

Re: 1974 Annual Election - Aldermanic Recount
Reasons for Judgment of Mr. Justice Rae


Attached is a copy of the Reasons for Judgment of Mr. Justice Rae regarding the Mandamus Application by Mr. Bert Arthur Price.

The Municipal Solicitor has reviewed the Reasons for Judgment and the following are his comments in this connection:

" You will note that the Judge paid particular attention to section 102(3) and the word 'forthwith'. This section, of course, in my view, has no application since in this case the Returning Officer did not count the votes. The Returning Officer, pursuant to section 102(4), dispensed with the counting of the votes. In that circumstance, section 106 applies and in that section the word 'forthwith' is not used. The words used are 'then and there'. There is no doubt in my mind that these words mean 'immediately' and not 'within a reasonable time'.

The Judge recognizes that Mr. Price had no agent at any of the polling stations or at the Municipal Hall when the Returning Officer examined the ballot paper accounts. In fact, Mr. Bastable, who is described in the judgment as agent, was not an agent within the meaning of section 70, nor was he alleged to be in any of the material filed.

Notwithstanding the foregoing, I would not have recommended an appeal for the reasons which I have already expressed. However, I am unhappy that we are obliged to pay costs when, construing sections 102 and 106 strictly, I believe the Returning Officer's decision was correct. However, the Judge did not choose to construe the statutory provisions strictly.


W.L. Stirling,
MUNICIPAL SOLICITOR

The Municipal Solicitor has now been served with a bill for costs in the amount of \$512.30.

RECOMMENDATION:

1. THAT the total costs from Swinton and Company amounting to \$512.30 be paid.

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 X6872

IN THE SUPREME COURT OF BRITISH COLUMBIA

(In Chambers)

IN THE MATTER OF AN APPLICATION)
 BY BERT ARTHUR PRICE FOR A WRIT)
 OF MANDAMUS)

AND

IN THE MATTER OF THE MUNICIPAL)
 ACT, R.S.B.C. 1960, CHAPTER 255)
 AND AMENDMENTS THERETO)

AND

IN THE MATTER OF AN ELECTION)
 OF ALDERMEN IN THE MUNICIPALITY)
 OF BURNABY)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE RAE

DATE OF HEARING: November 29, 1974

APPEARANCES:

H.G. LADNER, Esq. appearing for the Applicant;

W.L. STIRLING, Esq. appearing for the Respondent,
 the Returning Officer.

THE COURT: (Oral) The application is to show cause why a Writ of Mandamus should not issue directed to one James Hudson, the Returning Officer in a recent election in the Municipality of Burnaby, to count the votes in an election held on the 16th November, 1974, such count to be pursuant to Section 102(2) of the Municipal Act. No issue is raised as to the propriety of the procedure, in these proceedings.

There were 8 candidates for election as aldermen with 4 to be elected. The applicant was a candidate. According to the accounts hereafter referred to he was number 5. That is to say, he obtained 36 votes less than the votes of the fourth highest, who was elected. The applicant

obtained 5,362 votes and the fourth highest 5,398. There were 36 polling stations in the Municipality including an advance poll and 3 mobile polls. The polling stations were presided over by what is called a presiding officer. Under the Act the presiding officer counts the ballots at his station and forwards the ballots together with an account of his count to the Returning Officer. This was done here and the Returning Officer received the ballot boxes with the ballots and ballot-paper accounts between 9 and 10:30 P.M. at the Municipal Hall. The polls had closed at 8 P.M. This was in accord with Section 102(1) of the Act, i.e., the delivery of the items referred to the Returning Officer.

Section 102(2) provides for the Returning Officer making:

"...arrangements for examining the ballot-paper accounts and, where necessary, for counting the votes in the presence of the candidates or their agents as soon as practicable after the close of the poll,..."

It appears that the applicant was not himself present, nor did he have an agent present, at any of the polling stations, nor at the occasion referred to in Section 102(2) supra.

November 16, the date of the election, was a Saturday. At 12:30 A.M. November 17, i.e. a Sunday, the Returning Officer was in touch with the applicant's agent by telephone. The account of

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what was said on this occasion varies between the affidavit of the agent which is filed and that of the Returning Officer. Since the onus is on the applicant, and in the absence of viva voce evidence, I must in the circumstances accept the account of the Returning Officer, the respondent.

I quote in part from his affidavit, paragraph 5:

"...When advised of the number of votes cast ...he stated that the Burnaby Voters Association might have to consider the need for a recount. He asked me about the procedure. I pointed out to him in particular section 102(4) and section 109 of the Municipal Act. I informed him of the Returning Officer's recount (my emphasis) and the judicial recount. I mentioned to him that the Returning Officer could dispense with a recount unless a request in writing was made. I also mentioned the Returning Officer's proclamation and that the application for a judicial recount had to be made within 5 days of that proclamation."

Sub-section (3) of section 102 reads as follows:

"102 - (3) The Returning Officer shall, in the presence of such agents (if any) of the candidates as may be in attendance, open the ballot-boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith proclaim

to be elected the candidates or candidate having the highest number of votes for the offices or office for which they have respectively been nominated."

So that if there was nothing further in the Statute the Returning Officer would be required to conduct a count. Sub-paragraph (4) reads as follows, however:

"102(4) The Returning Officer may dispense with the counting of the votes as provided in subsection (3) where, in his opinion, after examination of the ballot-paper accounts, there is no doubt as to the result of the poll, and where no candidate or candidate's agent has, in writing, requested a count of the votes."

Section 109, to which the Returning Officer referred the agent, has to do with a judicial recount and is not of immediate relevance here.

The Returning Officer appears to have drawn the provisions of Section 102 (4) to the attention of the agent, as aforesaid, in the context of a discussion as to what was termed a recount. The "count" referred to in Section 102 (4) could reasonably so be referred to because there has already been a count at each polling station. I quote further from the affidavit of the respondent, paragraph 4:

"...I checked the tally sheets, the statement showing the number of votes cast for each

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candidate, the statement of ballot-papers received, ballot-papers counted as valid, ballot-papers counted as valid to which objection has been made, ballot-papers rejected and ballot-papers unused and spoilt. I also made a random sampling of the 91 rejected ballots cast...In my opinion, the rejected ballots which I examined were properly rejected. I also checked the poll books and verified the number of electors who voted. I concluded my examination of the ballot-paper accounts at about 12:30 A.M. on November 17, 1974."

At 10:15 A.M. on the Monday, November 18 following (the Municipal Hall opened at 9 A.M.) the agent spoke to the Returning Officer and requested a count by him. The Returning Officer replied that he had already proclaimed the result of the election. In fact, he proclaimed the result immediately the City Hall opened at 9 A.M., Monday, the first business day after the election.

I quote further from the affidavit of the respondent, paragraph 7:

"No candidate or candidate's agent having requested me in writing to count the votes, at 9 A.M. on November 18, 1974 at the Municipal Hall I proclaimed elected the candidates having the highest number of votes for the office for which they had

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been nominated and posted a statement under my hand in a conspicuous place in the Municipal Hall showing the result of the election and the number of votes cast for each candidate...."

A written request for a count was delivered to the Returning Officer at the Municipal Hall at 1:25 P.M. on November 18, 1974 by the applicant's agent.

I refer to the words of sub-section (3) in part:

"ascertain the result of the poll by counting the votes....and shall forthwith proclaim to be elected..."

"Forthwith" has been interpreted to mean within a reasonable time having regard to the circumstances of the case. See The King v. Cuthbertson (1949) 4 DLR 369. I would so interpret it in the context of the statute here. It doesn't, in my view, mean instantly, and what would be reasonable in any given case must depend on the circumstances of each case, paying due regard to the necessity of the Returning Officer performing his duties reasonably expeditiously so that the public interest may be served, i.e. the results of the election known. It appears to me, however, that one must interpret the provisions here in accord with reason and justice (see Maxwell, 12th Edition page 199 et seq.). The aldermen elected at this election do not take office until January 1, 1975.

The Returning Officer is required under Section

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(3), supra, to count the votes. Under sub-section (4) he may dispense with counting after he has examined the ballot-paper accounts and is in no doubt of the result of the poll and:

"...where no candidate or candidate's agent has, in writing, requested a count of votes".

On the evidence it appears to me that he could not have reached the opinion referred to until approximately 12:30 on the morning of Sunday, November 17th. He hadn't then at hand a written request for a count, and if one were to construe the statute strictly he could then forthwith proclaim, (subject to whatever effect the fact of its being Sunday night have).

No submissions were made to me as to the legal effect, if any, of November 17 being a Sunday. But the Returning Officer seems himself to have paid some regard to the fact, and treated it as not a proper day on which to do business, since he delayed until the first opportunity, when the Municipal Hall opened on the Monday, to make his proclamation.

Having regard to what had taken place between him and the agent of the applicant, it seems to me that a reasonable opportunity should have been afforded the applicant to make the formal written request, before being so hasty in proclaiming the results. And that could have been without doing violence to the requirements of the Act and the

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duties of the Returning Officer. It must be clear, however, what I am saying here has reference only to the particular circumstances of the case before me.

In the circumstances here present the Returning Officer, in my view, should conduct the count requested and an order will go accordingly.

I should say that counsel have assured me that they have made extensive search for authorities under this Section of the Act, and comparable sections, and they have provided me with none of any real assistance. It appears to me that the matter is one which requires to be dealt with with dispatch; hence these reasons upon the date of the application. Order accordingly. Costs will follow the event.

(CONCLUDED)