

Reasons Issued: November 28, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*, SBC 1998, c.9
and a Rule 1-36 review hearing concerning the November 15, 2017

VANCOUVER COUNTY BENCHER ELECTION

REASONS OF THE EXECUTIVE COMMITTEE

Decision:	November 28, 2017
Quorum:	Herman Van Ommen, QC, Chair Miriam Kresivo QC Nancy Merrill QC Craig Ferris QC Satwinder Bains Thomas Fellhauer

Introduction

Ms. Syer, one of the candidates in the Vancouver County Bencher election, applies to the Executive Committee for a review under Rule 1-36. This application was considered by the Law Society's Executive Committee with the exception of Sarah Westwood who recused herself. She did not take part in any of the Committee's deliberations with respect to this application.

Background

1. The Law Society conducted an election in November of 2017 for the position of Bencher. The election is conducted in various geographic regions or counties throughout the Province. In Vancouver County there were 19 candidates vying for 11 positions
2. The Law Society determined that the voting would be conducted electronically. The Law Society contracted with a service provider, Votenet Solutions, Inc. ("VoteNet") to conduct the electronic voting. A webpage linked to the Member Portal on the Law Society's website was established starting on October 26, 2017. Members eligible to vote in Vancouver County who had provided an email address for their communications from the Law Society were advised by email that they could vote online.

3. Members who had not provided an email address were mailed paper ballots, as had occurred in prior years.
4. On October 26, 2017 the Law Society sent an email to all lawyers eligible to vote in Vancouver County advising, pursuant to Rule 1-27, that online voting for the Vancouver County Benchers election was available. Voting instructions and a deadline for receipt of ballots were included. The email noted: "...Law Society Rule 1-29(1)(d) states that a ballot received on or after the election date must be rejected. The election date is Wednesday, November 15, 2017. Your online ballot must be transmitted by 5:00pm on Tuesday, November 14, 2017 to be counted".
5. The Law Society sent all eligible electronic voters further emails on November 8, 2017, and November 10, 2017 advising that "your online ballot must be transmitted by 5:00pm on Tuesday, November 14, 2017 to be counted".
6. The Law Society sent all eligible electronic voters an email on November 14, 2017 advising that "today is the last day to vote in the Vancouver County election" and "have extended the voting deadline from 5 pm to 7 pm. Online votes must be transmitted by no later than 7:00 pm today".
7. Between 10:05 pm on Sunday 12 November and 10:06 am on Tuesday, November 14 (a 36 hour period) online voting was unavailable due to an error on the part of Votenet. The error was remedied and voting was available after 10:06 am Tuesday until the extended deadline of 7 pm Tuesday evening.
8. During the period online voting was unavailable, 111 members eligible to vote in Vancouver County visited the Law Society's member portal and attempted to access the voting webpage. When the page was again available on November 14, Law Society staff and Votenet staff attempted to contact each of these 111 members, either speaking with them by phone, connecting by email or leaving a phone message, to advise that online voting was again available. At the close of voting, 89 of the 111 had visited the member portal voting webpage and voted: 22 did not make a further attempt.
9. Votenet reports that over the periods while the Member Portal election page was available, it was visited by 2,653 eligible voters, of whom 2,564 (approximately 96.6%) voted and 89 (approximately 3.4%) did not vote.
10. The electronic voting results were reported by Votenet on 15 November and tallied together with the paper ballots received. In Vancouver County, 2,564 ballots were cast electronically, 10 were cast by paper ballots. Including paper ballots, the 10th through 13th candidates received votes as follows:

Jeff Campbell, Q.C.	837
Steven McKoen	751
Ashley Syer	742
Vivienne Stewart	650

11. Mr. Campbell and Mr. McKoen were declared elected and Ms. Syer and those receiving few votes than her were not. Mr. McKoen's margin of victory over Ms. Syer was 9 votes. His margin of victory over Ms. Stewart was 101 votes.

Ms. Syer's request for review

12. On 15 November 2017, Ms. Syer wrote to request that the Executive Committee review the election results in Vancouver County pursuant to Rule 1-36. Rule 1-36 states:

1-36 (1) A candidate who is not elected in a Bencher election may apply to the Executive Committee for a review of the election.

(2) An application under subrule (1) can only be made

(a) in writing, and

(b) not more than 10 days after the election date.

(3) On an application under subrule **(1)**, the Executive Committee must promptly review the election in that district, and must

(a) confirm the declaration made by the Executive Director under Rule 1-34 [*Declaration of candidates elected*],

(b) rescind the declaration made by the Executive Director under Rule 1-34 and declare that the candidate who applied under subrule **(1)** or another candidate is elected, or

(c) order a new election in the district concerned, and give directions for it.

(4) The decision of the Executive Committee under subrule (3) is final.

13. Ms. Syer's letter stated two grounds of review. First, she stated:

"With more than 20 members who attempted to vote and were not able, and a 9-vote spread between a successful and unsuccessful candidate, I do not believe that this election was in keeping with the fairness required of a Bencher Election. As such, I formally object to the results of this election."

14. Second, Ms. Syer stated:

... Rule 1-20 of the Law Society Rules states that a Bencher Election must take place on November 15. This election took place before November 15. ...

... the Rules are clear that the election must take place on November. While the emails sent by the LSBC to members did indicate that the voting was open until 5pm, and later amended to 7 pm November 14, 2017, I had several members express to me that their understanding was

that voting would remain open until November 15, 2017, the election date required by the Rules.

15. On 16 November 2017, the Acting Executive Director, Adam Whitcombe emailed Ms. Syer to confirm receipt of her review application. He stated:

“I’m directed by the President to ask if there is any other material you wish to provide in relation to the review. If there is, it would be convenient if you would forward it as soon as you are able.”

16. Ms. Syer replied that day but did not submit additional material in support of her application.
17. The Executive Committee met on November 23, 2017 to consider Ms. Syer’s request.

The Executive Committee’s discretion under Rule 1-36

18. Rule 1-27(1) provides for the distribution of paper ballots to eligible voters. Rule 1-27(2) provides:

(2) The accidental omission to make the material referred to in subrule (1) available to any member of the Society or the non-receipt of the material does not invalidate an election.

19. In the context of an electronic voting procedure under Rule 1-27.1 to which Rules 1-20 to 1-44 apply ‘with the necessary changes and so far as they are applicable’, the effect of Rule 1-27(2) is that the accidental omission to make electronic voting available to certain members does not *invalidate* an election.

20. While the election is therefore valid, it remains subject to review by the Executive Committee pursuant to Rule 1-36. On the face of Rule 1-36, we are possessed of a broad discretion to confirm the result, rescind the result and substitute another, or order a new election in Vancouver County and give directions for it. We may take into account the circumstances of an accidental omission to make electronic voting available to eligible voters. For example, an outage that lasted the entirety of the 72 hour period before voting ended would invite an inference that eligible voters had been denied a reasonable opportunity to vote, potentially undermining the legitimacy of the election, while an outage that lasted 15 minutes a week prior to the closing of voting would likely be viewed as inconsequential. In our view, we are not prevented from reviewing an election that is validated by Rule 1-27(2) on the ground of substantive unfairness or irregularity. We may, however, take Rule 1-27(2) into account in the exercise of our discretion.

Date of the election: Ms. Syer’s second ground of review

21. We will consider Ms. Syer’s second ground of review first. She maintains that, because Rule 1-20 required that the election be held on November 15 voting had to remain open on November 15 and this election is therefore invalidated by the decision to cut-off electronic voting at 7 pm on November 14.

22. Rule 1-29(1)(d) expressly provides that paper ballots cannot be received on the election day of November 15. By Rule 1-27.1, the requirement must be applied to electronic ballots. The Rules only contemplate that voting take place in advance of the election day and not on the election day.
23. What remains of Ms. Syer's argument would be a contention that there must be provision made to receive ballots up to midnight of the day before election day. Such a requirement would be impractical in the case of paper ballots and is not expressly set out in the Rules. If it is not required in the case of paper ballots, it is not required in the case of electronic ballots either.
24. We conclude that, to the extent that Ms. Syer's second ground of review involves a legal interpretation of the Rules, it is not well founded.
25. Ms. Syer's second ground of review also seems to involve, as a factual premise, the possibility that eligible voters may have been misled as to the existence of a voting cut-off time by advice from various sources that the election was to be held 'on' November 15. One must take into account the Law Society's repeated email communications to members between October 26 and November 14, as set out above. At least some diligence must be expected of members who wish to vote.

Unavailability of Webpage: Ms. Syer's first ground of review

26. In exercising our discretion under Rule 1-36 we have considered *Opitz v Wrzesnewskyj*, 2012 SCC 55. It involved a challenge to the result in the riding of Etobicoke Centre in the 2011 federal general election. It is not directly on point because it turned on the particular language and scheme of the *Canada Elections Act* and because the case involved votes that were allegedly improperly cast due to mistakes on the part of officials rather than voters who were improperly prevented from voting. In joint reasons for judgment speaking for a 4-3 majority, Rothstein and Moldaver JJ stated that they need not address the case of persons prevented from voting (at [25]).
27. Nevertheless, the majority judgment in *Opitz* articulates the following helpful principles:
 - (a) The purpose of legislated election procedures is to enfranchise persons entitled to vote and allow them to express their democratic preferences. Where there is ambiguity, the legislation should be interpreted in a way that is enfranchising (at [35], [37]);
 - (b) Protecting the integrity of the electoral process is also a central purpose (at [38]);
 - (c) The *Canada Elections Act* (and, by extension, the electoral scheme under Rules 1-21 to 1-37) accepts some uncertainty in the conduct of elections, balancing interrelated and sometimes conflicting values that include certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency and cost, but the right to vote is central (at [44]);
 - (d) The practical realities of election administration are such that imperfections in the conduct of elections are inevitable (at [46]);

- (e) Annuling an election results disenfranchises every person who voted and voters' right to vote in a by-election is not a perfect answer.
 - (f) At [48], the court quoted Professor Steven F. Huefner: 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.
 - (g) Since the system is not designed for certainty alone, courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system (at [50]);
 - (h) The court should therefore adopt a substantive approach focusing on the underlying right to vote, and not merely on the procedures used to facilitate and protect that right (at [55] to [57]); and
 - (i) Where it is established that improperly counted votes equal or exceed the margin of victory (the 'magic numbers test'), the court may set aside the result (at [71]-[73]).
28. While, as noted above, *Opitz* was a 'miscounted votes' case rather than a 'voters turned away' case, the majority judges commented on a potential feature of 'voters turned away' cases in the following passages:

[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.

(emphasis added)

29. We infer that most of the 111 eligible voters who accessed the election page while it was unavailable were attempting to vote, and their attempt was unsuccessful as a result of administrative error. These voters, however, were not disenfranchised. They could have tried again, successfully, as 89 of them did. Law Society staff and Votenet made reasonable efforts to mitigate the effects of the error and were substantially successful in doing so. As the Supreme Court of Canada pointed out in *Opitz* (at [46]), imperfections in the conduct of elections are inevitable
30. The right to vote is central. The question on this application is not one of assigning fault for an administrative error, but rather of assessing the substantive risk that the right to vote was materially impaired by the error in this case. We do not know how many of the persons who tried to vote in the 36 hour period while the election page was unavailable actually received notice that the problem had been rectified in the 9 hour period that followed before the 7 pm cut-off. It is clear that some votes were lost, and the number very likely exceeds the 'magic' number of 9.
31. Of the 2654 lawyers who did vote, both Ms. Syer and Mr. McKoen received about 29% of the votes. We have no reason to believe that of the 22 who did not vote, more than 40% would vote for Ms. Syer and none for Mr. McKoen. We are not convinced that such a small number of voters who did not return to the webpage to vote would have changed the result.
32. While holding a Bencher by-election would be a relatively straight-forward and familiar exercise for the Law Society and the voting members, we note Professor Steven F. Huefner's comment above that "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".
33. In short, the minor irregularity caused by the unavailability of the webpage does not approach the substantial unfairness and prejudice that would be caused by ordering a new election.

Conclusion

34. We conclude that the results of the election are valid pursuant to Rule 1-27(2) and in the circumstances we exercise our discretion to confirm the declaration made by the Executive Director under Rule 1-34.

Concurring Reasons of Thomas Fellhauer

- 1) I agree with the decision of the majority of the Executive Committee to confirm the election of Mr. McKoen as the 11th and final Bencher for Vancouver County. I differ with the majority reasons only with respect to Ms. Syer's first objection: "With more than 20 members who attempted to vote and were not able, and a 9-vote spread between a successful and unsuccessful candidate, I do not believe that this election was in keeping with the fairness required of a Bencher Election."
- 2) It is very unfortunate that in the very first Bencher election where electronic voting was possible, there was a technical failure for a period of time which prevented members who wished to vote from exercising their right to vote electronically during this period of time.
- 3) Voting by email was embraced by the members. The option of voting on-line was available for a period of some 20 days (October 26, 2017 to November 14, 2017). But for the technical failure, voters could vote electronically any time of day or night and any day prior to the deadline of 7 pm on November 14, 2017. I understand that over 96% of voters chose this on-line option to exercise their right to vote.
- 4) It is also very unfortunate that this technical failure occurred so close to the deadline for voting. Members were unable to vote electronically from 10:05 pm on Sunday November 12, 2017 to 10:06 am Tuesday November 14, 2016. For an approximate 36 hour period over the last 3 days that members could vote electronically, they were prevented from doing so. After the technical failure was fixed, members had slightly less than 9 hours to vote electronically before the close of voting at 7 pm on November 14, 2017.
- 5) As Ms. Syer has stated, 22 members who were prevented from voting during this 36 hour period did not make a second attempt to vote electronically during the following 9 hour period after the technical failure was fixed. Ms. Syer lost by 9 votes. These 22 potential votes definitely exceed the margin of victory by Mr. McKoen.
- 6) Paragraph 31 of the majority reasons states that "Of the 2,654 lawyers who did vote, both Ms. Syer and Mr. McKoen received about 29% of the votes. We have no reason to believe that of the 22 who did not vote, more than 40% would vote for Ms. Syer and none for Mr. McKoen. We are not convinced that such a small number of voters who did not return to the webpage to vote would have changed the result."
- 7) No one except the 22 voters themselves can know how they would have voted had they been able to vote during this 36 hour period.
- 8) I do not believe that it is our role to speculate on how these 22 members would have voted.
- 9) There is no allegation of miscounted votes. The eligible voters of Vancouver County had the right to vote and the opportunity to vote but for the 36 hour period of 10:05 pm on Sunday November 12 to 10:06 pm on Tuesday November 14. It is very unfortunate that potential voters could not vote electronically during this 36 hour period. But I do not believe that it is reasonable to overturn the election results of voters who did vote on the

basis that some voters were prevented from voting electronically for a period of time and then ultimately did not vote.

- 10) A by-election or run-off vote between Mr. McKoen and Ms. Syer is possible and the cost would not be unreasonable. However, I do not believe that this situation was sufficiently unfair to resort to such a course of action. The unfairness caused by being prevented from voting electronically for 36 hours during a 20 day voting period does not, in my view, justify the potential unfairness that could result from a second election or by-election. On balance I do not believe that the election results should be overturned and I agree with the majority decision to confirm the results of the election pursuant to Rule 1-36(3)(a).