SUPREME COURT OF CANADA

CITATION: Opitz *v.* Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76

DATE: 20121025
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BETWEEN:

Ted Opitz
Appellant
and
Borys Wrzesnewskyj,
Attorney General of Canada,
Marc Mayrand (Chief Electoral Officer),
Allan Sperling (Returning Officer, Etobicoke Centre),
Sarah Thompson and Katarina Zoricic
Respondents

AND BETWEEN:

Borys Wrzesnewskyj
Appellant
and
Ted Opitz,
Attorney General of Canada,
Marc Mayrand (Chief Electoral Officer) and
Allan Sperling (Returning Officer, Etobicoke Centre)
Respondents
- and -
Keith Archer (Chief Electoral Officer of British Columbia),
O. Brian Fjeldheim (Chief Electoral Officer of Alberta) and
Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Moldaver JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 135) — Rothstein and Moldaver JJ. (Deschamps and Abella JJ. concurring)

DISSENTING REASONS: (paras. 136 to 217) — McLachlin C.J. (LeBel and Fish JJ. concurring)

Ted Opitz *Appellant*

v.

Borys Wrzesnewskyj,
Attorney General of Canada,
Marc Mayrand (Chief Electoral Officer),
Allan Sperling (Returning Officer, Etobicoke Centre),
Sarah Thompson and Katarina Zoricic *Respondents*

- and -

Borys Wrzesnewskyj *Appellant*

v.

Ted Opitz,
Attorney General of Canada,
Marc Mayrand (Chief Electoral Officer) and
Allan Sperling (Returning Officer, Etobicoke Centre) *Respondents*

and

Keith Archer (Chief Electoral Officer of British Columbia),
O. Brian Fjeldheim (Chief Electoral Officer of Alberta) and
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Indexed as: Opitz *v.* Wrzesnewskyj

2012 SCC 55

File No.: 34845.

2012: July 10; 2012: October 25.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Moldaver JJ.

ON APPEAL FROM THE ONTARIO SUPERIOR COURT OF JUSTICE

Elections — Contested election application — Candidate defeated in federal election by a margin of 26 votes alleging "irregularities . . . that affected the result of the election" — Whether election in electoral district should be annulled — Canada Elections Act, S.C. 2000, c. 9, ss. 524(1)(b), 531(2).

Evidence — Fresh evidence — Relevance and reliability — Motion seeking to adduce evidence from national registry of electors on appeal — Whether fresh evidence should be admitted.

O was the successful candidate in the electoral district of Etobicoke Centre for the 41st Canadian federal election, with a plurality of 26 votes. The runner-up, W, applied to have the election annulled, on the basis that there were

"irregularities . . . that affected the result of the election" (s. 524(1)(*b*) of the *Canada Elections Act* ("Act")). The Ontario Superior Court of Justice granted the application, finding that 79 votes amounted to such irregularities and that, since this number exceeded the plurality of 26 votes, the election could not stand. O appealed to the Supreme Court of Canada as of right, and W cross-appealed (s. 532(1) of the Act). The Chief Electoral Officer and the returning officer for Etobicoke Centre also brought a motion for directions, seeking to adduce fresh evidence, pursuant to s. 62(3) of the *Supreme Court Act*.

Held (McLachlin C.J. and LeBel and Fish JJ. dissenting): The appeal should be allowed and the cross-appeal should be dismissed. The motion to adduce fresh evidence should be dismissed.

Per Deschamps, Abella, Rothstein and Moldaver JJ.: W asks this Court to disqualify the votes of several Canadian citizens on account of administrative mistakes, notwithstanding evidence that those citizens were entitled to vote. The invitation to do so should be declined. There is no allegation in this case of any fraud or wrongdoing.

In accordance with s. 3 of the *Canadian Charter of Rights and Freedoms* and a plain reading of s. 6 of the Act, there are only three fundamental prerequisites to the right to vote (or "entitlement" to vote). A person must be 18 years of age or older, a Canadian citizen and a resident in the electoral district (or "riding"). The Act

provides various procedural safeguards that allow persons to satisfy election officials that they are entitled to vote and prevent those not entitled to vote from voting. Examples of such procedural safeguards are the lists of electors, registration procedures and identification and vouching requirements.

Lower courts have taken two approaches to determining whether votes should be invalidated on account of irregularities. Under the strict procedural approach, a vote is invalid if an election official fails to follow any one of the procedures aimed at establishing entitlement. Under the substantive approach, an election official's failure to follow a procedural safeguard is not determinative. Only votes cast by persons not entitled to vote are invalid. The substantive approach should be adopted, as it effectuates the underlying *Charter* right to vote, not merely the procedures used to facilitate that right.

The substantive approach has two steps under s. 524(1)(*b*). First, an applicant must demonstrate that there was a breach of a statutory provision designed to establish the elector's entitlement to vote. An applicant who has successfully done so has established an "irregularity". Second, the applicant must demonstrate that someone not entitled to vote, voted. He may do so using circumstantial evidence. This second step establishes that the irregularity "affected the result" of the election. Under this approach, an applicant who has led evidence from which an "irregularity" could be found will have met his *prima facie* evidentiary burden. At that point, the respondent can point to evidence from which it may reasonably be inferred that no

"irregularity" occurred or that, despite the "irregularity", the voter was in fact entitled to vote. After-the-fact evidence of entitlement is admissible. If the two steps are established, a vote is invalid. Finally, although a more realistic test may be developed in the future, the "magic number" test is used for the purposes of this application. It provides that an election should be annulled if the number of invalid votes is equal to or greater than the successful candidate's plurality.

Applying these principles to this appeal, at least 59 of the 79 votes disqualified by the application judge should be restored. The remaining 20 votes are less than O's plurality of 26. Although the remaining 20 votes are not discussed, there is no reason to believe that any of the 20 voters were not in fact entitled to vote. Because W has failed to establish that at least 26 votes should be disqualified, his application to annul the election should be dismissed.

The application judge made two errors of law. With respect to polls 31 and 426, he misstated the onus of proof five times, in the context of making crucial findings of fact, and it cannot be confidently said that he did not reverse the onus of proof. For polls 174 and 89, he failed to consider material evidence in reaching his findings. In light of these two errors of law, the application judge's findings at these polls are not entitled to deference. Because the evidence is exclusively documentary and the Act requires a contested election application to proceed without delay, it is incumbent on this Court to reach its own conclusion on the validity of the votes in

these polling divisions rather than remit the case to the application judge for redetermination.

At polls 31 and 426, a total of 41 required registration certificates were missing. If the certificates were never completed this would amount to an "irregularity", satisfying the first step of the test. Here, however, there was evidence that indicates the certificates were completed but were misplaced after the election. Considering the whole of the evidence, W failed to establish, on a balance of probabilities, that there was an "irregularity". For 13 of these voters at poll 31, there was positive proof that they were entitled to vote. They were on the list of electors at poll 31 or at other polls in the riding. This evidence confirms the decision to restore these votes. Although the minority also restores these votes, their explanation for doing so is contrary to their position that a voter must establish his entitlement before receiving and casting a ballot.

At poll 174, eight individuals who were vouched for are identified in the poll book by their relationship to the person who vouched for them, rather than by their full name. There was, however, evidence in the list of electors from which it could be inferred that the vouching was properly conducted. W failed to establish an "irregularity".

At poll 89, 10 registration certificates were not signed by the voters, but were instead signed only by the election official. With respect to these votes, W

established that there was an "irregularity". W failed, however, to show that the irregularity "affected the result" of the election. There was evidence from which it could reasonably be inferred that the 10 voters were entitled to vote and that the misplaced signatures were simply a clerical mistake.

The cross-appeal should be dismissed. There is no basis for interfering with the application judge's findings with respect to the other votes in polls 16, 21, 31, 89, 400 and 426.

Evidence from the national register of electors can be relevant in contested election applications as proof of voters' entitlement. Given that the motion to adduce fresh evidence could only assist O, however, the evidence need not be considered.

Per McLachlin C.J. and LeBel and Fish JJ. (dissenting): The federal election in the riding of Etobicoke Centre should be annulled because of votes cast by individuals who were not entitled to vote under the Act.

An individual must be entitled to vote before casting a ballot for the Member of Parliament for the riding where she is ordinarily resident. The Act sets out a comprehensive scheme defining entitlement to vote. In general, there are three prerequisites: qualification, registration and identification. First, a voter must be qualified, by being a Canadian citizen and 18 years of age or older. Second, she must

be registered, generally either by being on the list of electors or filing a registration certificate. Third, she must be properly identified at the polling station, whether by providing appropriate pieces of identification or by taking an oath and being vouched for by another elector.

Being a qualified elector, in terms of age and citizenship, is a necessary but not sufficient condition for entitlement to vote. The registration and identification prerequisites of entitlement must also be satisfied. These are fundamental safeguards for the integrity of the electoral system. Nothing in the Act suggests that a person who on election day is not entitled to vote should be permitted to do so and to establish her entitlement later.

A court may annul an election under s. 531(2) if the applicant establishes that there were "irregularities . . . that affected the result of the election" within the meaning of s. 524(1)(*b*). The term "irregularities" should be interpreted to mean failures to comply with the requirements of the Act, unless the deficiency is merely technical or trivial. For "irregularities" to have "affected the result of the election", they must be of a type that could affect the result of the election and impact a sufficient number of votes to have done so. Votes cast by persons not entitled to vote are irregularities that can affect the result of the election, because they are votes that should not have been cast. If the number of such votes equals or exceeds the winner's plurality, then the result of the election is affected and the election should be annulled.

Since election results benefit from a presumption of regularity, the applicant bears the burden of establishing, on a balance of probabilities, that there were "irregularities . . . that affected the result of the election". Here, the applicant had to establish that irregularities resulted in non-entitled voters casting votes. In the absence of palpable and overriding error, a judge's conclusions on whether a voter complied with the entitlement provisions of the Act should not be disturbed.

In this case, the application judge applied the correct burden of proof and, while he improperly set aside some votes, he did not err with respect to 65 ballots cast by persons not entitled to vote. As this exceeds the winner's plurality of 26 votes, the election should be annulled.

Irregularities in identification led the application judge to set aside votes at polls 21, 174, 502 and 30. He did not err in setting aside 27 votes on this basis. These votes were cast by individuals using the oath and vouching procedure under the Act to identify themselves at the polling station.

At poll 21 the evidence supported the application judge's conclusion that vouching was required for eight voters but did not occur. Similarly, the judge did not err in concluding that any vouching that occurred for eight voters at poll 174 was improper. Finally, seven voters at poll 502 and four voters at poll 30 were vouched for by individuals not resident in the polling division at which they were vouching, contrary to the Act.

Irregularities in registration led the application judge to set aside votes cast under the registration certificate procedure at polls 426, 174, 89 and 31. He did not err in setting aside 38 votes on this basis. Individuals voting by registration certificate must make a declaration of qualification, certifying their age and citizenship. This requirement is vital to entitlement to vote.

The evidence supported the application judge's conclusion that no declaration of qualification was made for 26 registration certificate voters at poll 426. No registration certificates were found for these voters and the relevant pages of the poll book were blank. The application judge did not err in concluding that the required declaration was not made by one registration certificate voter at poll 174 and nine registration certificate voters at poll 89. The evidence supporting these findings included the absence of voter signatures from the declaration of qualification on the registration certificates.

Regarding 15 votes cast by registration certificate voters at poll 31, the evidence supported the application judge's conclusion that declarations of qualification were never made. The registration certificates could not be found. However, while two of those votes were properly set aside by the application judge, the remaining 13 should not have been. Three voters had already satisfied the registration prerequisite of entitlement by being on the list of electors for polling division 31. The remaining 10 voters were on lists of electors for other polling divisions within the electoral district. In the circumstances, the fact that votes were

cast at the wrong polling station within the riding was a technical or trivial deficiency and not an irregularity within the meaning of s. 524(1)(*b*).

Since the 65 votes properly set aside exceed the 26-vote plurality, the election should be annulled.

The motion to adduce fresh evidence should be dismissed. After-the-fact information that a non-entitled voter was qualified is not relevant to whether he or she was entitled to receive a ballot on election day. Furthermore, the reliability of the evidence in this case is questionable. Moreover, admitting the evidence could not affect the disposition of the appeal, given the number of votes that were properly set aside by the application judge.

Cases Cited

By Rothstein and Moldaver JJ.

Applied: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517; **approved:** *Camsell v. Rabesca*, [1987] N.W.T.R. 186; *Flookes and Long v. Shrake* (1989), 100 A.R. 98; **disapproved:** *O'Brien v. Hamel* (1990), 73 O.R. (2d) 87; *Nielsen v. Simmons* (1957), 14 D.L.R. (2d) 446; *Hogan v. Careen and Hickey* (1993), 116 Nfld. & P.E.I.R. 310; *Blanchard v. Cole*, [1950] 4 D.L.R. 316; **referred to:** *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Henry v. Canada*

(Attorney General), 2010 BCSC 610, 7 B.C.L.R. (5th) 70; *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481, aff'd [1993] 2 S.C.R. 438; *Belczowski v. Canada*, [1992] 2 F.C. 440, aff'd [1993] 2 S.C.R. 438; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Longley v. Canada (Attorney General)*, 2007 ONCA 852, 88 O.R. (3d) 408, leave to appeal refused, [2008] 1 S.C.R. x; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Cusimano v. Toronto (City)*, 2011 ONSC 7271, 287 O.A.C. 355; *Abrahamson v. Baker and Smishek* (1964), 48 D.L.R. (2d) 725; *Beamish v. Miltenberger*, [1997] N.W.T.R. 160.

By McLachlin C.J. (dissenting)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; *R. v. Knott*, 2012 SCC 42, [2012] 2 S.C.R. 470; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Henry v. Canada (Attorney General)*, 2010 BCSC 610, 7 B.C.L.R. (5th) 70; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Beamish v. Miltenberger*, [1997] N.W.T.R. 160; *Wright v. Koziak*, [1981] 1 W.W.R. 449; *Morgan v. Simpson*, [1974] 3 All E.R. 722; *O'Brien v. Hamel* (1990), 73 O.R. (2d) 87; *Blanchard v. Cole*, [1950] 4 D.L.R. 316; *McMechan v. Dow* (1968), 67 D.L.R. (2d) 56; *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Dewdney Election Case*, [1925] 3 D.L.R. 770; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2

S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

Statutes and Regulations Cited

Canada Elections Act, S.C. 2000, c. 9, Part 1, ss. 3, 6, 32, 44, 93, 96 *et seq.*, 106, 109, 120(1), 125, Part 9, 143, 144, 148.1, 149, 161, 162, 509, 510, 511, 517, Part 20, 524, 525(3), 531, 532(1), 538.

Canadian Charter of Rights and Freedoms, ss. 3, 33.

Constitution Act, 1867, ss. 40, 51, 51A.

Rules of the Supreme Court of Canada, SOR/2002-156, rr. 3, 47.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 62(3).

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Superior Court of Justice (Lederer J.), 2012 ONSC 2873, 110 O.R. (3d) 350, [2012] O.J. No. 2308 (QL), 2012 CarswellOnt 6422, allowing a contested election application.

Appeal allowed and cross-appeal dismissed, McLachlin C.J. and LeBel and Fish JJ. dissenting.

W. Thomas Barlow, *Kent E. Thomson*, *Matthew I. Milne-Smith* and *Nicholas Shkordoff*, for the appellant/respondent Ted Opitz.

Gavin J. Tighe, *Stephen A. Thiele* and *Guy Régimbald*, for the respondent/appellant Borys Wrzesnewskyj.

David Di Paolo, *Alessandra Nosko* and *Trevor Knight*, for the respondents Marc Mayrand (Chief Electoral Officer) and Allan Sperling (Returning Officer, Etobicoke Centre).

Written submissions only by the respondent Sarah Thompson.

Harold Turnham, for the intervener Keith Archer (Chief Electoral Officer of British Columbia).

William W. Shores, Q.C., and *Fiona Vance*, for the intervener O. Brian Fjeldheim (Chief Electoral Officer of Alberta).

Allison A. Thornton and *Shashu Clacken Reyes*, for the intervener the Canadian Civil Liberties Association.

No one appeared for the respondent the Attorney General of Canada.

No one appeared for the respondent Katarina Zoricic.

The judgment of Deschamps, Abella, Rothstein and Moldaver JJ. was delivered by

ROTHSTEIN AND MOLDAVER JJ. —

I. Introduction

[1] A candidate who lost in a close federal election attempts to set aside the result of that election. We are asked to disqualify the votes of several Canadian citizens based on administrative mistakes, notwithstanding evidence that those citizens were in fact entitled to vote. We decline the invitation to do so. The *Canadian Charter of Rights and Freedoms* and the *Canada Elections Act*, S.C. 2000, c. 9 ("Act"), have the clear and historic purposes of enfranchising Canadian citizens, such that they may express their democratic preference, and of protecting the integrity of our electoral process. Following these objectives and the wording of the Act, we reject the candidate's attempt to disenfranchise entitled voters and so undermine public confidence in the electoral process.

[2] At issue in this appeal are the principles to be applied when a federal election is challenged on the basis of "irregularities". We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.

[3] The 41st Canadian federal election took place on May 2, 2011. In the electoral district (or "riding") of Etobicoke Centre, 52,794 votes were cast. After a judicial recount, Ted Opitz was the successful candidate with a plurality of 26 votes. Borys Wrzesnewskyj was the runner-up.

[4] Mr. Wrzesnewskyj applied under s. 524(1)(*b*) of the Act, to have the election annulled, on the basis that there were "irregularities . . . that affected the result of the election". The relevant provisions of the Act are contained in the Appendix to these reasons. The application was heard by Justice Lederer of the Ontario Superior Court of Justice (2012 ONSC 2873, 110 O.R. (3d) 350). Lederer J.

concluded that 79 votes amounted to irregularities that affected the result of the election. He declared the election "null and void" (para. 154). Mr. Opitz appealed as of right to this Court and Mr. Wrzesnewskyj cross-appealed (s. 532(1) of the Act).

[5] For the reasons that follow, we would allow the appeal and dismiss the cross-appeal. While we have only discussed 59 votes in these reasons, from our analysis of all of the evidence, we have no reason to believe that any of the other 20 voters did not in fact have the right to vote.

II. Ontario Superior Court of Justice, 2012 ONSC 2873, 110 O.R. (3d) 350

[6] The application proceeded on the basis that no fraud or wrongdoing was alleged. The submissions were restricted to alleged irregularities. In conformity with the statutory direction to resolve the contest in a summary way (s. 525(3) of the Act), Mr. Wrzesnewskyj agreed to limit his submissions to alleged irregularities at 10 of the more than 230 polls that made up the electoral district of Etobicoke Centre.

[7] The application judge first observed that when examining the conduct of an election, there is a presumption that it was conducted in accordance with the requirements of the governing legislation (para. 26). He further found that the onus was on the applicant throughout to prove, on a balance of probabilities, that there were irregularities and that they affected the result (paras. 45 and 51).

[8] The application judge next determined that the purpose of the Act was to enfranchise Canadian citizens (paras. 56-60). Hence, the legislation was to be interpreted liberally because a strict interpretation could detract from that goal. However, he also found that the word "irregularity", an undefined term in the Act, should be given a broad interpretation (paras. 62 and 67).

[9] Finally, in determining whether an irregularity "affected the result of the election", the application judge concluded that if the number of irregular votes exceeded the plurality of the winning candidate, in this case 26, the election could not stand (para. 71). The application judge set aside a total of 79 votes. Because the number of votes set aside, 79, exceeded the plurality of 26, he declared the election "null and void".

III. Analysis

A. *The Canada Elections Act*

[10] The right of every citizen to vote, guaranteed by s. 3 of the *Charter*, lies at the heart of Canadian democracy. The franchise has gradually broadened in Canada over the course of history from male property owners 21 years of age and older to the present universal suffrage of citizens aged 18 and over. Universal suffrage is reflected in s. 3 of the Act, which provides that a person is "qualified" to vote if he or she is a Canadian citizen and is 18 years of age or older.

[11] Canada is divided into "electoral districts" (commonly known as "ridings"): *Charter*, s. 3, and *Constitution Act, 1867*, ss. 40, 51 and 51A. Etobicoke Centre is an electoral district. Section 6 of the Act requires that a qualified elector be ordinarily resident in one of the polling divisions within the electoral district. Persons who are qualified as electors are entitled to vote for a member of Parliament for the electoral district in which the elector is ordinarily resident.

[12] The Act also sets out detailed procedures for voting that turn the constitutional right of citizens to vote into a reality on election day. What follows is a brief description of the procedural provisions that give rise to the issues in this appeal.

[13] Electoral districts in Canada are subdivided into polling divisions, each of which contains at least 250 electors (s. 538 of the Act). For each polling division, a returning officer establishes one or more polling stations (s. 120(1)). Each polling division considered in this judgment had only one polling station. Each station is overseen by a deputy returning officer ("DRO") and a poll clerk (s. 32). Sometimes several polling divisions may have polling stations in the same building, at separate tables. Certain polling divisions cover only residents of two or more institutions, often senior citizens' residences. In such cases, the returning officer can establish "mobile" polling stations to be located in each of the institutions (ss. 125 and 538(5)). The Chief Electoral Officer ("CEO") is required to maintain a national register of electors ("NROE") containing the name, sex, date of birth and address of electors (s. 44). Between elections, the CEO updates the NROE using data from various

government sources. Shortly after an election is called, the CEO prepares a preliminary list of electors ("PLE") for each polling division, based on the NROE (s. 93). A process of revision of the PLE is then undertaken (ss. 96 ff.). Before polling day, official lists of electors ("OLEs") are prepared for use at each polling station (s. 106).

[14] Many electors will be on the OLE of their assigned polling division, by "enumeration". Since age and citizenship are prerequisites for inclusion on the OLE, those listed do not have to establish their age and citizenship when they come to vote. To vote, these electors must prove their identity and residence by one of three means: (a) providing government-issued identification with photo and address (s. 143(2)(*a*)); (b) providing two pieces of authorized identification, at least one of which establishes their address (s. 143(2)(*b*)); or (c) taking a prescribed oath and being vouched for by someone on the OLE in the same polling division (s. 143(3)). Once identity and residence are established, the voter is given a ballot.

[15] Electors who are not on the OLE can have their names added on election day by the process of "registration" (s. 161(1)). To register, the elector must provide proof of identity and residence. Where the elector satisfies these requirements, the DRO will complete a registration certificate and the elector will sign it (s. 161(4)). Electors who register must also establish their age and citizenship. This is accomplished by signing a declaration to that effect, which appears on the registration certificate.

[16] Section 161(5) of the Act provides that, where a registration certificate is completed, the OLE is deemed to have been modified in accordance with the certificate. After polling day, the returning officer uses the registration certificates to update the OLE, and the CEO creates a final list of electors ("FLE") for each electoral district (s. 109). The FLE is an updated list containing the names of those electors who were enumerated on the OLE as well as those who voted by registration.

[17] Vouching is a procedure designed to enable persons to vote who lack appropriate identification. An elector may prove his or her identity by being vouched for by a person whose name appears on the list of electors for the same polling division. A voucher can only vouch once. A person who has been vouched for cannot vouch for someone else in the same election (s. 161(1)(*b*), (6) and (7)).

[18] The Act also establishes requirements for record-keeping by election officials. After the issue of the writ to call an election, a returning officer appoints one DRO and one poll clerk for each polling station in the electoral district for which he or she is responsible (s. 32). Once the DRO is satisfied that an elector's identity and residence have been proven, the name of the elector is crossed off the OLE and the elector is allowed to vote (s. 143(4)). Once the elector has voted, the poll clerk is required to indicate on the list that the vote was cast by placing a check mark in a box set aside for that purpose (s. 162(*b*)). The poll clerk is also required to make entries in a "poll book". The required entries include various matters, such as whether an

elector has taken an oath, the type of oath he or she has taken and the fact that the elector has voted using a registration certificate (s. 162(*f*) and (*j*)).

B. *Interpreting the Relevant Statutory Provision*

(1) Part 20 of the Act

[19] Part 20 of the Act deals with contested elections. Section 524(1) provides:

> **524.** (1) Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that
>
> (*a*) under section 65 the elected candidate was not eligible to be a candidate; or
>
> (*b*) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

[20] The remedy the court may provide is in s. 531(2):

> **531.** . . .
>
> (2) After hearing the application, the court may dismiss it if the grounds referred to in paragraph 524(1)(*a*) or (*b*), as the case may be, are not established and, where they are established, shall declare the election null and void or may annul the election, respectively.

The use of the word "respectively" means that where the grounds in s. 524(1)(*a*) are established, a court *must* declare the election null and void; where the grounds in s. 524(1)(*b*) are established, a court *may* annul the election. Conversely, a court may not annul an election unless the grounds in s. 524(1)(*b*) are established.

[21] The French version of the Act confirms this interpretation:

> **531.** . . .
>
> (2) Au terme de l'audition, [le tribunal] peut rejeter la requête; si les motifs sont établis et selon qu'il s'agit d'une requête fondée sur les alinéas 524(1)*a*) ou *b*), il doit constater la nullité de l'élection du candidat ou il peut prononcer son annulation.

[22] Under those provisions, if the grounds in para. (*a*) of s. 524(1) are established (the elected candidate was ineligible), then a court must declare the election null and void. In such circumstances it is as if no election was held. By contrast, if the grounds in para. (*b*) are established (there were irregularities, fraud or corrupt or illegal practices that affected the result of the election), a court *may* annul the election. Under these circumstances, a court must decide whether the election held was compromised in such a way as to justify its annulment.

[23] In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in

Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.

(2) Meaning of "Irregularities . . . That Affected the Result of the Election"

[24] This case involves interpreting the phrase "irregularities . . . that affected the result of the election". The phrase is composed of two elements: "irregularities" and "affected the result". As we shall explain, "irregularities" are serious administrative errors that are capable of undermining the electoral process — the type of mistakes that are tied to and have a direct bearing on a person's right to vote.

[25] "Affected the result" asks whether someone not entitled to vote, voted. Manifestly, if a vote is found to be invalid, it must be discounted, thereby altering the vote count, and in that sense, affecting the election's result. "Affected the result" could also include a situation where a person entitled to vote was improperly prevented from doing so, due to an irregularity on the part of an election official. That is not the case here and we need not address it.

[26] In construing the meaning of "irregularities . . . that affected the result", we have taken into account a number of aides to statutory interpretation, among them: (1) the constitutional right to vote and the objectives of the Act; (2) the text and context of s. 524; and (3) the competing democratic values engaged.

(a) *The Constitutional Right to Vote and the Objectives of the Act*

[27] Canadian democracy is founded upon the right to vote. Section 3 of the *Charter* provides:

> **3.** Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[28] The fundamental purpose of s. 3 of the *Charter* was described in *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, by Iacobucci J., for the majority, at para. 30:

> In the final analysis, I believe that the Court was correct in *Haig* [*v. Canada*, [1993] 2 S.C.R. 995], to define s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process. Democracy, of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives. The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy.

[29] The constitutional guarantee of the right to vote in s. 3 of the *Charter* is a fundamental provision, not subject to constitutional override under s. 33 of the *Charter*. Section 3 provides that citizens have the right to vote "*in an election of members of the House of Commons or of a legislative assembly*". The right to vote in

the election of "members of the House of Commons" reflects Canada's constitutional character as a parliamentary form of government. Citizens have the right to vote in a specific electoral district, choosing among various candidates who wish to be the Member of Parliament for that district: see *Henry v. Canada (Attorney General)*, 2010 BCSC 610, 7 B.C.L.R. (5th) 70, at para. 139.

[30] Section 6 of the Act recognizes that all persons meeting the three requirements of age, citizenship and residence are "entitled" to vote. It reads:

> **6.** Subject to this Act, every person who is qualified as an elector is entitled to have his or her name included in the list of electors for the polling division in which he or she is ordinarily resident and to vote at the polling station for that polling division.

Section 6 uses the term "polling division". Polling divisions exist within electoral districts for administrative simplicity and voter convenience on election day (J. P. Boyer, *Election Law in Canada: The Law and Procedure of Federal, Provincial and Territorial Elections* (1987), vol. I, at p. 101). The *Charter* right to vote is for the Member of Parliament for the electoral district in which the voter resides.

[31] On a plain reading of s. 6, qualification and residence in a polling division give an individual the entitlement or right to be included on the list of electors for that polling division, and to vote. Section 6 *does not* provide that inclusion on the list of electors is a prerequisite to the right to vote. Such a reading reverses the effect of the

provision. Entitlement to be on the list and entitlement to vote are consequences of being a citizen, being of age and being resident in the polling division.

[32] In this regard, it should be noted that s. 6 is a complete definition of "entitlement" in the Act. The definition is not altered by any other provision. "Entitlement" consists only of the fundamental requirements of age, citizenship, and residence.

[33] In so concluding, we recognize that the opening words of s. 6 are "[s]ubject to this Act". However, a distinction must be made between the requirements of "entitlement" in s. 6 itself, which appears in Part 1 of the Act under the heading "Electoral Rights", and the procedural mechanisms applicable on election day which appear in Part 9 of the Act under the heading "Voting". The Act establishes procedures to allow those citizens who have the right to vote to do so on election day. For example, ss. 148.1 and 149, which appear in Part 9, require procedures to be followed in establishing identity and residence, and in registering, before voting. These are procedural provisions designed to satisfy election officials that voters have the attributes that entitle them to vote. The purpose of procedural provisions in the Act is to enfranchise those persons having a right to vote under s. 6, and to prevent persons without the right to vote, from voting.

[34] The procedural safeguards in the Act are important; however, they should not be treated as ends in themselves. Rather, they should be treated as a means of

ensuring that only those who have the right to vote may do so. It is that end that must always be kept in sight.

[35] It is well accepted in the contested election jurisprudence that the purpose of the Act is to enfranchise all persons entitled to vote and to allow them to express their democratic preferences. Courts considering a denial of voting rights have applied a stringent justification standard: *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.), and *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.), both aff'd [1993] 2 S.C.R. 438.

[36] The words of an Act are to be read in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. The constitutional right to vote and the enfranchising purpose of the Act are of central importance in construing the words "irregularities . . . that affected the result".

[37] It is well recognized in the jurisprudence that where electoral legislation is found to be ambiguous, it should be interpreted in a way that is enfranchising: *Haig v. Canada*, [1993] 2 S.C.R. 995. Although he was in dissent in that case, Cory J. made the following observations at pp. 1049-50, with which L'Heureux-Dubé J., for the majority, at p. 1028, expressed total agreement:

> The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley v. Branchflower* (1884), 1 B.C.R. (Pt. II) 35 (S.C.). There Crease J. wrote at p. 37:
>
> > The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with. . . . It looks to realities, not technicalities or mere formalities, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute.
>
> To the same effect in *Re Lincoln Election* (1876), 2 O.A.R. 316, Blake V.C. stated (at p. 323):
>
> > The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise . . . .
>
> It can be seen that enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely restrictions on that right should be narrowly interpreted and strictly limited. [Emphasis deleted.]

[38] While enfranchisement is one of the cornerstones of the Act, it is not free-standing. Protecting the integrity of the democratic process is also a central purpose of the Act. The same procedures that enable entitled voters to cast their ballots also serve the purpose of preventing those not entitled from casting ballots. These safeguards address the potential for fraud, corruption and illegal practices, and the public's perception of the integrity of the electoral process. (See *Henry*, at paras. 305-6.) Fair and consistent observance of the statutory safeguards serves to enhance the public's faith and confidence in fair elections and in the government

itself, both of which are essential to an effective democracy: *Longley v. Canada (Attorney General)*, 2007 ONCA 852, 88 O.R. (3d) 408, at para. 64, leave to appeal refused, [2008] 1 S.C.R. x.

(b) *The Text and Context of Section 524*

[39] Just as the enfranchising purpose of the Act informs the interpretation of the phrase "irregularities . . . that affected the result" in s. 524, so too does the text of the provision itself. Parliament's use of the word "irregularities" in s. 524 of the Act is significant. A different phrase, "any non-compliance with the provisions of the Act", could have been used. Moreover, if Parliament had intended that *any* deviation from the statutory procedure be a basis on which to annul an election, it would have spoken in terms of "non-compliance". Instead, it used "irregularities", suggesting that Parliament intended to restrict the scope of administrative errors that give rise to overturning an election.

[40] How is the meaning of "irregularities" restricted? The well-known "associated words" or "*noscitur a sociis*" rule of interpretation assists in this regard. The rule states that a term or an expression should not be interpreted without taking the surrounding terms into account. "The meaning of a term is revealed by its association with other terms: it is known by its associates": *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 195 (emphasis deleted).

[41] Professor Sullivan defines the "associated words" rule as follows:

> The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator.
>
> (*Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 227)

[42] The word "irregularities" appears as part of the following phrase: "irregularities, fraud or corrupt or illegal practices". These are words that speak to serious misconduct. To interpret "irregularity" as meaning any administrative error would mean reading it without regard to the related words.

[43] The common thread between the words "irregularities, fraud or corrupt or illegal practices" is the seriousness of the conduct and its impact on the integrity of the electoral process. Fraud, corruption and illegal practices are serious. Where they occur, the electoral process will be corroded. In associating the word "irregularity" with those words, Parliament must have contemplated mistakes and administrative errors that are serious and capable of undermining the integrity of the electoral process. (See *Cusimano v. Toronto (City)*, 2011 ONSC 7271, 287 O.A.C. 355, at para. 62.)

(c) *Competing Democratic Values*

[44] Central to the issue before us is how willing a court should be to reject a vote because of statutory non-compliance. Although there are safeguards in place to prevent abuse, the Act accepts some uncertainty in the conduct of elections, since in theory, more onerous and accurate methods of identification and record-keeping could be adopted. The balance struck by the Act reflects the fact that our electoral system must balance several interrelated and sometimes conflicting values. Those values include certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency and cost. But the central value is the *Charter*-protected right to vote.

[45] Our system strives to treat candidates and voters fairly, both in the conduct of elections and in the resolution of election failures. As we have discussed, the Act seeks to enfranchise all entitled persons, including those without paper documentation, and to encourage them to come forward to vote on election day, regardless of prior enumeration. The system strives to achieve accessibility for all voters, making special provision for those without identification to vote by vouching. Election officials are unable to determine with absolute accuracy who is entitled to vote. Poll clerks do not take fingerprints to establish identity. A voter can establish Canadian citizenship verbally, by oath. The goal of accessibility can only be achieved if we are prepared to accept some degree of uncertainty that all who voted were entitled to do so.

[46] The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognized in *Camsell v. Rabesca*, [1987] N.W.T.R. 186 (S.C.), it is clear that "in every election, a fortiori those in urban ridings, with large numbers of polls, irregularities will virtually always occur in one form or another" (p. 198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases, a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience.

[47] The provision for contesting elections in Part 20 of the Act serves to restore accuracy and reliability where it has been compromised. However, tension exists between allowing an application to contest an election on the basis of irregularities and the need for a prompt, final resolution of election outcomes. The Act provides, in s. 525(3):

> (3) An application shall be dealt with without delay and in a summary way. . . .

[48] It should be remembered that annulling an election would disenfranchise not only those persons whose votes were disqualified, but every elector who voted in the riding. That voters will have the opportunity to vote in a by-election is not a perfect answer, as Professor Steven F. Huefner writes:

> . . . a new election can never be run on a clean slate, but will always be colored by the perceived outcome of the election it superseded. New elections may also be an inconvenience for the voters, and almost certainly will mean that a different set of voters, with different information, will be deciding the election. Moreover, there can be no guarantee that the new election will itself be free from additional problems, including fraud. In the long term, rerunning elections might lead to disillusionment or apathy, even if in the short term they excite interest in the particular contest. Frequent new elections also would undercut democratic stability by calling into question the security and efficiency of the voting mechanics.
>
> ("Remedying Election Wrongs" (2007), 44 *Harv. J. on Legis.* 265, at pp. 295-96)

[49] Permitting elections to be lightly overturned would also increase the "margin of litigation". The phrase "margin of litigation" describes an election outcome close enough to draw post-election legal action: Huefner, at pp. 266-67.

[50] The current system of election administration in Canada is not designed to achieve perfection, but to come as close to the ideal of enfranchising all entitled voters as possible. Since the system and the Act are not designed for certainty alone, courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system. This overarching concern informs our interpretation of the phrase "irregularities . . . that affected the result".

(d) *Conclusion: The Meaning of "Irregularities . . . That Affected the Result"*

[51] Having regard to the centrality of the constitutional right to vote, the enfranchising purpose of the Act, the language of s. 524, and the numerous democratic values engaged, we conclude that an "irregularit[y] . . . that affected the result" of an election is a breach of statutory procedure that has resulted in an individual voting who was not entitled to vote. Such breaches are serious because they are capable of undermining the integrity of the electoral process.

(3) When Is an "Irregularit[y] . . . That Affected the Result" Established?

[52] An applicant who seeks to annul an election bears the legal burden of proof throughout. (See *Cusimano*, at para. 74; *Abrahamson v. Baker and Smishek* (1964), 48 D.L.R. (2d) 725 (Sask. C.A.); *Camsell*, at p. 199; and *Beamish v. Miltenberger*, [1997] N.W.T.R. 160 (S.C.), at paras. 38-39.) As earlier noted, the present situation is governed by s. 531(2) of the Act. For ease of reference, the provision is reproduced below:

> (2) After hearing the application, the court may dismiss it if the grounds referred to in paragraph 524(1)(*a*) or (*b*), as the case may be, are not established and, where they are established, shall declare the election null and void or may annul the election, respectively.

[53] The word "established" places the burden squarely on the applicant. The applicable standard of proof is the civil standard, namely, proof on a balance of probabilities.

[54] Two approaches have been used in the past by courts to determine whether there was an "irregularit[y] . . . that affected the result" of an election. A strict procedural approach was followed by courts in *O'Brien v. Hamel* (1990), 73 O.R. (2d) 87 (H.C.J.); *Nielsen v. Simmons* (1957), 14 D.L.R. (2d) 446 (Y. Terr. Ct.); *Hogan v. Careen and Hickey* (1993), 116 Nfld. & P.E.I.R. 310 (S.C. (T.D.)); and *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C.). Under that approach, all votes cast pursuant to an irregular procedure were held to be invalid. The failure to comply with a procedural step aimed at determining entitlement was considered to directly affect the result of the election. In these cases, even where the elector's right to vote in the election could have been proven to the court after the fact, failure to comply with the procedural safeguards sufficed to discount the votes in question.

[55] A second approach, sometimes referred to as the "substantive" approach, emphasizes the substantive right of the elector to vote. An approach along these lines has been followed in other Canadian contested election cases: *Camsell* and *Flookes and Long v. Shrake* (1989), 100 A.R. 98 (Q.B.). On this approach, failure to follow a procedural safeguard is not determinative of whether the result of the election has been affected.

[56] In our view, adopting a strict procedural approach creates a risk that an application under Part 20 could be granted even where the result of the election reflects the will of the electors who in fact had the right to vote. This approach places a premium on form over substance, and relegates to the back burner the *Charter* right

to vote and the enfranchising objective of the Act. It also runs the risk of enlarging the margin of litigation, and is contrary to the principle that elections should not be lightly overturned, especially where neither candidates nor voters have engaged in any wrongdoing. Part 20 of the Act should not be taken by losing candidates as an invitation to examine the election records in search of technical administrative errors, in the hopes of getting a second chance.

[57] The substantive approach is recommended by the fact that it focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right. In our view, an approach that places a premium on substance is the approach to follow in determining whether there were "irregularities . . . that affected the result of the election". On this approach, a judge should look at the whole of the evidence, with a view to determining whether a person who was not entitled to vote, voted. Unlike the "strict procedural" approach, evidence going to entitlement is admissible. By the same token, direct evidence of a lack of entitlement is not required. Proof of an irregularity may itself be sufficient to discount a vote.

[58] There are two steps to this approach. First, an applicant must prove that there was an "irregularity": breach of a statutory provision designed to establish a person's entitlement to vote. We do not understand the minority to suggest otherwise. For example, a breach of s. 148.1 or s. 149 would amount to an "irregularity" because these provisions go to establishing entitlement.

[59] Second, an applicant must demonstrate that the irregularity "affected the result" of the election: someone not entitled to vote, voted. Where that is established, the vote is invalid, and must be rejected. Rejecting a vote affects the result of the election in the sense that it changes the vote count. It is at this second step that our approach departs from that of the minority.

[60] An "irregularity" constitutes evidence from which it may be inferred that a voter was not entitled to vote, because it is a breach of a procedure designed to establish the voter's entitlement. As indicated, proof of an irregularity may itself be sufficient to show that an invalid vote was cast, thereby affecting the result of the election.

[61] Under our approach, an applicant who has led evidence from which an irregularity could be found will have met his or her *prima facie* evidentiary burden. At that point, the respondent runs the risk of having the votes in issue set aside, unless he or she can adduce or point to evidence from which it may reasonably be inferred that no irregularity occurred, or that despite the irregularity, the votes in question were nevertheless valid. For example, where registration certificates cannot be located and there is a question as to whether they were completed as required, the respondent may point to evidence showing that they were completed, such as a list of names of people who voted by registration, or evidence from the polling officials that registration took place. Or, the respondent may show that the voters were entitled to vote by reference to their inclusion on a list of voters in the electoral district.

[62] Once all of the evidence from both parties is before the judge, the judge will decide, focusing on substance rather than form, whether the applicant has met his or her burden of establishing on a balance of probabilities that someone who voted was not entitled to do so. If the court is not so satisfied, then the applicant has failed to meet his or her onus.

C. *The Consequences of Statutory Non-Compliance*

[63] Our approach to contested elections allows a judge to consider evidence that an individual was entitled to vote on election day. It has to be remembered that "entitlement" is concerned with age, citizenship and residence. A judge may look at any evidence that is relevant to these criteria. This approach best ensures the accuracy of election results. Some prior jurisprudence in the lower courts suggests that this approach introduces uncertainty into election results. (See *Hogan*, at para. 77.) With respect, this concern is unfounded.

[64] When a court decides a contested election case based on alleged "irregularities . . . that affected the result", it is faced with uncertainty as to the outcome of an election arising from allegations of errors in the administration of the election. A contested election decision, by addressing these alleged errors, is designed to remedy this uncertainty. An approach allowing for an examination of voter entitlement bolsters accuracy and confidence that only entitled persons cast ballots.

[65] Any concern that our approach would result in the inconsistent application of the Act is unfounded. The minority suggests that since some entitled voters may be turned away on election day by election officials properly following procedures in the Act, it is unfair for a court to allow votes to stand where there was an administrative procedural error but other evidence that the voter was entitled to vote (para. 167). However, unlike the rejection of a valid vote, turning away a voter on election day is not fatal to that person's right to vote. If at first that voter could not comply with a procedural requirement, with some additional effort, he or she can return to the polling station and obtain a ballot. As well, if a person feels that he or she should be permitted to vote, scrutineers may be available to help resolve the matter.

[66] By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official.

[67] For example, compare the situation of two voters who arrive at the polling station with inadequate identification. The DRO personally knows one of the voters, and vouches for him, enabling him to cast a ballot. The DRO does not live in the polling division, so he has vouched in a manner not permitted by the Act. However, the voter leaves the polling station believing that he has cast a valid vote. If a court later rejects the voter's vote, he is irreparably disenfranchised, through no

fault of his own. In the case of the second voter, the DRO properly refuses to let her vote without proper identification. This voter can return to the polling station later in the day, accompanied by a voucher who lives in the polling division, and cast her ballot. She has not been disenfranchised.

[68] Nor will the approach that we endorse encourage non-compliance with the Act. The election process is open and public. Polling officials work in a public environment at a polling station where their actions can be observed by other election officials, candidates or candidates' representatives and members of the public present to vote. If there is a reasonable concern about whether a person is entitled to vote, any polling official, candidate or candidate's representative can ask that the person take an oath before voting (s. 144).

[69] In recognizing that mistakes are inevitable, this Court does not condone any relaxation of training and procedures. The Commissioner of Canada Elections appointed by the CEO has an obligation to ensure, as far as reasonably possible, that procedures are followed (s. 509). Failure to live up to this mandate would shake the public's confidence in the election system as a whole and render it vulnerable to abuse and manipulation.

[70] The Commissioner of Canada Elections is responsible for compliance with and enforcement of the Act (s. 509). The Chief Electoral Officer may refer any matter for investigation to the Commissioner, and, with respect to specific offences,

may direct the Commissioner to "make any inquiry that appears to be called for in the circumstances", and the Commissioner shall do so (s. 510). Following an inquiry, the Commissioner may refer the matter to the Director of Public Prosecutions, who will decide whether to prosecute the offence (s. 511). Alternatively, the Commissioner may enter into an agreement with the offender aimed at providing for compliance with the Act (s. 517). Overturning an election is but one of several consequences that may flow from the failure of election officers to follow rules. A declaration that an election is annulled may be considered the ultimate public consequence of violating provisions of the Act, and accordingly should be reserved for serious cases.

D. *Should an Election Be Annulled? The "Magic Number" Test*

[71] To date, the only approach taken by Canadian courts in assessing contested election applications has been the "magic number" test referred to in *O'Brien* (p. 93). On this test, the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality (*Blanchard*, at p. 320).

[72] The "magic number" test is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.

[73] Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing contested election applications might be adopted by a court in a future case.

E. *Summary*

[74] The following approach should be followed in determining whether there were "irregularities . . . that affected the result of the election": An applicant must prove that a procedural safeguard designed to establish an elector's entitlement to vote was not respected. This is an "irregularity". An applicant must then demonstrate that the irregularity "affected the result" of the election because an individual voted who was not entitled to do so. In determining whether the result was affected, an application judge may consider any evidence in the record capable of establishing that the person was in fact entitled to vote despite the irregularity, or that the person was not in fact entitled to vote.

[75] If it is established that there were "irregularities . . . that affected the result of the election", a court may annul the election. In exercising this discretion, if a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election. For the

purposes of this application, the "magic number" test will be used to make that determination.

IV. Application

[76] To this point, we have concentrated on the legal framework and principles that govern when a candidate seeks to have an election annulled on the basis of irregularities that affected the result. We now consider the application of those principles to the evidence as it relates to certain of the polling divisions where the application judge set aside votes (Mr. Opitz' appeal). We then consider the evidence in relation to those polling divisions in which the application judge refused to set aside votes (Mr. Wrzesnewskyj's cross-appeal).

[77] Before turning to the evidence of the particular polling divisions, it is important to observe that in support of his position that the election should be annulled, Mr. Wrzesnewskyj relied entirely on circumstantial evidence. There is no direct evidence that any votes, including the 79 that the application judge set aside, were cast by someone who in fact was not entitled to vote.

[78] In the end, for reasons that will become apparent, we are satisfied that the application judge wrongly set aside at least 59 votes. Therefore, the magic number test is not met, as the remaining number of votes invalidated (not more than 20) is not equal to or does not exceed the plurality of 26 votes.

A. *Mr. Opitz's Appeal*

[79] We would restore 59 votes that the application judge should not in our view have disqualified. In respect of polls 31 and 426, the application judge set aside 15 votes and 26 votes respectively for missing registration certificates. At poll 174, he set aside 8 votes for incorrect recording of vouching. At poll 89, he set aside 10 votes for unsigned registration certificates.

[80] Before addressing the evidence poll by poll, we propose to identify two errors of law made by the application judge in his analysis. First, at polls 31 and 426, he reversed the onus of proof; second, at polls 174 and 89, he failed to consider material evidence in reaching his finding.

[81] Because of these two legal errors, the findings of the application judge are not entitled to deference and it is open to this Court to come to its own conclusion on the validity of the votes cast in these polling divisions. The evidence in this case is exclusively documentary, and credibility is not in issue. Our decision to proceed in that fashion finds support in s. 525(3) of the Act, which requires a contested election application to proceed "without delay and in a summary way". To order a new hearing would cause considerable delay.

[82] As will be seen, in polls 31, 426 and 174, we find that the mistakes complained of do not rise to the level of an "irregularity". In poll 89, we find that

Mr. Wrzesnewskyj has established an "irregularity" but has not established that it "affected the result". We would restore the impugned votes.

(1) Poll 31 (15 Votes at Issue)

[83] In the poll book at poll 31, the names and addresses of 86 people are listed on the page entitled "RECORD OF ELECTORS VOTING BY *REGISTRATION CERTIFICATE*". However, after the election, only 70 registration certificates were located. Sixteen certificates could not be found.

[84] The application judge twice misstated the onus of proof in making his crucial finding that votes should be discarded for poll 31. He wrote, "I am not prepared to find that on a balance of probabilities these 16 people certified that they were qualified to vote" (para. 122 (emphasis added)). With respect, that was the wrong question. Applying the correct onus, he should have asked whether he was satisfied on a balance of probabilities that these 16 people *had not* certified that they were qualified to vote. His formulation reverses the onus, placing it on the respondent to establish that the voters *had* certified rather than on the applicant to show that they had *not*. The application judge also framed the onus incorrectly at para. 120 when writing: "For me to conclude that these 16 people certified themselves as qualified to vote, the finding would have to be made" (emphasis added).

[85] These are not isolated instances of misstating the test. In the context of assessing the validity of votes at poll 426, the application judge wrote, "The question is . . . whether, in the circumstances, I am prepared to find that these 33 people certified that they were qualified to vote" (para. 113 (emphasis added)) and "I am not prepared to find that, on a balance of probabilities, these 33 people declared that they were qualified to vote" (para. 115 (emphasis added)). And again when considering the invalidity of a vote with an unsigned registration certificate in poll 174, the application judge stated: "In the absence of any indication that the question of qualification was raised, I am not prepared to find that citizenship was certified" (para. 126 (emphasis added)).

[86] On these five occasions in his reasons for judgment, when making crucial findings of fact as to the validity of the votes, the application judge misstated the onus of proof. Instead of asking whether Mr. Wrzesnewskyj, the applicant, had satisfied his onus of establishing an irregularity, the application judge asked instead whether Mr. Opitz had established that there was no irregularity, thereby effectively shifting the burden of proof.

[87] Because the application judge misstated the onus of proof a number of times in the course of his analysis, we cannot be confident that he applied the correct onus in arriving at his findings: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 85-86. Overturning an election is a very serious matter. In order to uphold the findings of the application judge, we must be satisfied that he not only appreciated

which of the parties bore the onus, but also that he applied the correct onus in arriving at his critical findings of fact. We cannot be so satisfied.

[88] In fairness, we recognize that the application judge stated the onus of proof correctly on occasion. However, in view of the five occasions when he did not — in the context of making crucial findings of fact — we cannot be confident that these were only slips of language: *Couture*, at para. 85.

[89] We turn now to our assessment of the evidence at poll 31. Mr. Wrzesnewskyj must first establish the existence of an "irregularity" — that is, non-compliance with the Act that goes to entitlement. The 16 missing registration certificates at poll 31 give rise to two possibilities, one being that the certificates were never completed, the other that the certificates were completed but went missing after the election. If Mr. Wrzesnewskyj could establish that the certificates were never completed, this would amount to an "irregularity". There would be non-compliance with s. 161(4) of the Act which requires that a person not listed on the OLE who wishes to vote on election day must sign a completed registration certificate. This particular non-compliance would go to entitlement because within a registration certificate is a declaration of citizenship and age signed by the elector.

[90] However, we are not satisfied that Mr. Wrzesnewskyj has established an "irregularity". He relied on three pieces of evidence. First, the registration certificates could not be located. Second, the poll book pages recording those who

took oaths and those who vouched were not filled in. Third, the 16 people were not added to the FLE whereas, normally, when the returning officer receives the registration certificates, he updates the OLE and the CEO updates the FLE accordingly.

[91] The evidence relied on by Mr. Wrzesnewskyj falls short of the mark. That the certificates were missing and that the FLE was not updated are also consistent with the explanation that the completed certificates were lost after the election. If the certificates never arrived in the hands of the returning officer, he could not have used them to update the OLE and the FLE would not have been updated either. This alleged third deficiency is tied into the first; it is not an independent basis for finding that the registration certificates were never completed. That the pages for oaths and for vouching were blank is consistent with all 16 people who voted by registration certificate providing photographic identification rather than establishing their addresses through vouching.

[92] There was evidence that favoured the second explanation — that the certificates existed but were misplaced after the election. Seventy of the 86 certificates were found. The names and addresses of the 16 people at issue are handwritten in the poll book, interspersed among the other 70 people whose certificates were found. This is an indication that the 16 certificates were in fact completed. A tally of the total number of registration certificates (86) is repeated on the page which summarizes the results of the election. On this page, the DRO and

poll clerk signed below the statement: "I have verified that the number of electors who voted by *Registration Certificate* (line (2)) [the number 86 appears on line (2)] corresponds to the number of *Registration Certificates* . . . inserted in the large white *Registration and/or Correction Certificates Envelope*".

[93] Considering this evidence in the context of the whole of the evidence, we are unable to find, on balance, that the registration certificates were not completed. Hence, Mr. Wrzesnewskyj has failed to establish an "irregularity" concerning any of the 16 votes.

[94] Ironically, for 14 of the 16 impugned voters, there is positive proof that they were indeed entitled to vote. The application judge relied on this direct proof for 1 of the 14 electors (para. 123). Hence, he only discarded 15 of the 16 votes. In fairness, had the direct proof relating to the other 13 voters been brought to his attention, we are satisfied that the application judge would have allowed the votes.

[95] There is evidence that 13 more of the 16 voters in question were on a list of electors in Etobicoke Centre, three on the list for poll 31 and 10 on the lists for other polling divisions. This information was in the evidence before the application judge (R.F. (Mr. Opitz), at para. 45). A chart prepared by Elections Canada matches the names and addresses of 13 electors to names on these lists of electors. Two voters were on a list of electors for poll 28, four on a list for poll 29, two for poll 30, three for poll 31, and two for poll 33. This information comes from an independent source

and Mr. Wrzesnewskyj does not challenge its reliability. To the contrary, in a separate chart, created by Mr. Wrzesnewskyj, these 13 persons are listed and beside their identifier is the following notation: "Elector on the Official List of Electors: Yes" (A.F. (Mr. Wrzesnewskyj), at App. C). In accordance with s. 149, all but the three voters ordinarily resident in polling division 31 needed a registration certificate in order to vote at polling station 31. However, the presence of the 10 voters on an electoral list for another polling division in Etobicoke Centre constitutes proof of age, citizenship and residence within that polling division (and therefore the electoral district of Etobicoke Centre).

[96] The basis upon which our colleagues would restore these 10 votes is, in our respectful view, inconsistent with their emphasis on the plain words of s. 149 of the Act and their concern about certainty at the time the voter casts his ballot (paras. 165-66). The plain language of s. 149 provides that "[a]n elector whose name does not appear on the official list of electors <u>in his or her polling station shall not</u> be allowed to vote unless . . . the elector gives the deputy returning officer a registration certificate". It is not clear why, following the minority's approach, under which a voter is not entitled to vote unless all procedural safeguards are followed, it is sufficient that a voter be on the list of electors at another polling division (para. 165). Furthermore, to consider the lists of electors from other polling divisions — while consistent with our approach — is contrary to our colleagues' position that to ensure certainty in the electoral process, a voter must establish his entitlement before receiving and casting a ballot (para. 166). The 10 voters' names were not on the OLE

for poll 31. Information from OLEs of other polling divisions was not before the DRO at poll 31 at the time the ballots were cast. Information from these other lists only came to light during the contested election application, when brought before the application judge.

[97] We would not invalidate any of the 16 votes at poll 31. For 14 voters there is direct evidence of their entitlement to vote. We have restored the remaining 2 votes for the reasons stated above. Deducting the one vote already allowed by the application judge, the total number of votes restored on appeal is 15.

(2) Poll 426 (26 Votes at Issue)

[98] At poll 426, the poll book page "RECORD OF ELECTORS VOTING BY *REGISTRATION CERTIFICATE*" lists 33 names with no addresses. After the election, none of the 33 registration certificates could be found. The application judge noted that 7 of the 33 electors whose votes were at issue were on the OLE and thus the registration certificates were superfluous, and need not have been completed. Their presence on the OLE established their age and citizenship. The application judge allowed those 7 votes to stand.

[99] For the remaining 26 voters, the application judge reversed the onus of proof on two occasions when making his crucial findings on the validity of the votes. He wrote, first: "The question is . . . whether, in the circumstances, I am prepared to

find that these 33 people certified that they were qualified to vote" (para. 113 (emphasis added)). On the second occasion, he wrote: "I am not prepared to find that, on a balance of probabilities, these 33 people declared that they were qualified to vote" (para. 115 (emphasis added)).

[100] As with poll 31, Mr. Wrzesnewskyj has not established that there was an "irregularity" with respect to the 26 voters. The absence of registration certificates raises the question of whether the certificates were in fact completed. The burden rested on Mr. Wrzesnewskyj to establish that the certificates were not filled out. He relied on four pieces of evidence. First, there were no registration certificates. Second, another poll book page which should serve to tally up the number of people who voted by registration certificate was not completed. Third, the poll book pages recording those who took oaths and those who vouched were blank. Fourth, the 33 people were not added to the FLE.

[101] As we stated with poll 31, that the certificates were missing and that the FLE was not updated are also consistent with the explanation that the completed certificates were lost after the election. If the certificates never arrived in the hands of the returning officer, he could not have used them to update the OLE and the CEO could not have updated the FLE with that information. This alleged fourth discrepancy is tied into the first; it is not an independent basis for finding that the certificates were not completed. That the pages for oaths and for vouching were

blank is consistent with these people providing photographic identification rather than establishing their addresses through vouching.

[102] There was evidence that the registration certificates had been completed but misplaced after the election. First, the poll book listed the names of 33 persons having completed certificates. Second, the DRO, when asked eight months after the election, said she thought she had completed the 33 certificates. An email dated January 4, 2012, from the respondent Allan Sperling, the returning officer for Etobicoke Centre, to Trevor Knight, a lawyer at the Office of the CEO, reads:

> I spoke to . . . the DRO at 426. She said that 33 registrants sounds about right and they did not record addresses in the poll book because this was a stand-alone poll (a senior's residence) so everyone lived there (which they checked).
>
> She did say she thought they completed the registration certificates and returned them as per process, and added she has done this many times, so knows the process. She is going to talk to her PC [poll clerk] who is usually her partner on election day to see if she can remember anything. [J.C.R., vol. 6, at tab 53]

[103] The application judge placed little weight on the DRO's comments:

> The comment that the deputy returning officer "thought" the forms were completed is not definitive, and the statement that "33 sounds about right" is too general to provide much confidence as to whether these documents were completed. [para. 115]

With respect, we see the matter differently. Any vagueness in the DRO's evidence is consistent with her being asked to recall something that occurred eight months earlier. Her recollection provides direct evidence that she knew she had to complete registration certificates.

[104] Mr. Opitz argues that, to find that the registration certificates were not completed would require the following assumptions: (a) the DRO and the poll clerk ignored their training; (b) the DRO did not know or ignored that an unregistered voter must complete a registration certificate; and (c) despite not following the registration procedure, the DRO or poll clerk still recorded the names of these 26 people in the list of those who voted by certificate. In light of the DRO's comments in the email and the evidence that the poll clerk filled out the relevant poll book page, these three assumptions are improbable, to say the least.

[105] Considering the evidence as a whole, Mr. Wrzesnewskyj has failed to satisfy us that there was an irregularity. We would restore these 26 votes.

(3) Poll 174 (8 Votes at Issue)

[106] At poll 174, eight persons on the OLE did not have identification and required vouching to establish their identity. The page listing *vouchers* is completed with eight names, but the page that should list *vouchees* is not filled in. However,

next to the name of each *voucher* is an indication of the relationship of the voucher to the vouchee (e.g., "spouse" or "mother").

[107] Not recording the names of vouchees contravenes s. 162(*f*) of the Act. However, there is a distinction between proper vouching and proper record-keeping of vouching. Vouching is a means of establishing identity and residence. Vouching establishes the relation between the person who is physically present at the polling station and that person's attributes of age, citizenship and residency. Improper vouching can amount to an "irregularity" if it means that identity and residence were not established, which go to entitlement. By contrast, incorrect *record-keeping* of vouching, on its own, cannot amount to an "irregularity".

[108] Based on the evidence, it can easily be inferred that vouching was properly conducted. There were persons on the OLE who, in terms of last names, addresses and ages, matched the familial relationship in question. It is easy to identify the full names of the vouchees from the information noted. Initials have been used in these reasons because of a confidentiality order applicable to names of voters. To give one example, the page of vouchers indicates that "L.F." vouched for her spouse. The page for vouchees is blank, and so we do not know from that page of the poll book the name of her spouse. However, the OLE contains only two persons with the same last name: L.F. and A.F. with the same address, born in 1935 and 1932 respectively. It is a reasonable inference that A.F. is the spouse in question.

[109] The application judge disregarded this evidence, calling it a "forensic analysis" (para. 146). With respect, such labelling does not justify a refusal to take account of relevant evidence and draw reasonable inferences from it. The identification of the vouchees is easily determined on the evidence before the Court. Mr. Wrzesnewskyj has not satisfied us that there was an irregularity. We would restore these eight votes.

(4) Poll 89 (10 Votes at Issue)

[110] On a registration certificate, an elector is required to sign in Box 5 after the following declaration:

> I, the person whose name appears in Box 1, certify that I am a Canadian citizen, 18 years of age or over on polling day and have been ordinarily resident at the address appearing in box 2. . . . I certify that the information provided on this form is accurate.

An election official must sign below in Box 6. In poll 89, the official signed the 10 certificates in the place where the voter was supposed to sign. There were no voter signatures.

[111] This is the one instance where Mr. Wrzesnewskyj has established an "irregularity": there is no signature, contrary to s. 161(4) of the Act, and this goes to entitlement to vote since the declaration serves to establish age and citizenship. From

this, the application judge concluded that he should reject the 10 votes with unsigned certificates:

> Any understanding of the registration certificate should begin with a reading that is consistent with what is present on its face. . . . In my mind, it is more likely that the polling official . . . did not deal with citizenship. In the absence of any indication that the question of qualification was raised, I am not prepared to find that citizenship was certified. . . .
>
> . . . There is nothing to suggest that the prospective voters were asked to, or did, declare they were qualified to vote. [paras. 126-27]

[112] With respect, we believe the application judge stopped short of the mark. In our view, he focused exclusively on the absence of voters' signatures and failed to consider other evidence from which it could reasonably be inferred that the 10 voters were entitled to vote. The election official completed each registration certificate in full. On each certificate, he took down the elector's first and last name, full address, and date of birth. He signed and dated the certificate. He rewrote all 10 names and addresses on the poll book page "RECORD OF ELECTORS VOTING BY *REGISTRATION CERTIFICATE*".

[113] The application judge did not consider this evidence. In our view, he erred in failing to do so. Accordingly, his findings are not entitled to deference.

[114] This is not a situation in which the certificates do not have any signature on them. The 10 misplaced signatures are consistent with a clerical mistake. The

mistake was outside the voters' control. From the election official's signature, it is reasonable to infer, in the absence of evidence to the contrary, that he knew the prerequisites that needed to be met for a voter to register and was satisfied that they were met in each case.

[115] Absent evidence of fraud or corruption, we find it highly improbable that the election official would put his signature on completely filled out registration forms without being satisfied of the voters' entitlement to vote, on 10 separate occasions. We would restore these 10 votes.

[116] Moreover, one of the voters with an unsigned registration certificate is on the OLE for poll 89. That voter did not need to complete a registration certificate at all. Her presence on the OLE established her age and citizenship.

(5) Conclusion on Mr. Opitz's Appeal

[117] We would allow Mr. Opitz's appeal and restore 15 votes at poll 31, 26 votes at poll 426, 8 votes at poll 174 and 10 votes at poll 89. The total restored is 59 votes. This leaves 20 votes that have not been restored. Under the magic number test, 20 votes is less than the winner's plurality of 26. It is not necessary to discuss the remainder of the votes rejected by the application judge because, as we explain below, we would dismiss Mr. Wrzesnewskyj's cross-appeal. Although we have not

discussed the remaining 20 votes in these reasons, we have considered them and we have no reason to believe that any of the 20 voters were not in fact entitled to vote.

B. *Mr. Wrzesnewskyj's Cross-Appeal*

(1) Incorrect Polling Division (Polls 16 and 31)

[118] Mr. Wrzesnewskyj alleges that the application judge should have disqualified votes where the elector voted within the proper electoral district, but in the incorrect polling division. At issue are one vote in poll 16 and 66 votes in poll 31. The electors voted by registration certificate and listed an address within Etobicoke Centre, but outside the polling divisions for polls 16 and 31.

[119] Voting in the wrong polling division has no effect on the result of the election; the ballot boxes from each polling division are aggregated in the overall tally for the electoral district. It is not comparable to voting in the incorrect riding, for a different member of Parliament. Polling divisions exist for administrative and practical efficiency on election day. We see no reason to disturb the application judge's finding that these votes should stand.

(2) Address Oaths Requiring Vouching (Polls 16 and 21)

[120] Mr. Wrzesnewskyj argues that the application judge should have disqualified six votes at poll 16 and six at poll 21 where the poll books do not record

which type of oath was taken, contrary to s. 162(*f*) of the Act. On the page in each poll book for electors who swore oaths, alongside each name is the notation "no address ID" or no notation at all. Mr. Wrzesnewskyj argued that "no address ID" meant that each voter did not have identification and thus needed to be vouched for, pursuant to s. 143(3). The absence of vouchers' names would imply vouching had not been performed. Because vouching is a means of identification, this would be non-compliance going to entitlement.

[121] The application judge found that it was not possible to "so carefully parse the words 'no address ID' to ascertain with certainty the circumstances in which the oath was required" (para. 138). On its face, the poll book could reflect the circumstance contemplated by s. 143(3.2), where a "candidate or candidate's representative who has reasonable doubts concerning the residence of an elector referred to in that subsection may request that the elector take the prescribed oath". No vouching would then be needed. We see no basis for interfering with the application judge's finding.

(3) Registration Certificate Not Completed (Poll 89)

[122] In poll 89, two voters were not on the OLE, and thus required a registration certificate to vote. However, no certificates were found and they were not listed on the page for electors voting by registration certificate. This suggests that no registration certificates were completed.

[123] However, there is evidence that the voters were entitled to vote. Both voters were listed in the poll book under "RECORD OF ELECTORS REQUIRING AN OATH" and are shown as having been vouched for by relatives, with names and addresses provided. The oath sworn to by the vouchee reads:

> OATH OF PERSON VOUCHED FOR
>
> . . .
>
> You swear or solemnly affirm that:
>
> - you are (state name) of (state address);
> - you have attained 18 years of age;
> - you are a Canadian citizen;
> - you are a resident of this polling division;
> - you have not already voted at this electoral event
>
> (If sworn, add SO HELP YOU GOD)
>
> (Sample Poll Book, at p. 15, see J.C.R., vol. 1, at tab 12.)

[124] The application judge was satisfied that both voters had sworn this oath. We have no reason to question this finding.

(4) <u>No Voucher Name, Only Voucher's Relationship to Vouchee (Polls 89 and 400)</u>

[125] Two voters in poll 89 and two voters in poll 400 are on the OLE but are also on the list of vouchees. That can only mean that they did not have sufficient

identification. For each, the names of their respective vouchers are missing. Instead of a name, the voucher is identified by his or her relationship to the vouchee (e.g., mother, daughter-in-law) followed by "ditto marks" to indicate they have the same address as the vouchee. The scenario is virtually identical to that at poll 174 addressed earlier, with the only difference being that here it is the name of the *voucher*, and not of the *vouchee*, that is missing. Mr. Wrzesnewskyj submits that the absence of names amounts to an irregularity. This issue was not raised before the application judge. For the same reasons as we gave for poll 174 above, we find that this is not an irregularity. We dismiss Mr. Wrzesnewskyj's argument with respect to these four voters.

(5) Missing Vouchers (Poll 400)

[126] Mr. Wrzesnewskyj alleges the application judge should have discounted six votes at poll 400. Page 31 of the poll book indicates: "The total number of electors who were vouched for at this polling station is: 16". But p. 23 shows only 10 vouchers. The application judge found that the remaining six people swore oaths that did not require vouching, such as for error in the spelling of their name on the OLE or in order to assist another elector at the poll booth. Implicit in this is that the number "16" was a clerical error on the poll clerk's behalf: 16 people swore oaths, but only 10 were in the context of vouching. We see no reason to interfere.

(6) Voters Alleged to Have Voted More Than Once (Poll 426)

[127] Mr. Wrzesnewskyj submits that six electors at poll 426 may have voted twice. Six names on the list of electors who voted by registration certificate match six names on the OLE. On the OLE, these six names are crossed off (meaning they were given a ballot) and checked off (meaning they voted). Their presence on the registration certificate list means they were given a ballot. Mr. Wrzesnewskyj argued that each of these six voted once by registration, and once by "enumeration". The number of people checked off on the OLE (173) plus the number voting by certificate (33) added up to the total number of ballots (206). This would effectively count these six persons twice and, in Mr. Wrzesnewskyj's submission, supports that those six had voted twice.

[128] At first instance, Mr. Wrzesnewskyj made a similar argument, saying that there were *five* electors on both lists. The application judge identified five instances on the OLE where a name was crossed off but not checked off. He concluded that the most logical explanation was that the election official simply neglected to *check off* these other five people as having voted (para. 89). This increased from 173 to 178 the number of persons who voted by enumeration. This meant there was no discrepancy in the count: people voting from the OLE (178) plus electors voting by registration (33) minus the five duplicates added to the total (206). Implicit in this explanation was that these five had voted by registration but the polling official had later found them on the OLE and crossed them off for good measure. The application judge

concluded there was no evidence of double-voting. We would not disturb this finding of fact.

[129] Mr. Wrzesnewskyj now submits that there are *six* electors on both lists instead of five. The application judge only addressed the five that Mr. Wrzesnewskyj raised before him. Also within poll 426, Mr. Wrzesnewskyj raises another case where it appears a voter voted twice. On the list of 33 persons who voted by registration certificate, the same handwritten name appears twice: once as the 11th person, and once as the 31st person.

[130] In light of the fact that we have restored 59 votes, and that only 20 votes remain disqualified by the application judge, we need not consider these two allegations of double-voting. Assuming they can be raised for the first time on appeal, even if sound, they are not enough for Mr. Wrzesnewskyj's application under s. 524 to succeed.

(7) Conclusion on Cross-Appeal

[131] For the reasons given, we would dismiss Mr. Wrzesnewskyj's cross-appeal.

V. Conclusion

[132] As indicated, we find it unnecessary to consider whether the balance of 20 votes rejected by the application judge should be restored. Even if these votes were properly rejected, they are fewer in number than the plurality of 26 votes. Had all 20 persons voted for Mr. Opitz, discounting them would not have been sufficient for Mr. Wrzesnewskyj to be successful in the election in Etobicoke Centre. For these reasons, we would allow the appeal, dismiss the cross-appeal and dismiss Mr. Wrzesnewskyj's application under s. 524 of the Act.

[133] In view of the circumstances of this case, there will be no award of costs.

VI. Motion to Adduce Fresh Evidence

[134] The CEO and the returning officer brought a motion for directions, seeking to adduce fresh evidence, pursuant to s. 62(3) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and Rules 3 and 47 of the *Rules of the Supreme Court of Canada*, SOR/2002-156. The fresh evidence is a chart compiled by Elections Canada employees, based on the NROE. The employees matched handwritten names in the poll books of polls 426, 89 and 31 to names in the NROE. The NROE is periodically updated by reference to the FLE and to various governmental databases. Evidence from an NROE may be relevant in a contested election application. Presence of a name on the NROE is proof of that person's citizenship and age: s. 44 of the Act. Evidence from the NROE can be helpful to the application judge in assessing

"irregularities . . . that affected the result of the election" because it serves as evidence of a voter's entitlement.

[135] Mr. Wrzesnewskyj objected to the introduction of the new evidence. As the proposed evidence could only assist Mr. Opitz, given our conclusion, we need not consider it. For that reason, we would dismiss the motion to adduce fresh evidence.

The reasons of the Chief Justice and LeBel and Fish JJ. were delivered by

THE CHIEF JUSTICE (dissenting) —

I. Introduction

[136] The issue in this case is whether the federal election in the riding of Etobicoke Centre should be annulled because of votes cast by individuals who were not entitled to vote under the *Canada Elections Act*, S.C. 2000, c. 9 ("Act").

[137] An election outcome may be contested by a candidate on the basis of "irregularities . . . that affected the result of the election" (s. 524(1)(*b*) of the Act). Borys Wrzesnewskyj made an application under s. 524 of the Act after being defeated in the federal election of May 2, 2011, by a margin of 26 votes. The application judge declared the election null and void, finding that 79 of the votes cast were irregular and affected the result of the election. Because the number of irregular

votes exceeded the winner's plurality of 26 votes, he held that the election could not stand (2012 ONSC 2873, 110 O.R. (3d) 350).

[138] I would dismiss the appeal. The election result in Etobicoke Centre should be annulled because of "irregularities . . . that affected the result of the election". The irregularities in this case concerned ballots cast by individuals who were not entitled to vote.

[139] An individual must be entitled to vote before casting a ballot for the Member of Parliament for the riding where she is ordinarily resident. The Act sets out a comprehensive scheme defining entitlement to vote: ss. 6, 143(2), (3), 148.1, 149 and 161. In general, there are three prerequisites to entitlement to vote: qualification, registration and identification. First, an individual must be *qualified* to vote, in terms of citizenship and age. Second, she must be *registered* to vote, generally either by being on the list of electors or filing a registration certificate. Third, she must be *identified* at the polling station in a way permitted under the Act, whether by providing appropriate pieces of identification or by taking an oath and being vouched for by another elector. There are different ways in which the requirements of entitlement to vote under the Act can be fulfilled, but if any of the prerequisites of entitlement are not satisfied, an individual is not permitted to cast a ballot.

[140] Whether a person is entitled to vote is a distinct question from whether she is qualified to vote. All Canadian citizens who are 18 years or older on election day are qualified electors: s. 3 of the Act. Being a qualified elector is a necessary but not sufficient condition for entitlement to vote. Qualified electors must fulfill all the prerequisites of an entitlement procedure under the Act before voting. These procedures ensure that election officials have verified the qualifications and identity of prospective voters before they cast their ballots. They are fundamental safeguards for the integrity of the electoral system.

[141] Votes cast by persons not entitled to vote are irregularities that can affect the result of the election under s. 524(1)(*b*) of the Act. If the number of such irregular votes is equal to or exceeds the winner's plurality, then the result of the election *is* affected and the election should be annulled. This is known as the "magic number" rule. In the present case, the winning candidate in Etobicoke Centre, Ted Opitz, had a plurality of 26 votes. Therefore, the application judge should have annulled the election only if the applicant established that 26 or more ballots were cast by non-entitled voters. The onus was on the applicant to establish the existence of irregularities sufficient to annul the election.

[142] While the application judge in this case improperly set aside some votes, he did not err with respect to 65 ballots cast by persons not entitled to vote. As this exceeds the plurality of 26 votes, under the "magic number" rule the appeal should be dismissed and the election annulled.

[143] I would also dismiss the motion for fresh evidence.

II. Analysis

A. *Applicable Principles of Statutory Construction*

[144] The overriding principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). The best indication of Parliament's intent is found in the language of the statutory provisions: *R. v. Knott*, 2012 SCC 42, [2012] 2 S.C.R. 470, at para. 54.

[145] The words of the statute must be interpreted with a view to the objectives of the Act. Courts have considered different aspects of the purpose of the Act but none has identified the broad and overarching purpose of the legislation: see, e.g., *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Henry v. Canada (Attorney General)*, 2010 BCSC 610, 7 B.C.L.R. (5th) 70, at para. 139. The overarching purpose of the Act is to ensure the democratic legitimacy of federal elections in Canada. This broad purpose encompasses several discrete objectives. The first is to enfranchise individuals who are qualified to vote: *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1058 (*per* Cory J.). A second and complementary objective

is to ensure that people who are not qualified to vote do not do so: see *Haig*, at p. 1027, *per* L'Heureux-Dubé J. A third objective is to promote efficiency and certainty in the electoral process. In considering these objectives, we must be careful to respect the words chosen by Parliament: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 33.

B. *The Meaning of "Irregularities . . . That Affected the Result of the Election" Under Section 524(1)(b) of the Act*

[146] Any elector or any candidate in an electoral district may apply to a competent court to contest an election on the grounds that "there were irregularities, fraud or corrupt or illegal practices that affected the result of the election" (s. 524(1)(*b*)). If the elements of s. 524(1)(*b*) are established, a court may annul the election (s. 531(2)).

[147] In the ordinary sense of the word, something is "irregular" when it is "[n]ot in conformity with rule or principle" (*The Oxford English Dictionary* (2nd ed. 1989), vol. VIII, at p. 93). This suggests that under the Act, an election may be set aside as a result of non-compliance with the provisions of the Act, even in the absence of fraud or corrupt or illegal practices.

[148] The objective of efficiency and certainty in the electoral process suggests that there ought to be strict compliance with the requirements of the Act. The objective of ensuring that those not qualified to vote not do so pulls in the same

direction. On the other hand, the objective of enfranchisement suggests that "irregularities" should not be interpreted in a technical or trivial way that improperly disenfranchises voters. The votes of Canadian citizens 18 years of age or over should not be set aside over trifles: *Beamish v. Miltenberger*, [1997] N.W.T.R. 160 (S.C.), at para. 33; *Wright v. Koziak*, [1981] 1 W.W.R. 449 (Alta. C.A.); *Morgan v. Simpson*, [1974] 3 All E.R. 722 (C.A.). Based on the language and purposes of the Act, I conclude that "irregularities" under s. 524(1)(*b*) should be interpreted to mean failures to comply with the requirements of the Act, unless the deficiency is merely technical or trivial.

[149] Only irregularities that "affected the result of the election" permit the annulment of the election under s. 531(2). Irregularities must be of a type that *could* affect the result of the election, and impact a *sufficient number* of votes to have done so. An irregularity resulting in a vote being cast that should not have been is of a type that *could* affect the result of the election. To have actually affected the result of the election, the number of such votes must be equal to or exceed the winning candidate's plurality. If the irregularities are of this type and impact this number of votes, then a court can and should annul the election under s. 531(2). This is known as the "magic number" rule. (See *Beamish*, at para. 18; *O'Brien v. Hamel* (1990), 73 O.R. (2d) 87 (H.C.J.), at para. 34; *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C.), at p. 320; *Wright*, at pp. 458 and 465-66; *Morgan*, at p. 727.)

[150] The critical question raised in this case is the following: What kinds of irregularities result in a vote being cast that should not have been? The answer lies in the principle of entitlement to vote, which is a central pillar of our electoral system.

C. *Entitlement to Vote*

[151] Every electoral system must strike a balance between enabling those who have the constitutional right to vote to do so, and ensuring that those who do not have that right are not allowed to vote. The formal system of entitlement is our mechanism for striking the right balance between these two valid concerns, while ensuring the efficiency and certainty of the electoral process. It aims to safeguard both the right to vote and the integrity of elections.

(1) Prerequisites to Entitlement to Vote

[152] In general, there are three prerequisites to entitlement to vote under the Act. These prerequisites concern qualification, registration and identification as a voter. Only when all of these elements are met is a person entitled to vote for the Member of Parliament for the riding where she is ordinarily resident.

(a) *Qualification*

[153] The first prerequisite of entitlement to vote is qualification. This means that the voter must be a Canadian citizen and 18 years of age or older. Section 3 of

the Act defines a qualified elector as "[e]very person who is a Canadian citizen and is 18 years of age or older on polling day". Section 6 of the Act sets out the qualification prerequisite of entitlement to vote:

> **6.** Subject to this Act, every person who is qualified as an elector is entitled to have his or her name included in the list of electors for the polling division in which he or she is ordinarily resident and to vote at the polling station for that polling division.

[154] The words "[s]ubject to this Act" make clear that entitlement to vote is also conditioned on other prerequisites to entitlement found in the Act. In order to be given a ballot and permitted to vote on election day, it is not enough that a person be qualified. Entitlement to vote goes beyond qualification: *McMechan v. Dow* (1968), 67 D.L.R. (2d) 56 (Man. Q.B.), at p. 62; *O'Brien*.

(b) *Registration*

[155] The second prerequisite of entitlement to vote is registration, through (a) inclusion on the list of electors in the polling division where the voter is ordinarily resident or (b) filing a registration certificate. Other exceptional voter registration procedures exist under the Act, but these are not applicable in this case and will not be dealt with here. The Act makes clear that a voter *shall not* be allowed to vote unless one of these registration procedures is satisfied.

[156] Section 149 of the Act provides:

> **149.** An elector whose name does not appear on the official list of electors in his or her polling station shall not be allowed to vote unless
>
> . . .
>
> (*c*) the elector gives the deputy returning officer a registration certificate described in subsection 161(4).

[157] Inclusion on the list of electors is one way that an individual can satisfy the registration prerequisite of entitlement to vote. Prior to election day, election officials prepare a list of electors for each polling division, listing qualified electors who are ordinarily resident in that polling division (s. 106). These lists are then used by election officials at the polling station for each polling division on election day. If a person is on the list of electors, then s. 149 is no barrier to voting entitlement.

[158] If a person is not on the list of electors, s. 149(*c*) provides an alternative means of registering to vote: filing a registration certificate. A person is entitled to vote despite not being on the list of electors if she satisfies the registration certificate procedure.

[159] The registration certificate procedure under s. 149(*c*) requires a prospective voter to prove her identity and residence, and to sign a declaration that she is a Canadian citizen 18 years of age or older (s. 161). The declaration on the registration certificate states:

> I, the person whose name appears in Box 1, certify that I am a Canadian citizen, 18 years of age or over on polling day and have been ordinarily

> resident at the address appearing in box 2. . . . I certify that the information provided on this form is accurate.

If a person voting by registration certificate does not sign this declaration, she has not established her age and citizenship as required by the Act. The declaration is therefore a vital prerequisite of entitlement to vote. Upon completing the registration certificate, a person is deemed to be included on the list of electors (s. 161(5)).

(c) *Identification*

[160] The third prerequisite of entitlement to vote is identification. A prospective voter must prove her identity and residence at the polling station in a way permitted by the Act. Section 148.1(1) of the Act states:

> **148.1** (1) An elector who fails to prove his or her identity and residence in accordance with subsection 143(2) or (3) or to take an oath otherwise required by this Act shall not receive a ballot or be allowed to vote.

[161] A person can prove her identity and residence in two ways: (a) providing the necessary piece or pieces of identification (such as a driver's licence); or (b) taking a prescribed oath and being vouched for by another person in the manner set out in the Act. These two options are available both for individuals who are on the list of electors and for individuals voting by registration certificate (ss. 143(2), (3) and 161(1)).

[162] If the oath and vouching procedure is used, the person vouching for the prospective voter must (i) be on the list of electors for the same polling division, (ii) provide the required piece or pieces of identification to prove his identity and residence, (iii) state a prescribed oath, (iv) not have already vouched for another elector in the election, and (v) not have herself been vouched for in that election (ss. 143(3), (5), (6), 161(1)(*b*), (6) and (7)). If these conditions are not met, the vouching is invalid and the prospective voter's identity and residence have not been proved in a manner permitted by the Act.

[163] Only if all of the prerequisites to entitlement to vote are met is a person permitted to cast a ballot in a Canadian federal election. The Act expressly states that a person who is not entitled to vote shall not receive a ballot or be allowed to vote, even if he is qualified to vote, in the sense of meeting the citizenship and age requirements (ss. 148.1 and 149). The constitutionality of these entitlement provisions is not at issue in this appeal, so this Court must adhere to the unambiguous directions from Parliament as to the prerequisites to exercising the right to vote: *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513, at para. 29; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

[164] My colleagues, with respect, merge the concepts of qualification and entitlement. They take the position that everyone who is qualified to vote and ordinarily resident in the electoral district is entitled to vote. Thus, a voter who is not on the electoral list and has not filed a registration certificate (s. 149) can be later held

to have been "entitled" to vote if he was qualified to vote and ordinarily resident in the electoral district. I cannot accept this view.

[165] First, as discussed, in terms of registration, the plain words of the Act condition entitlement on either being on the list of electors or filing a registration certificate (s. 149). Sections 6, 148.1 and 149 together describe prerequisites of entitlement to vote. Both ss. 148.1 and 149 state that, unless their respective conditions are satisfied, the elector "shall not" be allowed to vote. These conditions require, in addition to qualification, fulfillment of the identification and registration prerequisites of entitlement to vote.

[166] Second, the objective of certainty in the electoral process requires that entitlement be established before receiving and casting a ballot. Nothing in the Act suggests that a person who on election day is not entitled to vote should be permitted to do so and to establish his entitlement later. If we decline to set aside votes cast by non-entitled people on the grounds that they are subsequently proven to be qualified and ordinarily resident in the electoral district, the result is a system where the only way to be confident in the accuracy of an election outcome is to investigate the identity, residence and qualification of voters after the election.

[167] Third, such an approach would be unfair. It disregards the fact that other qualified electors who did not follow the necessary steps to become entitled to vote may have rightly been turned away from the polling station and not permitted to vote

on election day. The Act sets out the rules and procedures electors must follow in order to exercise their constitutional right to vote. Those rules must be applied fairly and consistently if the right is to have meaning.

D. *Requirements for Annulment of an Election*

[168] As noted above, a court should annul an election under s. 531(2) if the applicant has established that there were "irregularities . . . that affected the result of the election" under s. 524(1)(*b*). The irregularities must be of a type that could affect the outcome of the election and impact a sufficient number of votes to equal or exceed the winner's plurality. The winning candidate's plurality in this case was 26 votes, so this is the "magic number" of votes that the applicant had to establish were subject to irregularities of a kind that could affect the result of the election.

[169] Election results benefit from a "presumption of regularity": *Dewdney Election Case*, [1925] 3 D.L.R. 770 (B.C.C.A.), at p. 771. This reflects the fact that the applicant bears the burden of establishing, on a balance of probabilities, that there were "irregularities . . . that affected the result of the election": see *Beamish*, at para. 39. It follows that the applicant in this case must establish that irregularities resulted in non-entitled voters casting votes. If the judge concludes that on a balance of probabilities the record reflects a lack of entitlement, the vote must be set aside.

[170] An applicant may lead direct evidence that a non-entitled person voted. For example, he may demonstrate that a person who voted was neither on the list of electors nor filed a valid registration certificate. However, a judge may also rely on circumstantial evidence to conclude, on a balance of probabilities, that voters who did not comply with the entitlement provisions of the Act were improperly permitted to vote. In the absence of palpable and overriding error, a judge's conclusions on such questions of fact should not be disturbed: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

III. Application to This Appeal

[171] Two main issues are raised on this appeal. First, did the application judge err in law by reversing the onus of proof in his analysis? Second, did the application judge err in annulling the election on the basis of "irregularities . . . that affected the result of the election"?

A. *Did the Application Judge Reverse the Onus of Proof?*

[172] In my view, the application judge did not reverse the onus of proof in his analysis. He understood that there was a presumption of regularity in contested elections and that the applicant bore the burden of proving, on a balance of probabilities, the existence of "irregularities . . . that affected the result of the

election". He clearly articulated this understanding of the law, and analyzed the evidence accordingly. As he explained at para. 26 of his reasons:

> An examination of the conduct of an election begins with a presumption that it was conducted in a fashion that is consistent with the requirements of the applicable legislation. The presumption will stand in the absence of evidence to the contrary.

[173] The application judge discussed repeatedly and at length that the onus lies with the applicant throughout. He stated flatly, "[t]here is no doubt that the responsibility for demonstrating the presence of an irregularity rests with the applicant, the party seeking to have the election set aside" (para. 42). He also stressed the importance of placing the onus on the applicant at all times, even when this may make it difficult to establish that irregularities affected the result:

> Counsel for the applicant pointed out that, given the limitations on the available evidence, it would be equally difficult for the applicant to prove the irregularities affected the result of the election, as it would be for the respondent to disprove this proposition. I am not sympathetic to this complaint. I referred earlier to the conundrum that would result if elections were easily overturned. It is not supposed to be easy to overturn an election. [para. 46]

[174] My colleagues suggest that despite these clear statements, the application judge in fact reversed the onus in relation to polls 426 and 31. I cannot accept this contention. Crucially, in his treatment of both these polls, the application judge made an express finding indicating the applicant had discharged his onus of proof (paras. 115 and 122).

B. *Did the Application Judge Err in Annulling the Election on the Basis of "Irregularities . . . That Affected the Result of the Election"?*

[175] To recap, the applicant's onus was to establish that votes were cast by individuals who had not fulfilled the qualification, registration or identification prerequisites to entitlement set out in the Act. Unless the deficiencies were merely technical or trivial, votes cast by persons not entitled to vote constitute irregularities of a type that could affect the result of the election within the meaning of s. 524(1)(*b*). If their number was equal to or exceeded the winning candidate's plurality, then the result of the election was affected, and the election should be annulled under s. 531(2). If not, then the outcome of the election must stand, and the decision of the application judge must be reversed.

(1) Votes Set Aside Due to Irregularities in Identification

[176] An individual must satisfy the identification prerequisites in the Act in order to be entitled to vote (ss. 148.1(1) and 149(*c*)). These identification requirements must be fulfilled, regardless of whether an individual is on the list of electors or whether they are voting by registration certificate. One option is for the individual to present a piece or pieces of approved identification establishing identity and residence (ss. 143(2) and 161(1)(*a*)). Another is for the individual to take an oath and to be vouched for by someone meeting the vouching requirements set out in the Act (ss. 143(3), (5), (6), 161(1)(*b*), (6) and (7)).

(a) *Poll 21*

[177] The application judge set aside eight votes at this poll due to vouching problems. All eight voters were on the list of electors for poll 21, and all were listed in the poll book as requiring an oath. The application judge found as a fact that the oaths required for these eight electors concerned their identities and not merely their residence, based on comments next to these names in the poll book. Oaths sworn to establish identity always require vouching by another person. However, the page of the poll book for recording vouchers' names was blank. The application judge found that vouching did not occur, and set aside the eight votes.

[178] The finding that vouching did not occur cannot be disturbed in the absence of palpable and overriding error: "where evidence exists to support [a factual] inference, an appellate court will be hard pressed to find a palpable and overriding error": *Housen*, at para. 22. The question is whether evidence existed to support the application judge's conclusion. The absence of vouchers' names in the poll book provided such evidence.

[179] Nor did the application judge err in concluding that vouching was required for the eight voters. This was supported by the comments listed next to their names in the poll book, which indicated that identity and not merely residence was at issue.

[180] Having found that vouching was required but did not occur, the application judge did not err in concluding that the applicant had discharged his onus under s. 524(1)(*b*) with respect to these votes. The vouching irregularities at poll 21 resulted in individuals voting who were not entitled to do so, and their eight votes were properly set aside.

(b) *Poll 174*

[181] Regarding poll 174, the application judge set aside eight votes for what he characterized as improper vouching. At issue were the pages of the poll book that document the vouching procedure. First, p. 22 of the poll book required that the names of voters who were vouched for be listed. However, this page of the poll book was left blank. Second, p. 23 of the poll book required that the names of vouchers be indicated. On this page, the names of eight vouchers were recorded. In addition, the poll clerk appeared to indicate on p. 23 the relationship of each voucher to the person vouched for (for example, "son", "spouse", or "mother"). Third, p. 31 of the poll book indicated the number of electors who were vouched for. On this page, it was recorded that eight voters were vouched for.

[182] The application judge concluded on this evidence that any vouching that occurred was improper, and that the eight votes cast under the vouching procedure should therefore be set aside. This conclusion did not constitute palpable and overriding error and should not be interfered with. The problem identified at poll 174

by the application judge was that there was no way of knowing who was being vouched for by each voucher. The names of individuals voting under the vouching procedure were not recorded on p. 22 as required under the Act (s. 162(*f*)). This provided a factual basis for the trial judge's conclusion that any vouching that occurred was improper.

[183] Although not expressly noted by the application judge, the absence of voter names from the required form in the poll book could indicate that these voters never swore oaths required of them under the vouching procedure. Individuals voting under the vouching procedure must take an oath swearing their qualification, residence and identity (ss. 143(3) and 161(1)(*b*) of the Act). Section 162(*f*) of the Act requires the poll clerk to indicate on the prescribed form that an elector has taken an oath. The prescribed form for indicating the names of voters vouched for is p. 22 of the poll book. At poll 174, no names were listed on p. 22 of the poll book, despite the fact that eight voters cast their ballots under the vouching procedure. This evidence supports the application judge's conclusion that the vouching at poll 174 was improper.

[184] Improper vouching is an irregularity of a type that can affect the result of the election. Having found such an irregularity at poll 174, the application judge properly set these eight votes aside.

(c) *Poll 502*

[185] Regarding poll 502, the application judge found that seven voters were vouched for by individuals who were not resident in that polling division. This finding of fact was supported by the evidence. The application judge then set aside these seven votes, on the basis that the vouching requirements in the Act were not met. The Act, as discussed, requires that vouchers be on the list of electors for the polling division in which they are vouching (ss. 143(3) and 161(1)(*b*)).

[186] In my view, the application judge did not err in setting aside these votes. Vouching allows a voter to satisfy the identification prerequisite of entitlement to vote in the absence of approved documentary identification. To maintain the integrity of the election process, Parliament has established limitations on vouching. One limitation is that a voucher must appear on the list of electors for the polling division at which he is vouching. This allows polling officials to ensure that vouchers only vouch for one person and reduces the risk of fraudulent vouching: *Henry*, at paras. 368 and 400.

[187] The seven voters who were vouched for at poll 502 failed to comply with entitlement prerequisites of the Act, in a way that was not merely technical or trivial. The presumption of regularity was displaced and these votes were properly set aside.

(d) *Poll 30*

[188] The application judge set aside four votes at poll 30. As with poll 502, the application judge found that these voters were vouched for by individuals who were not on the list of electors for the polling division. This finding was supported by the evidence. For the reasons I have already described with respect to poll 502, these voters were not entitled to vote, as they did not fulfill the identification prerequisite of entitlement to vote. The deficiency of entitlement was not merely technical or trivial. The presumption of regularity was displaced and these votes were properly set aside.

[189] The application judge noted that he would have set aside two of these votes for the additional reason that each of the two vouchers also vouched for another voter in the election. This alternative analysis was not in error. Vouching for more than one person is specifically prohibited by the Act (s. 143(5)). If a person attempts to become entitled to vote by relying on a voucher who has also vouched for another voter, this constitutes non-compliance with the entitlement requirements of the Act. The deficiency is not merely technical or trivial. Such vouching is invalid, and a voter who relied upon it to establish her identity was not entitled to vote.

(2) Votes Set Aside Due to Irregularities in Registration

[190] As discussed, an individual becomes registered to vote either by having her name included on the list of electors or through the registration certificate process set out in the Act (ss. 6 and 149(*c*)).

(a) *Poll 426*

[191] The application judge set aside 26 votes at poll 426 cast by individuals voting by registration certificate. He concluded, on a balance of probabilities, that the required declaration of qualification to vote was not made for these voters. (The text of this declaration is set out in para. 159 above.)

[192] There is evidence to support the application judge's conclusion. The problems were many. No registration certificates were found for these voters. The page of the poll book recording the number of people who voted by registration certificate is blank. No addresses are listed for any registration certificate voters. The page of the poll book where vouchers are to be recorded is also blank. Finally, none of these 26 registration certificate voters appear on the final list of electors as would normally be the case if registration certificates were sent to the returning officer for the riding after the election.

[193] While various explanations for each of these problems were advanced, the application judge concluded, on a balance of probabilities, that the explanation for this catalogue of deficiencies was that the necessary declarations were never made. The application judge made no palpable and overriding error in drawing this factual inference on the evidence before him.

[194] Having found that no declaration of qualification was made, the application judge correctly concluded that the applicant had established, on a balance of probabilities, that these votes should be set aside. The absence of a declaration of qualification was not merely technical or trivial. This irregularity went to the heart of entitlement to vote. Accordingly, the presumption of regularity was rebutted and these votes were properly set aside.

(b) *Poll 174*

[195] The application judge set aside one vote at poll 174 cast by a registration certificate voter. He concluded, on a balance of probabilities, that this voter had not made the required declaration of qualification to vote.

[196] The evidence before the application judge supported this factual conclusion. The box on the registration certificate dealing with qualification to vote was left blank, and the certificate in question verified the voter's identity and residence, but did not attest to the voter's qualification to vote. The declaration was not signed by the voter. On this basis, the application judge concluded that the declaration of qualification was never made. Consequently, the presumption of regularity was rebutted and this vote was properly set aside.

(c) *Poll 89*

[197] At poll 89, 10 people voted by registration certificate without signing their declaration of qualification. Instead, the election official signed in the space reserved for the voter's declaration, while leaving blank the space where the deputy returning officer or registration officer is required to sign.

[198] The Act permits election officials to assist voters, including by signing the declaration of qualification on behalf of the voter. However, the application judge found that the election official did not sign the declaration on behalf of the voters in question. Rather, he did so on his own behalf, although in the wrong place. Therefore, the application judge concluded that no declaration was made by the voters.

[199] There was evidence to support his conclusion, which was not tainted by palpable and overriding error. First, the space where the election official was required to sign in his own capacity was blank. Second, there is nothing to indicate that the election official signed on behalf of the elector, instead of signing for himself, albeit mistakenly in the wrong place. Accordingly, the presumption of regularity is displaced.

[200] I note that the poll book indicates that one of the 10 voters at issue here was already on the list of electors for polling division 89. That voter had already complied with the registration prerequisite of entitlement to vote by being on the list

of electors for polling division 89. The voter therefore did not need to file a registration certificate in order to become entitled to vote.

[201] Therefore, only nine of these votes were properly set aside.

(d) *Poll 31*

[202] Regarding poll 31, the application judge set aside 15 votes cast by registration certificate voters whose registration certificates could not be found. Here, as at poll 426, no one was listed as having vouched for any of these voters, and the voters' names were not added to the final list of electors following the election. The application judge concluded that registration certificate declarations of qualification were never made for these voters. There was evidence to support this conclusion, which is not tainted by palpable and overriding error.

[203] Ordinarily, this conclusion would result in all of the registration certificate votes concerned being set aside, and this is indeed the case for two of the votes. However, an additional issue is raised, as the remaining 13 registration certificate voters were already on the list of electors for polling division 31 (three voters) or for other polling divisions within the electoral district (10 voters).

[204] The three votes cast by voters already on the list of electors for polling division 31 should not have been set aside. These voters had already satisfied the

registration prerequisite of entitlement to vote. The application judge erred in failing to identify these three voters as entitled to vote through inclusion on the list of electors for polling division 31.

[205] A further 10 voters were on lists of electors, but for other polling divisions within the electoral district. The issue is whether these votes were properly set aside. The application judge declined to set aside one vote at poll 31 because that voter was on the list of electors for another polling division in the same electoral district. If the application judge had consistently applied this approach, these further 10 votes would also have been allowed.

[206] In my view, the application judge erred in setting these 10 votes aside. The record establishes that each of these voters was qualified, registered in a polling division within the electoral district and properly identified before they cast their ballots. The difficulty is that the polling station in Etobicoke Centre where they cast their ballots was not the polling station for the polling division in Etobicoke Centre where they were registered to vote. Section 6 of the Act expressly states that a person on the list of electors is only entitled to vote at the polling station for the polling division in which she is listed.

[207] In this case, the fact that 10 votes were cast at the wrong polling station within the riding is a merely technical or trivial deficiency. It is therefore not an irregularity within the meaning of s. 524(1)(*b*) and these votes should not be set aside.

In essence, the 10 electors placed their ballots in the wrong box. Because the ballots from all boxes in an electoral district are aggregated to determine the winning candidate, placing a ballot in the wrong box does not impact the overall tallies for the district. There is no evidence or suggestion of double-voting. Ultimately, the problem here went simply to where the votes were cast within the electoral district. Often, the polling stations for different polling divisions are grouped together in a central polling location. The error might have been as minor as walking to the wrong table in the room where voting was taking place. As a result, I am of the view that the deficiency affecting these 10 votes is inconsequential and, as a result, may be considered technical or trivial. For this reason, these votes should not be set aside.

[208] My conclusion in respect of these 10 votes should not be understood as undermining the practical importance of polling divisions. Polling divisions are key administrative units around which elections are organized, ensuring that voting proceeds in an orderly fashion, and they ought to be respected.

IV. Fresh Evidence Motion

[209] The Chief Electoral Officer and the returning officer brought a motion to adduce fresh evidence. The evidence consists of a list of 52 names of voters in Etobicoke Centre for whom registration certificates are missing, and indicates whether those names appeared in March 2011 in the national register of electors ("NROE"), a database of Canadians qualified to vote in federal elections. The NROE

is used to generate a preliminary list of electors, which is then added to and deleted from to create the list of electors used on election day.

[210] Of the votes set aside by the application judge, eight were cast by individuals whose names did not appear in the NROE at all, so there is no suggestion that it was an error to set those votes aside on the basis of the NROE. Three names on the NROE are those of voters from poll 31 who were on the list of electors for that polling division, which I have held were improperly set aside. This leaves 41 voters whose names appear in the NROE and whose votes were set aside by the application judge.

[211] An appellate court will consider the relevance and reliability of fresh evidence in determining whether to admit it, as well as whether the evidence could have been adduced at trial through due diligence: *Palmer v. The Queen*, [1980] 1 S.C.R. 759. However, contested election applications must be heard "without delay and in a summary way" under s. 525(3) of the Act, which suggests that the due diligence requirement can perhaps be relaxed in the election context.

[212] In my view, notwithstanding any relaxation of the due diligence requirement, the fresh evidence motion should be dismissed for two reasons.

[213] First, the evidence is not relevant to the matter before this Court. As discussed earlier in these reasons, after-the-fact information that a non-entitled voter

was qualified is not relevant to whether he was entitled to receive a ballot on election day. Nothing in the Act suggests that this is an appropriate way to protect the integrity of the electoral system. Votes were set aside in this case because of failures in the registration and identification prerequisites of entitlement. These cannot be remedied by after-the-fact proofs of qualification. Without the voter establishing his qualifications in an approved manner prior to voting, the Act is clear that he is not entitled to vote (ss. 6, 148.1 and 149).

[214] Second, the reliability of the evidence is questionable. All that Elections Canada has done is attempt to discern names that are handwritten in the poll book, and type them into the NROE database to find the closest match. Some of the names typed in are significantly different from their closest match, suggesting that the person in the NROE is not the person in the poll book. It is also entirely possible that handwritten names have been misread, or that two individuals have the same name. Furthermore, the NROE data relates to two months before the election. If the person in the NROE is the same individual whose name did not appear on the list of electors on election day, there is no way of knowing whether she was removed from the list inadvertently or intentionally.

[215] In any event, even if one were to accept that this after-the-fact, untested information about qualification can somehow legitimize voting by a non-entitled but qualified individual, admitting the evidence would not affect the disposition of the appeal. Of the 41 individuals at issue on the NROE list, 22 are linked in the NROE

database to addresses outside Etobicoke Centre. This suggests either that these are different people, or that, as of March 2011, they were not resident within the riding. Neither conclusion supports a finding that these were qualified Etobicoke Centre voters. This leaves a total of 19 individuals who, were this evidence to be accepted as relevant and reliable, appear to have been qualified voters in Etobicoke Centre in March 2011. Even if all 19 of these votes were wrongly set aside, the number of votes properly set aside would still be 46, a number sufficient to annul the election.

V. Conclusion

[216] Of the 79 votes set aside by the application judge, I conclude that 65 were properly set aside, as follows:

Votes Set Aside Due to Irregularities in Identification

8 votes properly set aside at poll 21

8 votes properly set aside at poll 174

7 votes properly set aside at poll 502

4 votes properly set aside at poll 30

Votes Set Aside Due to Irregularities in Registration

26 votes properly set aside at poll 426

1 vote properly set aside at poll 174

9 votes properly set aside at poll 89

2 votes properly set aside at poll 31

This exceeds the 26-vote plurality in this electoral district.

[217] Therefore, the applicant succeeded in establishing the existence of "irregularities . . . that affected the result of the election" under s. 524(1)(*b*) and the election is properly annulled as contemplated under s. 531(2) of the Act. There is no need to consider the cross-appeal. The appeal should be dismissed and the fresh evidence motion dismissed.

APPENDIX

Canada Elections Act, S.C. 2000, c. 9

> **3.** Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector.
>
> . . .
>
> **6.** Subject to this Act, every person who is qualified as an elector is entitled to have his or her name included in the list of electors

for the polling division in which he or she is ordinarily resident and to vote at the polling station for that polling division.

. . .

44. (1) The Chief Electoral Officer shall maintain a register of Canadians who are qualified as electors, to be known as the Register of Electors.

(2) The Register of Electors shall contain, for each elector who is included in it, his or her surname, given names, sex, date of birth, civic address, mailing address and any other information that is provided under subsections 49(2), 194(7), 195(7), 223(2), 233(2) and 251(3).

(2.1) The Register of Electors must also contain, for each elector, a unique, randomly generated identifier that is assigned by the Chief Electoral Officer.

(3) Inclusion in the Register of Electors is at the option of the elector.

. . .

143. (1) Each elector, on arriving at the polling station, shall give his or her name and address to the deputy returning officer and the poll clerk, and, on request, to a candidate or his or her representative.

(2) If the poll clerk determines that the elector's name and address appear on the list of electors or that the elector is allowed to vote under section 146, 147, 148 or 149, then, subject to subsection (3), the elector shall provide to the deputy returning officer and the poll clerk the following proof of his or her identity and residence:

(*a*) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or

(*b*) two pieces of identification authorized by the Chief Electoral Officer each of which establish the elector's name and at least one of which establishes the elector's address.

(2.1) For greater certainty, the Chief Electoral Officer may authorize as a piece of identification for the purposes of paragraph (2)(*b*) any document, regardless of who issued it.

(2.2) For the purposes of paragraph (2)(*b*), a document issued by the Government of Canada that certifies that a person is registered as an Indian under the *Indian Act* constitutes an authorized piece of identification.

(3) An elector may instead prove his or her identity and residence by taking the prescribed oath if he or she is accompanied by an elector whose name appears on the list of electors for the same polling division and who

(*a*) provides to the deputy returning officer and the poll clerk the piece or pieces of identification referred to in paragraph (2)(*a*) or (*b*), respectively; and

(*b*) vouches for him or her on oath in the prescribed form.

(3.1) If the address contained in the piece or pieces of identification provided under subsection (2) or paragraph (3)(*a*) does not prove the elector's residence but is consistent with information related to the elector that appears on the list of electors, the elector's residence is deemed to have been proven.

(3.2) Despite subsection (3.1), a deputy returning officer, poll clerk, candidate or candidate's representative who has reasonable doubts concerning the residence of an elector referred to in that subsection may request that the elector take the prescribed oath, in which case his or her residence is deemed to have been proven only if he or she takes that oath.

(4) If the deputy returning officer is satisfied that an elector's identity and residence have been proven in accordance with subsection (2) or (3), the elector's name shall be crossed off the list and, subject to section 144, the elector shall be immediately allowed to vote.

(5) No elector shall vouch for more than one elector at an election.

(6) An elector who has been vouched for at an election may not vouch for another elector at that election.

(7) The Chief Electoral Officer shall publish each year, and within three days after the issue of a writ, in a manner that he or she considers appropriate, a notice setting out the types of identification that are authorized for the purpose of paragraph (2)(*b*). The first annual notice

shall be published no later than six months after the coming into force of this subsection.

. . .

144. A deputy returning officer, poll clerk, candidate or candidate's representative who has reasonable doubts concerning whether a person intending to vote is qualified as an elector may request that the person take the prescribed oath, and the person shall not be allowed to vote unless he or she takes that oath.

. . .

148.1 (1) An elector who fails to prove his or her identity and residence in accordance with subsection 143(2) or (3) or to take an oath otherwise required by this Act shall not receive a ballot or be allowed to vote.

(2) If an elector refuses to take an oath because he or she is not required to do so under this Act, the elector may appeal to the returning officer. If, after consultation with the deputy returning officer or the poll clerk of the polling station, the returning officer decides that the elector is not required to take the oath, and if the elector is entitled to vote in the polling division, the returning officer shall direct that he or she be allowed to do so.

149. An elector whose name does not appear on the official list of electors in his or her polling station shall not be allowed to vote unless

(*a*) the elector gives the deputy returning officer a transfer certificate described in section 158 or 159 and, for a certificate described in subsection 158(2), fulfils the conditions described in subsection 158(3);

(*b*) the deputy returning officer ascertains with the returning officer that the elector is listed on the preliminary list of electors or was registered during the revision period; or

(*c*) the elector gives the deputy returning officer a registration certificate described in subsection 161(4).

. . .

161. (1) An elector whose name is not on the list of electors may register in person on polling day if the elector

(*a*) provides as proof of his or her identity and residence the piece or pieces of identification referred to in paragraph 143(2)(*a*) or (*b*), respectively, which piece or one of which pieces must contain an address that proves his or her residence; or

(*b*) proves his or her identity and residence by taking the prescribed oath, and is accompanied by an elector whose name appears on the list of electors for the same polling division and who

(i) provides the piece or pieces of identification referred to in paragraph 143(2)(*a*) or (*b*), respectively, which piece or one of which pieces must contain either an address that proves his or her residence or an address that is consistent with information related to him or her that appears on the list of electors, and

(ii) vouches for him or her on oath in the prescribed form, which form must include a statement as to the residence of both electors.

(2) Where subsection (1) applies, the registration may take place before

(*a*) a registration officer at a registration desk established under subsection 39(1); or

(*b*) a deputy returning officer at a polling station with respect to which the Chief Electoral Officer determines that the officer be authorized to receive registrations.

(3) In the case of a registration under paragraph (2)(*a*), the registration officer shall permit one representative of each candidate in the electoral district to be present.

(4) Where the elector satisfies the requirements of subsection (1), the registration officer or deputy returning officer, as the case may be, shall complete a registration certificate in the prescribed form authorizing the elector to vote and the elector shall sign it.

(5) When a registration certificate is given under subsection (4), the list of electors is deemed, for the purposes of this Act, to have been modified in accordance with the certificate.

(6) No elector shall vouch for more than one elector at an election.

(7) An elector who has been vouched for at an election may not vouch for another elector at that election.

. . .

162. Each poll clerk shall

. . .

(*f*) indicate, if applicable, on the prescribed form that the elector has taken an oath and the type of oath;

. . .

524. (1) Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that

(*a*) under section 65 the elected candidate was not eligible to be a candidate; or

(*b*) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

. . .

525. . . .

(3) An application shall be dealt with without delay and in a summary way. The court may, however, allow oral evidence to be given at the hearing of the application in specific circumstances.

. . .

531. . . .

(2) After hearing the application, the court may dismiss it if the grounds referred to in paragraph 524(1)(*a*) or (*b*), as the case may be, are not established and, where they are established, shall declare the election null and void or may annul the election, respectively.

Appeal allowed and cross-appeal dismissed, MCLACHLIN C.J. *and* LEBEL *and* FISH JJ. *dissenting.*

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