



# Judicial Recounts

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## **1. Introduction**

### 1.1 Purpose of this handbook

This handbook is designed to provide a better understanding of the process for carrying out a judicial recount under the *Canada Elections Act*. This handbook is designed for reference purposes only, does not take precedence over electoral legislation, and should be read in conjunction with the relevant provisions of the Act. The jurisprudence cited in this handbook is not exhaustive.

A judge may carry out a judicial recount upon the receipt of a request from a returning officer or from an elector. Judicial recounts are automatic where there is a small margin of difference between the votes cast for the winning candidate and those cast for the candidate who came in second place. Judicial recounts may also take place where there is evidence that election officers have incorrectly counted, tabulated or discarded ballots.

This handbook deals with judicial recounts and does not address contested elections (see Part 20 of the *Canada Elections Act*). Allegations that the elected candidate was not eligible to be a candidate or that there were irregularities, fraud or corrupt or illegal practices that affected the result of the election can only be addressed by an application to contest an election, and cannot be dealt with at a judicial recount.

### 1.2 Scope of this handbook

This handbook explains the rights of individual electors and candidates to request a judicial recount and who may attend at the recount. This handbook also sets out who may act as a judge and the responsibilities of a judge tasked with conducting a judicial recount. Election officers may be required to provide evidence about the state of ballot boxes, individual ballots or other relevant information requested by the judge. Finally, this handbook discusses the legal principles relevant to establishing the validity of a ballot.

Relevant sections of the *Canada Elections Act* are indicated in square brackets after each related statement. Any adaptation issued under section 17 of the Act for the election in question, and which is relevant to the counting of ballots, may also need to be consulted.

### 1.3 Engaging counsel

It is recommended that any elector who wishes to make an application for a judicial recount seek advice from private legal counsel to ensure that their request is made in accordance with the *Canada Elections Act* and the rules of the relevant

court. Any such application is made under the rules of a competent court in the jurisdiction where the election occurred.

#### 1.4 Questions about this handbook

Please direct any questions about this handbook to Elections Canada. We can be reached by telephone at 1 (800) 486-6563, by fax at (613) 990-2530, by e-mail through our Web site at [www.elections.ca](http://www.elections.ca), or by mail at Elections Canada, 257 Slater Street, Ottawa, Ontario, K1A 0M6.

Please bring all alleged violations of the *Canada Elections Act* to the attention of the Commissioner of Canada Elections, in writing by mail to 257 Slater Street, Ottawa, Ontario, K1A 0M6 or by fax at (613) 990-4877. It is the duty of the Commissioner to ensure that the *Canada Elections Act* is complied with and enforced.

## **2. Counting votes**

### **2.1 Counting votes at the close of polling day**

At the end of polling day, the deputy returning officer shall count the votes cast at his polling station in the presence of the poll clerk and any candidates or representatives who are present or, if no candidates or representatives are present, in the presence of at least two electors. [283(1)]

With the assistance of the poll clerk, and under the scrutiny of candidates or their representatives, the deputy returning officer shall:

- count the number of electors who voted at the polling station;
- count the number of spoiled ballots;
- count the unused ballots;
- open the ballot box, empty the contents onto a table, examine each ballot, show the ballot to each person who is present, and ask the poll clerk to record the name of the candidate for whom the vote was cast; and
- reject ballots that meet the rejection criteria in the Act. [283(3), 284(1)]

The deputy returning officer shall prepare a statement of the vote setting out the number of votes in favour of each candidate and the number of rejected ballots. The original statement and a copy of it are placed in separate envelopes. [287(1)]

The spoiled ballots, unused ballots, rejected ballots and marked ballots shall also be placed in separate envelopes, and along with the list of electors and a copy of the statement of the vote, shall be placed in the ballot box. The deputy returning officer shall then seal the ballot box. [288]

Without delay after sealing the ballot box, the deputy returning officer will forward the ballot box and other election documents to the returning officer for validation of the results. [290]

The returning officer oversees all polling stations within his electoral district. After the returning officer receives all the ballot boxes from every polling station, the returning officer shall proceed to validate the result using the original statements of the vote and the results of the count of special ballots that were counted at the Office of the Chief Electoral Officer. [293]

The returning officer will verify and record the number of votes cast for each candidate, the number of valid votes, the number of rejected votes, and the

number of the total vote. [293(1), RO Manual] The validation process does not involve counting the ballots a second time. [295(3)]

The returning officer shall prepare a certificate setting out the number of votes cast for each candidate, and forward the original to the Chief Electoral Officer and a copy of it to each candidate or his or her representative. [297] No earlier than six days following the validation of the results, the returning officer shall declare elected the candidate who obtained the largest number of votes by completing the return of the writ and forwarding the writ to the Chief Electoral Officer. [313(1), 314(1)]

## 2.2 Counting votes cast by special ballot

An elector who votes by special ballot shall:

- a) write the name of the candidate of his or her choice on the ballot;
- b) place the ballot in an envelope (the “inner envelope”);
- c) place the inner envelope into another envelope (the “outer envelope”);
- d) sign the declaration on the outer envelope;
- e) and seal the outer envelope. [212, 213, 227(2), 238, 257(1), 258(1)]

### Counting special ballots at the office of the returning officer

An elector who votes by special ballot in his or her electoral district must ensure that the ballot is received at the office of the returning officer before the close of the polling stations on polling day. [239(2)(a)]

A deputy returning officer and a poll clerk shall be appointed by the returning officer to count the special ballots issued to electors in his or her electoral district and received in his or her office. [273(1)] The returning officer shall notify the candidates of the time and place of the verification, and the candidates and their representatives may be present for the verification of the outer envelopes and the counting of the ballots. [274, 276(2)]

At the time fixed by the Chief Electoral Officer, a deputy returning officer and a poll clerk shall

- verify the outer envelopes by determining from the information on the outer envelope whether the elector is entitled to vote in the electoral district; [276(1)]

- set aside every outer envelope unopened that falls within the criteria for spoiled envelopes under the Act and place them in the envelope for spoiled ballots; [277(1), Elections Canada Manual EC 78700]
- count all valid outer envelopes; and [278(1)]
- open the valid outer envelopes and place the inner envelopes into a ballot box. [278(2)]

After the close of polling stations, the deputy returning officer shall

- open the ballot box and together with the poll clerk open the inner envelopes and count the votes; and [278(3)]
- reject ballots that meet the rejection criteria under the Act. [279]

#### Counting special ballots at the Office of the Chief Electoral Officer

An elector who votes by special ballot outside his or her electoral district must ensure that the ballot is received at the office of the special voting rules administrator in Ottawa not later than 6:00 p.m. on polling day. [239(2)(b)]

The counting of the special ballots shall be conducted by a pair of special ballot officers under the supervision of the special voting rules administrator. [264(1)]

The counting of special ballots at the Office of the Chief Electoral Officer shall commence on a date to be fixed by the Chief Electoral Officer, or if no date is fixed, on Wednesday, the fifth day before polling day. [266]

The special ballot officers shall set aside every outer envelope unopened that meets the criteria for spoiled envelopes under the Act. [267(1), (2)]

The special ballot officers shall, on examining a special ballot, reject it if it meets the rejection criteria under the Act. [269].

The special ballot officers shall prepare a statement of the vote and deliver it to the special voting rules administrator. [270(1)]

Without delay after the counting of the votes for every electoral district has been completed, the special voting rules administrator shall

- inform the Chief Electoral Officer of
  - the number of votes counted for each candidate for each electoral district;
  - the total number of votes counted for each electoral district; and

- the number of rejected ballots for each electoral district; and [271]
- send to the Chief Electoral Officer in separate envelopes:
  - the list of electors;
  - all other documents and election materials received from commanding officers, deputy returning officers and special ballot officers;
  - the oaths of office; and
  - the complete files of correspondence, reports and records in his or her possession. [272]

### 3. Judicial recount

#### 3.1 What is a judicial recount?

A judicial recount is a completely separate tabulation of the votes by a judge of a superior court who sits in the electoral district where the election was held. [2(1), 299(1)] A judicial recount must occur where the number of votes separating the candidate who received the most votes and any other candidate is less than one one-thousandth (1/1000) of the votes cast, or where it appears to a judge, on credible affidavit evidence, that there was an error in the tabulation of the vote by either the returning officer or the deputy returning officer. [300(1), 301(2)]<sup>1</sup>

Recounts will not occur when the results of the election are contested because of allegations of irregularities, fraud, illegal practices or corrupt practices as those allegations are dealt with through an application to contest an election. [524(1)]

#### 3.2 When does a judicial recount occur?

There are two situations that give rise to a judicial recount.

##### An automatic judicial recount in the case of a close result

A judicial recount must take place if the difference between the number of votes cast for the candidate with the most votes and the number of votes cast for any other candidate is less than one one-thousandth (1/1000) of the votes cast. The returning officer is obliged to make a request for a judicial recount within four days of the initial results being validated. [300(1)]

This request must be made to a judge who sits in the electoral district where the results are validated. [2(1), 299(1)] In the event of an automatic judicial recount, the returning officer must give each candidate or his or her official agent written notice of the request for a recount. [300(2)]

##### Recount by way of application

Subsection 301(1) of the Act allows an elector to apply for a judicial recount within four days of the returning officer issuing a certificate setting out the number of votes cast for each candidate, on the grounds that the returning officer or the deputy returning officer committed errors in tabulating the votes cast. [301(1), (2), 297]

An application for a judicial recount is made to a judge of a court in the province or territory in which the election occurred, as specified in the Act. [2(1), 299(1)]

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<sup>1</sup> On the nature of a recount, see *Strang v. Orangeville* [2003] O.J. No. 5214 (S.C.J.) (QL); *Sharma v. Silver*, [2003] M.J. No. 166 (Q.B.) (QL); *Weremchuk v. Jacobsen* (1986), 35 D.L.R. (4<sup>th</sup>) 278 (B.C.C.A.); *Lorje v. Karwacki*, [1999] S.J. No. 903 (C.A.) (QL).

A more detailed description of the application process can be found in the relevant rules of the court.

Upon application by an elector, a judge may conduct a judicial recount if there is credible affidavit evidence that:

- The deputy returning officer improperly counted or rejected ballots;
- The deputy returning officer made an incorrect statement of the vote; or
- The returning officer improperly added up the votes.<sup>2</sup> [301(2)]

#### Date for recount

The judge must conduct the recount within four days of the date that he or she receives the application. Upon setting the date for the recount, the judge will summon the returning officer to attend the recount, and the returning officer shall bring to the recount the ballots that were counted, relevant ballot boxes and the statements of the vote that were used by the returning officer to complete the certificate of votes cast. [300(3), (4), 301(2), (4)] The returning officer may, as requested by the judge, perform other logistical functions in support of the recount.

The judge will provide written notice to the candidates or their official agents of the time and place at which a recount requested by an elector will be held. [301(5)]

Except in the case of an automatic recount, the judge may terminate the recount at any time at the written request of the person who applied for the recount. [307]

### 3.3 Security for costs

In the event that an elector requests a recount, the applicant must deposit with the clerk or prothonotary of the Court the sum of \$250.00 as security for costs of the

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<sup>2</sup> Section 177 of the former *Canada Elections Act*, the predecessor to section 301 of the current *Canada Elections Act*, was judicially considered in *Gerrard v. Hilstrom*, [1997] M.J. no 356 (Q.B.) (QL). In his reasons, Oliphant A.C.J.Q.B. noted that in order for a recount to occur, there must be an error by either the returning officer or the deputy returning officer. Complaints about the integrity of the process should be dealt with other than through an application for judicial recount. See also *Re Canada Elections Act* [1993] S.J. No. 615 (Q.B.) (QL).

Section 54 of the *Dominion Elections Act*, S.C. 1938, c.46, an earlier antecedent to Part 14 of the *Canada Elections Act*, was judicially considered in the case *In re The Dominion Elections Act, 1938 & In re McCulloch and Maple Creek Electoral District*, [1940] 2 W.W.R. 185 (Sask.Dist.Ct.). In that case, the court held that an unsuccessful application for a recount of votes made by one elector did not preclude a second elector from making a subsequent application on the same issue provided that it was within the time period prescribed in the Act.

candidate who obtained the largest number of votes. [301(3)] Costs consequences are discussed below, at 3.10.

#### 3.4 Who has authority to conduct a judicial recount?

Judges eligible to conduct a judicial recount are as follows:

- in Ontario, a judge of the Superior Court of Justice;
- in Quebec, a judge of the Superior Court of Québec;
- in Nova Scotia and British Columbia, a judge of the Supreme Court of the Province;
- in New Brunswick, Manitoba, Saskatchewan and Alberta, a judge of the Court of Queen’s Bench of the Province;
- in Prince Edward Island and Newfoundland and Labrador, a judge of the Trial Division of the Supreme Court of the Province;
- in Yukon, a judge of the Supreme Court of Yukon;
- in the Northwest Territories, a judge of the Supreme Court of the Northwest Territories; and
- in Nunavut, a judge of the Nunavut Court of Justice,

as long as the judge sits in the electoral district where the results are validated. [2(1), 299(1)]

If no judge exercises the necessary jurisdiction, the Minister of Justice may designate a judge for that purpose. [2(1)]

A judge may conduct a judicial recount, to the extent authorized by the Act, within or outside his or her judicial district, as long as the judge sits in the electoral district where the results are validated.<sup>3</sup> [299(2)]

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<sup>3</sup> A judge conducting a recount of ballots in an election is acting within his powers as a judge, and not as a *persona designata*. Therefore a writ of prohibition cannot be issued against him personally (*Gagnon v. Savard (Juge)* (1939), 77 C.S. 529 (C.S.Q.)). For other cases on the status or function of the judge on a recount, see *Re Courneys and the Village of Tweed*, [1949] O.R. 270 (C.A.); *Re Weston Local Option Bylaw*, [1907] O.J. No. 262 (High Ct.) (QL); *Huyghebaert v. McPherson* [2000] S.J. No. 34 (Q.B.) (QL); *Re Reaume*, [1950] O.J. No.337 (H. Ct.) (QL); *Re Election of the Member of the Legislative Assembly for St. Patrick’s Riding*, [1934] O.J. No. 88 (H. Ct.) (QL); *Re Toronto Beaches Election*, [1943] O.R. 787; *Re Coquitlam Election* (1976), 10 B.C.L.R. (2d) 172 (B.C.C.A.)

### Additional powers of a judge

A judge charged with conducting a recount has the same power as a returning officer to summon any witness and to require that they bring with them any necessary documents, in order to arrive at the facts with respect to a missing ballot box or statement of the vote. [304(4), 296(2)(b)]

Any person who fails to appear after being summoned is guilty of an offence, and liable on summary conviction to a fine of not more than \$1,000, or to imprisonment for a term of not more than three months, or to both. [304(4), 493, 500(2)]

A judge conducting a judicial recount also has the power to summon any deputy returning officer or poll clerk as a witness and can require him or her to give evidence on oath and, for that purpose, has the same power that is vested in any court of record. [304(5)]

This power is particularly important in the case of counting rejected ballots. Since the judge does not have access to the poll book, or any other electoral documents, besides the ballots and the statements of the vote, the judge may require that the deputy returning officer explain why a ballot was rejected if it is not readily apparent from the documents at hand. [304(1), (2)]

In the event that an examination on oath occurs, the judge shall give notice to the candidates of the time fixed for the appearance of the individuals who are to provide evidence. [296(3), 304(4)]

### Order of multiple judicial recounts

If a judge receives more than one recount application for more than one electoral district, the recounts shall be conducted in the order in which the judge receives the applications. [302]

### Administrative assistance for the recount

Subject to the approval of the Chief Electoral Officer, a judge who is called upon to conduct a judicial recount may retain the services of support staff to assist in the performance of his or her duties under the Act. [304(6)]

## 3.5 Recount procedures

The returning officer shall attend the recount and provide the judge with the ballot boxes. The ballot boxes contain the ballots cast, the unused ballots, the spoiled ballots, the rejected ballots, copies of the statements of the vote, as well as the

ballots cast and the statements of the vote made in accordance with the Special Voting Rules of the Act.<sup>4</sup> [300(4), 301(4)]

The ballot box also contains the envelopes received under the Special Voting Rules which were set aside, unopened by a deputy returning officer or by the special ballot officers. [Elections Canada Manual EC 78700: Deputy Returning Officer's Manual – Counting Local Special Votes for an Election]

Ballots come in two forms. The ballot used at regular polling stations and advanced polling stations sets out the names of the candidates in an electoral district with a white space beside each name for the elector to indicate his or her choice. [Sch.I, Form 3]

Special ballots are used under the Special Voting Rules for votes cast by Canadian Forces electors, electors temporarily resident outside of Canada, incarcerated electors, and electors resident in Canada who choose to vote by special ballot. [177–282] A special ballot may be in two forms. One form is the same as that for regular ballots and is used only in the circumstances set out in section 241 of the Act. The usual special ballot form simply provides a blank space for the elector to write in the name of a candidate. [Sch.I, Form 4]

A judge shall conduct the recount by any of the following procedures:

- by adding the number of votes reported in the statements of the vote;
- by counting the valid ballots; or
- by counting all of the ballots returned by the deputy returning officers or by the Chief Electoral Officer, including the envelopes set aside unopened under the Special Voting Rules. [304(1)]

If proceeding by way of the first procedure, the judge does not count each ballot. The recount is completed by adding the number of votes recorded in the statements of the vote. [304(1)] This procedure may be followed where the returning officer has made an arithmetic error in adding the number of votes in the statements of the vote.

If proceeding by way of one of the other two procedures set out above, the judge will apply subsection 304(3) of the Act. This subsection requires the judge to count the ballots in the manner prescribed for a deputy returning officer or a special ballot officer. The judge conducting a recount shall open the ballot boxes and empty their contents onto a table. [283] The judge shall also review the

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<sup>4</sup> The case of *Re: Bevilacqua* held that the envelopes do not have to be properly sealed in order for the ballots therein to be counted during a judicial recount, and that holding otherwise would deprive eligible electors of their franchise despite their lawful participation in the election. Voters should not be punished because of the errors of the election officials. ((1988), 56 D.L.R. (4th) 698 (Ont.H.Ct.))

special ballots counted by deputy returning officers and special ballot officers. [300(4)(c), 301(4)] Since the ballots have already been counted once, the ballots supplied to the judge will include the ballots for each candidate, the spoiled ballots, the unused ballots, and the rejected ballots. [288]

The large plastic envelope that contains regular ballots will also contain the statement of the vote, the poll book, the document envelope, the seal control sheet, the identification cards of the deputy returning officer, the tally sheets, and any remaining material.

In conducting the recount, the judge may only open sealed envelopes that contain the used, counted, unused, rejected and spoiled ballots. During the recount, the judge may not refer to any of the other election documents, nor may he or she open any other envelopes that appear to contain other election materials. [304(2)]

The envelope for spoiled special ballot papers will also contain envelopes set aside unopened under the Special Voting Rules. [Elections Canada Manual EC 78700] These should be examined, as described below.

In relation to regular ballots, the judge shall examine each ballot, show the ballot to each person who is present, and ask that a note be made on the tally sheet beside the name of the candidate for whom the vote was cast for the purpose of arriving at the total number of votes cast for each candidate. [283(3), 304(3),]

In relation to special ballots, the judge shall examine each ballot, call out the name of the candidate for whom it has been marked, and ask that a note be made on the tally sheet beside the name of the candidate for whom the vote was cast, for the purpose of arriving at the total number of votes cast for each candidate. The special ballot papers should be placed in separate piles for each candidate. [278(3), 304(3), Elections Canada Manual EC 78700]

In relation to special ballots, the judge shall also review any envelopes that were set aside unopened. [267, 277, 304(3)] This is discussed further at 3.8, below.

The procedures upon completion of the judicial recount are discussed at 3.10, below.

### 3.6 Individuals who may be present at the recount

The returning officer for the electoral district is required to be present for any recount. [300(4), 301(6)] In addition to the explicit tasks of the returning officer during the recount set out in the Act, including to be present throughout the recount, and to bring all required election materials to the recount, the returning officer may perform other important logistical functions in support of the recount as requested by the judge. [300(4), 301(4), (6)]

Each candidate and up to three of his or her representatives may attend at a recount. If a candidate is not present, no more than three electors are entitled to attend on his or her behalf. No other person may attend, unless they are granted permission to attend by the judge. [303]

Every representative of a candidate must have written authority from the candidate or his official agent in order to act in that capacity. [135(3)] A representative with written authorization is entitled to represent the candidate in preference to any elector who might otherwise claim that right. [135(3), 303(1)]

### 3.7 Continuous count and the timing of the recount

As far as it is practicable, the judge shall proceed continuously with the recount, except for necessary breaks, between the hours of 9:00 a.m. and 6:00 p.m. The recount will take place between those hours only, unless the judge orders otherwise. The count will continue until it is completed. [305] There is no provision in the *Canada Elections Act*, or in the *Interpretation Act*, R.S.C. 1985, c. I-21, that suggests that the count should be suspended for weekends or holidays.

#### Security of the ballots during a break in the count

During the overnight break in the count between 6:00 p.m. and 9:00 a.m., and during other necessary breaks during the day, the judge, or any other person who has possession of the ballots and other election documents, shall keep them sealed in parcels, and the judge shall sign the seal. Any other person in attendance may also sign the seal. [306(1)]

The judge shall personally supervise the parcelling and sealing of ballots and documents at a recount and take all the necessary precautions for their security. [306(2)]

### 3.8 Rejection of envelopes under the Special Voting Rules

Where a judge decides to conduct the recount by counting all of the ballots returned by deputy returning officers or by the Chief Electoral Officer, the judge's recount will include a review of the envelopes set aside unopened by the special ballot officers or the deputy returning officers under the Special Voting Rules. [304(3)]

In deciding whether to accept envelopes previously set aside, a judge must apply the same requirements as those that apply to the special ballot officers and the deputy returning officers under the Special Voting Rules. [304(3)(a)]

Therefore, upon examination, a judge shall set aside unopened

- **an outer envelope where the information concerning the elector, as described on the outer envelope, does not correspond with the information on the application for registration and special ballot; [267(1)(a), 277(1)(a)]**
- **an outer envelope that has not been signed by the elector;**
  - This ground does not apply if the elector was assisted in marking the ballot paper by an election officer and there is a note to that effect on the back of the outer envelope. [267(1)(b), 277(1)(b)]
- **an outer envelope where the correct electoral district of the elector cannot be ascertained; [267(1)(c)]**
- **an outer envelope that either has been received by the returning officer after the close of polls in that electoral district or has been received in Ottawa by the special voting rules administrator after 6:00 p.m. on polling day; [277(1)(d), 267(1)(d)]**
- **An outer envelope of an elector who has received more than one ballot from a returning officer. [277(1)(c)]**

### 3.9 Rejection of ballots

Where a judge decides to conduct the recount by counting all of the ballots returned by the deputy returning officers or by the Chief Electoral Officer, the ballots that were rejected by the deputy returning officer and by the special ballot officers are to be reviewed by the judge during a recount.<sup>5</sup> The judge may choose to reject ballots that a deputy returning officer or the special ballot officers did not reject and accept ballots that a deputy returning officer or the special ballot officers did not accept. [269, 278(3), 279, 283(3), 284, 304(3)(a), (b)]

As a general rule, individuals who are responsible for counting the votes cast by electors should be cognizant of the commentary of Mr. Justice Cory in the Supreme Court of Canada case *Haig v. Canada*. Mr. Justice Cory noted that:

every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against their disenfranchisement... 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. ([1995] 2 S.C.R. 995 at 1048, 1049)

Subject to the above, upon examination, the judge should reject a ballot that:

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<sup>5</sup> On the acceptability of various marks on ballots in a municipal election recount context, see *Re Janigan v. Harris* (1989), 70 O.R. (2d) 5 (H.Ct.).

- **was not supplied to the elector by the deputy returning officer;**
  - The deputy returning officer should have initialled all regular ballots. If at the initial count the deputy returning officer discovers a ballot that is not initialled, and the deputy returning officer is satisfied that he or she issued the ballot, he or she is required to initial it. Therefore, all regular ballots counted as valid should have been initialled. [285]
  - If a ballot that has not been initialled by the deputy returning officer is discovered during the recount:
    - The judge may decide that an un-initialled ballot included with the ballots counted by the deputy returning officer was not initialled because the deputy returning officer made an error by failing to initial the ballot at the original count. [284(2), 304(3)]
    - Alternatively, a judge may decide that an un-initialled ballot was included with the rejected ballots because the deputy returning officer did not believe that he or she issued the ballot. [284(1)(a), 285, 304(3)]
    - In the latter case, there should be a handwritten number on the back of the ballot indicating that the ballot was objected to by a candidate or by his or her representative. [286(1)]
    - The judge may summon the deputy returning officer or poll clerk to give evidence under oath. [304(5)]
- **in the case of a special ballot, was not supplied by the Chief Electoral Officer, or in the case of a special ballot cast at the office of the returning officer, was not supplied for the election;**
  - The judge shall reject a special ballot that was not supplied by the Chief Electoral Officer. [269(1)(a), 304(3)]
  - For special ballots cast at the office of the returning officer, the judge shall reject a special ballot that was not supplied for the election. [279(1)(a), 304(3)]
- **has been marked in a way that identifies the elector;**
  - If the judge, in the course of examining the ballots, discovers a ballot or a special ballot that was marked in such a way that it could identify the

elector, the judge shall reject the ballot.<sup>6</sup> [269(1)(e), 279(1)(e), 284(1)(e), 304(3)]

- **has been marked in such a way that two candidates have been selected by the elector;**
  - The judge shall reject a ballot that was marked in more than one circle to the right of the candidates' names.<sup>7</sup> [284(1)(d), 304(3)]
  - The judge shall reject a special ballot that is marked with the names of more than one candidate. [269(1)(d), 279(1)(d), 304(3)]
- **has been marked for someone who is not a candidate;**

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<sup>6</sup>The Ontario Court of Appeal considered municipal electoral legislation with similar statutory language to that of the *Canada Elections Act*, and held that the elector must be identifiable on a balance of probabilities in order for this to be a valid reason for rejecting a ballot (*Re: O'Donohue and Silva et al* (1995), 27 O.R. (2d) 162).

The Court of Appeal in *O'Donohue* referred to the decision of *Lucas-Astley v. Barrie*, [1995] O.J. No. 255 (Gen.Div.) (QL), which held that the intention of the voter must be considered when examining the mark made on the ballot. A voter's intention to identify himself or herself remains part of the overall consideration as to whether the ballot should be rejected. It could not have been the intention of the legislature to provide that any mark, tear or writing will vitiate a ballot, however inadvertent or accidental that mark, tear or writing may be.

The Newfoundland Supreme Court observed that the size of the community is one factor to be taken into consideration when determining whether a distinctive mark on a ballot could reasonably cause the elector to be identified. (*Re Ford*, [1993] N.J. No. 203 (S.C.T.D.) (QL))

Initialling a change of vote by scratching out one candidate, voting for another, and initialling the change does not constitute an intention by the voter to identify himself. (*O'Donohue v. Silva* (1995) 28 M.P.L.R. (2d) 9, [1995] O.J. No. 1690 (Gen.Div.) (QL))

For other cases on whether a mark may identify an elector, see *Re Fitzgerald*, [1989] N.J. No. 268 (S.C.T.D.) (QL); *Re Hewlett*, below.

<sup>7</sup> The Newfoundland Supreme Court held that where an elector placed a mark in two candidates' boxes, but it was obvious that the elector intended to vote for one of the candidates only, this ballot is valid and should be counted. The Court considered three examples. First, an elector had marked an "X" for a candidate, then obliterated it and voted for a second candidate. Second, an elector made a mark in the box for one candidate, but stopped after making one diagonal line, and subsequently marked an "X" for another candidate. In these two cases, the Court found the ballots valid. However, in the third example, one "X" was found in one candidate's box, and two Xs were found in another. The ballot was rejected because it was impossible to determine the intention of the voter. (*Re Hewlett*, [1996] N.J. No. 125)

The Ontario Court of Appeal found that "in deciding whether a given mark amounts to the "casting" of a vote, the voter's intention, as manifested by the nature of the mark is a relevant consideration to be taken into account in determining whether the vote must be rejected [because the voter has placed marks next to the names of more than one candidate.]" As it was clear that the voter meant to scratch out one mark and to cast a vote for only one candidate, this ballot was acceptable. (*O'Donohue v. Silva* (1995), 27 O.R. (3d) 162 (C.A.), aff'g (1995), 28 M.P.L.R. (2d) 9 (Gen.Div.))

- Any votes given for a person other than a candidate are void. [76, 269(1)(c), 279(1)(c), 284(1)(c), 304(3)]
- **has not been marked in the circle at the right of the candidate’s names, or in the case of a special ballot, has not been marked;**
  - The judge shall reject a ballot where the voter did not make a mark in one of the circles to the right of the candidate’s name circle. [284(1)(b)]
  - The judge shall reject a special ballot where the voter did not make a mark. [269(1)(b), 279(1)(b), 304(3)]
  - There is divided judicial opinion on the imputed intention of a voter where the elector has not properly marked the ballot.<sup>8</sup>

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<sup>8</sup> The Ontario Court of Appeal has strictly interpreted the requirement that the voter place a mark on the ballot nowhere else than in the circle or circular space to the right of the candidates’ names. Where a mark is not placed correctly, even where “it is abundantly clear for whom the elector intended to vote,” the ballot must be rejected. *O’Donohue v. Silva* (1995), 27 O.R. (3d) 162 (C.A.), aff’g (1995), 28 M.P.L.R. (2d) 9 (Gen.Div.).

The Northwest Territories Court of Appeal held, in *Re Firth et al and Nickerson et al* (1980), 111 D.L.R. (3d) 525, that the deputy returning officer must reject ballots not marked in the circles to the right of the candidate’s name. The court stated that Parliament had clearly expressed its will that the deputy returning officer “shall” reject ballots improperly marked in this way.

The Ontario Divisional Court reviewed the provisions of the *Ontario Municipal Elections Act* with respect to ballots marked incorrectly. The Court noted the absence of any provision compelling the rejection of ballots not marked as directed, and held that the correct marking of the ballot set out in the law must be taken as a direction only. Where the intention of the voter is clear, that intention is paramount and should not be frustrated. Marks made outside of the space provided, but in a manner that clearly indicated the voter’s intent, must be counted. This case can be distinguished from *Re Firth* because, unlike the *Canada Elections Act*, the Ontario statute lacked a provision requiring a ballot to be rejected if not marked as required. (*Re Dingley and McLean* (1973), 34 D.L.R. (3d) 38)

Circling the name on the ballot has been held to be a valid vote by the Newfoundland Supreme Court, Trial Division in *Re: Ford*, [1993] N.J. No. 203 (QL). The circle clearly indicated the voter’s intent and could not serve as a way to identify the voter in question. However, the *Newfoundland Elections Act* expressly provided that ballots could be marked outside of the circle to the right of the candidate’s name.

In *Re: Controverted Elections Act (N.S.)*, [1990] N.S.J. No. 33 (QL), some voters who cast their votes at a special poll marked their ballots outside of the circle to the right of the candidate’s name. Despite clear and unambiguous language in the provincial statute, the Nova Scotia Supreme Court, Trial Division held that as the electors’ voting intentions were clear, and as the form of ballot used at the special poll should have been the same as that used for an ordinary poll, the votes of these electors should be counted.

In *Massana c. Lucas*, [1999] J.Q. No. 6020 (QL), the Quebec Superior Court, Civil Division held that the fact that the ballots did not conform to the regulations did not cause any prejudice, as voters for different candidates failed to mark their ballots correctly. As long as the clear intention of the voter was shown, the court counted the ballot. This decision disregarded the wording of Quebec’s municipal electoral legislation, which required that ballots marked incorrectly must be rejected.

**Subject to the above, a ballot should not be rejected by a judge simply because it was:**

- **marked in any way by the deputy returning officer;**
  - No ballot shall be rejected by reason only that the deputy returning officer placed on it any writing, number or mark. [284(2)]
  - Ballots that were objected to during the initial count have been marked by the deputy returning officer with a number that coincides with a number listed in the poll book. [286(1), DRO Manual] The judge may not examine the poll book. [304(2)]
    - The judge may summon the deputy returning officer to give evidence under oath. [304(5)]
- **marked with a symbol other than a cross;**
  - An elector may mark a ballot with a cross or other mark in the circular space opposite the name of the candidate of his or her choice, provided that the mark cannot be used to identify the elector. [151(1)(b), 279(1)(e)]
- **marked with a writing instrument other than a black lead pencil;** [304(3), DRO Manual]
- **marked where the mark extends outside the circle to the right of the candidate's name;** [304(3), DRO Manual]
- **marked, but the counterfoil was not removed by the deputy returning officer;**
  - No ballot shall be rejected by reason that the deputy returning officer failed to remove the counterfoil. [284(2), 304(3)]
  - The deputy returning officer is required to remove a counterfoil during the counting and examination of the ballots if the deputy returning officer did not remove the counterfoil initially. [284(3)]
- **marked in a way that the circle is completely filled<sup>9</sup>; or** [304(3), DRO Manual]

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<sup>9</sup> In interpreting Ontario's *Municipal Elections Act 1972*, the Ontario Divisional Court held that failing clear legislative intent to the contrary, the intention of the voter is paramount and should not be frustrated because a box on the ballot was shaded in rather than marked with a cross. (*Re: Dingley and McLean* (1973), 34 D.L.R. (3d) 38)

- **in the case of a special ballot, if the elector wrote the name of a candidate incorrectly, or if the elector wrote the candidate’s political affiliation in addition to the name of the candidate.**
  - A judge should not reject a special ballot for the sole reason that the elector has incorrectly written the name of a candidate, if the ballot clearly indicates the elector’s intent. [269(2), 279(2), 304(3)]
  - A judge should not reject a special ballot for the sole reason that the elector has written, in addition to the name of the candidate, the candidate’s political affiliation, if the ballot clearly indicates the elector’s intent. [279(3), 304(3)] This legislative provision only applies to votes cast by special ballots counted at the office of the returning officer.

### 3.10 The completed recount

At the end of the judicial recount, the judge shall seal the ballots in a separate envelope for each polling station. [308(a)]

#### Certificate of the votes cast

At the conclusion of a recount, the judge shall, without delay, prepare a certificate in the prescribed form that sets out the number of votes cast for each candidate and deliver the original of the certificate to the returning officer. [308(a), (b)] The judge shall deliver a copy of the certificate to each candidate. [308(b)]

This certificate is printed on every *Result of Voting* form, to be completed in the case of a judicial recount.

In the event that the recount requires that the previously recorded results be altered, the judge shall manually modify the results of the *Result of Voting* form, sign the certificate portion of the *Result of Voting* form, and provide the original to the returning officer and a copy of it to each candidate. If the judge wishes, he or she may also amend the *Detail of the Vote* form in addition to amending the *Result of Voting* form. [308, RO Manual]

The modified results will then be forwarded to the Chief Electoral Officer by the returning officer. [RO Manual]

Without delay after receiving the certificate of the votes cast, the returning officer shall declare elected the candidate who obtained the largest number of votes by completing the return of the writ in the prescribed form on the back of the writ of election. [313(1)]

If there is an equality of votes between the candidates with the largest number of votes, the returning officer shall indicate that fact on the return of the writ. [313(2)]

### Costs

If a judicial recount requested by an elector does not alter the result so as to affect the return, the judge shall:

- order the costs of the candidate for whom the largest number of votes have been cast to be paid by the person who applied for the recount; and
- tax those costs, following as closely as possible the tariff of costs allowed with respect to proceedings in the court in which the judge ordinarily presides. [309(1)]

In a non-automatic recount, the applicant for a judicial recount will have paid into court the sum of \$250 as security for the costs of the candidate who received the largest number of votes. [301(3)]

The money paid into the court for security of costs under subsection 301(3) shall, so far as is necessary, be paid out to the candidate in whose favour costs are awarded. If the deposit is insufficient to cover the costs, the party in whose favour the costs are awarded has a right to sue for the balance. [309(2)]

Candidates may make applications to the Chief Electoral Officer for a reimbursement of their costs in respect of the recount. [310(1)]

Upon receipt of such an application, the Chief Electoral Officer shall determine the costs and shall make a request for reimbursement to the Receiver General for Canada for that amount, up to a maximum of \$500 per day or part of a day during which the judge conducted the recount. [310(2)]

While section 310 of the Act does not prescribe a form for the written request for costs made to the Chief Electoral Officer, a request must set out the amount and nature of the costs and whether they were actually and reasonably incurred. [310(1)]

Any costs incurred for a judicial recount that have not been reimbursed by the Receiver General are considered an electoral campaign expense of a candidate. [406(c)]

#### 3.11 Failure of a judge to conduct a recount

Should a judge who is requested by a returning officer to carry out a judicial recount under section 300 of the Act, or requested by an elector to carry out a

judicial recount under section 301 of the Act, fail to do so, an aggrieved party may make an application to a designated superior court or court of appeal. [311(1)] The application must be made within eight days after the failure to comply. [311(1)] This application may be supported by, and responded to by, affidavit evidence. [311(2),(4)]

If it appears to a judge of a designated court that there was a failure to comply with the Act on the party of the judge complained of, a date shall be set for a hearing of the application, and all parties, including the judge complained of, shall be directed to attend. [311(3)]

After hearing oral arguments and testimony, including that of the judge complained of, the judge hearing the application may dismiss the application or order the judge in default to comply with the requirements of the Act in respect of the recount. An order to costs may also be made. [312]

#### Courts competent to hear an application regarding a failure to conduct a recount

Applications of this type may be made:

- in Ontario, a judge of the Superior Court of Justice;
- in Quebec, New Brunswick, Alberta, Yukon, the Northwest Territories or Nunavut, a judge of the Court of Appeal of the Province or Territory;
- in Nova Scotia or British Columbia, a judge of the Supreme Court of the Province;
- in Manitoba or Saskatchewan, to a judge of the Court of Queen's Bench for the Province; and
- in Prince Edward Island or Newfoundland and Labrador, to a judge of the trial division of the Supreme Court of the Province. [311(1)]