

## Contesting Municipal Elections - Recounts and More

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October is the season for municipal elections in Manitoba. It is an opportunity for resident electors to exercise their democratic franchise, the culmination of many weeks of campaigning. It is the basis for government at the level closest to the population and its day-to-day needs and aspirations.



It is not unusual to have a very small margin of victory of one candidate over their next closest competitor, or even a tie. Each candidate wants to make sure that every vote for them counts. That is where judicial recounts sometimes come into play. No matter how simple it seems to count ballots, there are a wide variety of situations in which a court's supervision and interpretation are required to rule upon whether a ballot has been validly cast and counted.

Sometimes, election matters can take a wrong turn. Elections have been contested on the basis that a candidate was not eligible for election in a particular municipality in the first place. In other cases, unsuccessful candidates have challenged the validity of elections on the basis that election offences occurred during the election.

Over the years, I have had the opportunity to work on a few judicial recounts and even a case involving alleged election offences. The stakes can be high for the leading and the second-place candidate. Same for the election officials, who want to be able to stand by their results. The courts activate quickly and become fully engaged; judges understand the importance of getting the correct result quickly. It can be exciting, challenging work, punctuated by tedious periods of physically examining ballots.

Even electronically counted ballots can be subject to a recount. There are two Manitoba cases that give guidance as to how this should be done. Mechanically counted ballots that are marked by fallible, human voters sometimes still need a set of eyes to discern voting intent.

Municipal elections in Manitoba are governed by *The Municipal Councils and School Boards Elections Act*. The Act specifies that there must be a judicial recount where the vote count results in a tie and a candidate or scrutineer has objected to a decision made by an election official to accept or reject any ballot. Any voter may apply to the court for a judicial recount on the grounds that:

1. ballots were not correctly accepted, rejected, or discarded;
2. the statement of the vote does not correctly record the number of valid votes for a candidate; or
3. the statement of official results does not correctly tabulate the total number of valid votes for a candidate.

Candidates can apply for a judicial recount on any of those grounds, plus the ground that there was a tie.

Applications for a judicial recount must be made to the court within 14 days after the election results are declared. Once the application is made, the court must set a date for the recount within two weeks (or as soon as practicable) following receipt of the application.

The parties to the recount (the applicant, the candidates potentially affected by the recount, and the senior election official of the municipality) will conference with the presiding judge, who will set the ground rules for how the recount is to be conducted. This will not always be an examination by the judge of all ballots cast. Usually, the parties' lawyers will identify disputed ballots, and it will only be those ballots that will be referred to the judge for a determination.

It is beyond the scope of this article to get into specifics of which ballots are counted as valid, how voter intention is determined, and when ballots are considered 'spoiled.' The general rule is that voter intention is primary, and that ballots are not lightly rejected. The court will also look for and reject ballots with 'identifying marks' that might be traceable to an individual voter; the theory being that the voter is identifying themselves to receive some benefit from the candidate for whom they cast their ballot. Good scrutineers appointed by the candidate are important to election campaigns. During the vote count, scrutineers can identify suspect ballots, dispute their being counted, and, after the count, report any irregularities to the candidate's election team.

Once the recount is completed, the judge must announce the result, give the statement of the vote for each ballot box opened, give the statement of official results, and seal the ballots and other documents. The senior election official must then declare the candidate with the most votes to be elected. If there is still a tie, a by-election must be called.

A separate part of the Act deals with 'election offences,' such as bribery, intimidation, fraudulent or multiple voting, violating the secrecy of voting, interfering with voting, improperly handling ballots, and printing false ballots. Election offences can result in a fine of not more than \$10,000, imprisonment for a term of not more than one year, and a prohibition from seeking elected office or being appointed as an election official for up to eight years.

An eligible voter, a candidate, or a senior election official may apply to the court to challenge an election on the grounds that the winning candidate was not eligible to hold office or that there were irregularities in the election constituting election offences. The application must be made within 60 days after the election results are officially declared. It takes strong

evidence to successfully challenge an election based on alleged irregularities, and the applicant has the burden of convincing the court on a balance of probabilities that the irregularity materially affected the election results. This usually means that the person challenging the election must show that the irregularity likely affected the vote by at least the plurality of votes separating the elected and the unelected candidate.

Almost all elections go without a hitch. Almost all ballots are easily and properly counted. These legal avenues protect the democratic process when things are otherwise.

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