she advised Mr. Gordon of the counting errors and went through the tally sheets with him; and that upon her review of ballots on November 18th she found two ballots that ought to have been rejected and brought them to the attention of Mr. Gordon.

[85] I also accept Mr. Gordon's evidence that the election results are accurate and reflect a true result. There is no evidence that Mr. Gordon's failure to notify the candidates of the date, time and place of the recount affected how Mr. Gordon or Ms. Gilbertson carried out the process for the determination of the official election results. Certainly mistakes were made in tabulating and calculating the election results. However, as already found, there is no evidence of bad faith, only inadvertence, and the errors made were discovered and corrected before the official election results were declared by Mr. Gordon.

[86] Thirdly, I am mindful that Mr. Gordon's failure to notify the candidates as required by s. 135(2) undermined the important principle of transparency on which the *Act* is grounded. However, I remain satisfied for the reasons expressed, that the election should not be declared invalid.

[87] Finally, I find that in all the circumstances the appropriate remedy to address the petitioners' complaints would have been an application for a judicial recount. Section 143(6) provides that an application for a declaration of an invalid election may not be made on any basis for which an application for judicial recount may be or may have been made. I do not accept the petitioners' position that a judicial recount would not have addressed their concerns. There is no evidence to support their charges about misplaced ballots or tally sheets. In fact, the true nature of their complaints has to do with human error in the tabulation and calculation of the election results. It strikes me that rather than speculate, as they have, on alleged discrepancies or the reason for changes in the totals for the candidates between the preliminary and official election results, they should have applied for a judicial recount pursuant to ss. 138 and 139 of the *Act*. These sections are an important tool for those who wish to challenge election results as they provide a speedy process for determining whether votes were correctly accepted or rejected, or were correctly calculated.

[88] Thus, I find that the petition should be dismissed.

“Cohen, J.”