

**COMMITTEE OF THE WHOLE JUNE 18, 2007**

**JUDICIAL RECOUNT**

**Recommendation**

The City Clerk, in consultation with the Commissioner of Legal and Administrative Services, recommends:

That this report be received; and

That the following resolution be adopted:

Whereas a Court-ordered partial manual recount was recently conducted in the City of Vaughan, and

WHEREAS the primary reason for the recount was the Court's disagreement with the method in which poll count vote tabulating machines were programmed, and

WHEREAS the decision as to programming is a matter within the purview of the Clerk pursuant to the Municipal Elections Act; and

WHEREAS it would be desirable to avoid such costly and time-consuming recounts in future; and

WHEREAS the Municipal Elections Act and Regulations pursuant thereto are silent in this regard; and

WHEREAS it would be desirable to have legislation or regulations in place to set out whether poll count vote tabulating machines should or should not be programmed to return "over" and "under" voted ballots to the elector;

THEREFORE be it resolved that the Minister of Municipal Affairs and Housing be requested to bring forward legislation for implementation prior to the 2010 Municipal Election that would address whether poll count vote tabulators, where used, must be programmed to return "over" and "under" voted ballots to the elector for review; and

THAT this resolution be circulated to all municipalities over 100,000 population requesting that they endorse the resolution and forward it to the Minister of Municipal Affairs and Housing.

**Economic Impact**

N/A

**Communications Plan**

N/A

**Purpose**

The purpose of this report is to provide information to Council on the Court-ordered judicial recount following the November 13, 2006 Municipal Election.

## **Background - Analysis and Options**

Following the November 13, 2006 Municipal Election, former Mayor Michael Di Biase lost to challenger Linda Jackson. Mr. Di Biase submitted a request to Council for a recount which was granted. The recount was conducted on the 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> days of November 2006.

The Council-ordered recount which pertained only to Di Biase and Jackson, and was conducted in the same manner as the original election (as a machine count), did not change the outcome but changed the total votes for each of the two candidates in issue, resulting in an increased margin of 4.

Subsequently Di Biase made application to the Superior Court for various orders including an application to declare that he had been elected, an application to declare the election invalid and controverted and an application for a manual recount. In application, it was alleged that the election had been fraught with irregularities. With the exception of the programming of the vote tabulating machines (VTM) Mr. Justice Howden dismissed all the alleged irregularities and found "no breach or inconsistency in the conduct of the election which is inconsistent with the principles of the Act or which affected the result".

With respect to the programming of the VTM's, Mr. Justice Howden took exception with the manner in which the Clerk executed his discretion in this regard and as a result ordered a partial manual recount of some 1656 ballots that had been either "over" or "under" voted and had not been counted. In his decision he indicated that, "There is no issue in this case as to the accuracy of the vote tabulating machines, and their memory cards". In fact he directed that the VTM's be used to isolate the "under" and "over" voted ballots for manual review. This was done at the second machine recount conducted on April 26, 2007 followed by a hand recount of the isolated ballots. The result of the recount was the same 90 vote spread between the two candidates that had been reported on election night. During the second recount 49 ballots were disputed and ruled upon by the Clerk. The Clerk's ruling was subject to appeal to the Superior Court of Justice. No appeal was made and the appeal period expired on May 14, 2007.

A concern now exists with respect to programming of the VTM's. There is no doubt that Clerks have the authority under the Municipal Elections Act (the Act), to program the machines and that procedures so established "prevail over anything in this Act and the Regulations". However, Mr. Justice Howden's decision overturns the Clerk's proper exercise of authority in this instance. At issue here is whether the VTM's should be programmed to return ballots that have been overvoted (the elector voted for more candidates than the number to be elected to the particular office) or, undervoted (the elector votes for less than the number of candidates to be elected to the particular office), so that the elector can be advised accordingly and provided with the opportunity to vote again, or, if the "under" or "over" vote is intentional, request that the ballot be processed as is. In Vaughan's 2006 election, the VTM's were not programmed to return such ballots. Some municipalities programmed "overs" and "unders" to be returned and some did not. It is important to note that there is no requirement under the Act or any regulation or guideline whatsoever to go by in this regard.

Mr. Justice Howden in short indicated in his decision that to program the VTM's not to return over and under voted ballots to the voter, often referred to as "second chance voting" offended the principles of the Act. Specifically he quoted the Court of Appeal case of Montgomery vs. Balkissoon: "...the principle that the proper majority votes decide the election. That principle is achieved by ensuring, so far as is reasonably possible, that valid votes be counted and invalid votes be rejected."

In other words, where possible, voters should be given a second chance, a chance to correct a ballot that has been "under" or "over" voted. Also to be considered is the principle of the secrecy of the vote. When a ballot is returned to a voter that had been "under" or "over" voted, whether deliberately or otherwise, and the voter is confronted with this, the secrecy of the vote is

compromised. The challenge is to balance the principle of "majority vote" and the principle of voter secrecy.

Also to be considered is the principle of consistency and equality of the franchise. Relatively few municipalities utilize poll count equipment that can be programmed to return "under" and "over" voted ballots, the vast majority of municipalities still conduct hand count elections where "second chance" voting is not an option. The Legislature amended the Act some time ago to permit municipalities to use vote tabulating equipment. It is submitted that where such equipment is used, a decision as to "second chance" voting is a decision to be made by the Legislature and stipulated in the Act or Regulation, not to be left to a Clerk's discretion.

It is desirable to have this matter addressed and any legislative amendments made prior to the 2010 Municipal Election. It is suggested that a request should be submitted to the Ministry of Municipal Affairs and Housing to bring forward appropriate clarification to the Municipal Elections Act and a resolution sent to municipalities using poll count vote tabulator equipment for endorsement.

### **Relationship to Vaughan Vision 2007**

This report is consistent with the objective of demonstrating leadership and promoting effective governance.

### **Regional Implications**

N/A

### **Conclusion**

The Superior Court of Ontario ordered a partial manual recount because he disagreed with the manner in which the vote tabulating machines were programmed. This decision raises an issue that ought to be addressed by the Legislature. Therefore, it would be appropriate to request the Minister of Municipal Affairs and Housing to bring forward Legislation for implementation prior to the 2010 Municipal Election to clarify how poll count vote tabulators, where used, should be programmed.

### **Attachments**

None

### **Report prepared by:**

John D. Leach, City Clerk and Returning Officer

Respectfully submitted,

---

John D. Leach,  
City Clerk

---

Janice Atwood-Petkovski,  
Commissioner of Legal and Administrative Services