Ted Opitz, et al. v. Borys Wrzesnewskyj, et al.: the Battle Over Etobicoke Centre Election Results

On July 10, 2012, the Supreme Court of Canada took a rare break from its summer recess to hear the Etobicoke case, a case which centered on a dispute in Etobicoke, Ontario over contested federal election results. The case was an appeal from Conservative MP of Etobicoke Centre, Ted Opitz. He questioned a lower court's decision in May 2012 that declared his election win null and void. This means that the election results were invalid and a re-election would have to be held. The case leading up to the Supreme Court sheds insight into a number of issues, including Canada's election system and its connection to our right to vote.

Background

In the May 2011 federal election, Conservative MP Ted Opitz ("Opitz") was declared the winner of the Etobicoke Centre riding. He won his riding by beating his opponent, former Liberal MP, Borys Wrzesnewskyj ("Wrzesnewskyj") by a margin of 26 votes. In June 2011, Wrzesnewskyj launched a challenge to the election results in the Ontario Superior Court of Justice. The challenge was made under section 524(1)(b) of the*Canada Elections Act ("Elections Act"),* which allows any elector who is eligible to vote and any candidate in an electoral district to make an application to contest the election in that district on the grounds that there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.[1]

Wrzesnewskyj argued there were "irregularities" including three major clerical errors:

- **1) Discrepancies in information** such as the total number of votes cast and the total number of votes counted.
- **2) Failure in registration** such as adding individuals to the voter list where a polling official failed to sign a registration certificate.[2]
- **3) Vouching errors** such as missing names of vouchers and differences in vouching count.[3]

It was Wrzesnewskyj's opinion that such irregularities affected the results of the Etobicoke election and should be declared null and void. Wrzesnewskyj also restricted his submission to ten of the polls that make up for the electoral district of Etobicoke Centre because he felt

that a review of the poll books and registration certificates in these polls provided enough evidence of irregularities.[4]

The Trial Decision

Issue: are the voting requirements pre-conditions or safeguards in the election process?
Justice Lederer of the Ontario Court of Justice, characterized the general issue between the parties as being a conflict in interpreting the voting requirements in the *Canada Elections Act*. Some of these voting requirements include the need for electors to be Canadian citizens and over the age of 18. Other requirements pertain to the procedural aspects of voting – for example, electors need to bring identification before receiving a ballot and they must be on the official list of electors. According to Wrzesnewskyj, if any of the requirements in the *Elections Act* were not met, then the ballot should not have been cast. Consequently, if requirements were not met, the ballot should be treated as withdrawn.[5]

Opitz took a different position on the issue: the requirements do not provide strict preconditions that must be met for a ballot to be valid. Instead, they establish procedural safeguards that protect our right to vote. According to Opitz, when a safeguard has failed or was not followed in the casting of a ballot during an election, it doesn't necessarily mean that the ballot is automatically invalid.[6]

Fundamental election principles

Justice Lederer identified several fundamental election principles to guide his analysis. First, there is a presumption of regularity in elections.[7] Regularity means that a court must presume that all steps prescribed under statute have been followed.[8] In this case, it would mean that there is a presumption that Elections Canada administered the voting process according to the requirements of the *Elections Act*. Even if some mistakes were made during the voting process, this presumption of regularity would still apply.[9]Justice Lederer pointed out that evidence limits in the *Elections Act* support this presumption. For example, it would be improper to approach individual electors to review with them the circumstances surrounding their vote or how they voted in order to determine whether there were any "irregularities" that affected "the result of the election".[10] In this case, both parties agreed that it would be inappropriate to approach individual voters and that no such evidence should be or would be brought forward or relied on.[11]

Secondly, Justice Lederer commented on the applicable burden of proof. The burden of proof is the duty placed on a party to prove or disprove a disputed fact –in this case –the occurrence of irregularities in the election. Drawing on a variety of case law and the *Elections Act*, he suggested that the applicant must prove that there were irregularities and that those irregularities affected the results of the election.[12]

Justice Lederer also pointed out that voting is a fundamental right of citizenship. The **right**

to vote is guaranteed by section 3 of the *Charter of Rights and Freedoms.* Case law suggests that the main concern of election legislation is the enfranchisement of citizens—we want qualified people to vote. Citing the *Haig v Canada (Chief Electoral Officer)* case, Justice Lederer ruled that democracy cannot exist without the right to vote.[13] The C*harter* entrenches the fundamental right to vote. Because it is so fundamental to our democratic system, it must be given a broad and liberal interpretation.[14]

Justice Lederer recognized that section 524 of the *Elections Act* required a determination as to whether there were "irregularities" that "affected the result of the election."[15] He said that words in the section should be interpreted more liberally to include the many kinds of errors that could potentially affect the result of an election.[16] Opitz argued that irregularity is not meant to include mistakes, errors and trivial non-compliance with the *Elections Act*. The trial judge disagreed –he said that the implication of his approach would be that no error could be subject to an application to set aside the vote unless it was done intentionally. The judge ruled that the most important part of the inquiry turned on whether the irregularity affected the result of the election. Any non-compliance with the *Elections Act* that affected election results would not be trivial and would be considered an irregularity.[17]

The election win is null and void

In reviewing the ten polls for alleged irregularities, the judge discounted a total of 79 votes on the basis of failures in registration and vouching. Because this number exceeded the plurality of 26 contested votes, he declared the election null and void.[18]
At trial, the judge drew a distinction between irregularities. He recognized that people who are qualified to vote should be allowed to have their votes count. True clerical errors such as recording the number of ballots incorrectly do not matter and oversights such as failing to cross off a voter's name once he or she has voted can be accepted. In his view, these should not cause a qualified voter to be "disenfranchised" or have their voting rights withdrawn.[19]

However, he noted that there are requirements in the election process that are fundamental. He pointed out that the Canadian public needs to be confident that those who receive a ballot are on an official electors list or properly registered. In his view, we risk a loss of confidence in our elections system and government if we give up these foundational requirements of the election process.[20]

He concluded that it cannot be good enough to accept individuals who were qualified to vote without registration certificates, poll books recording vouching and names from the final list of electors. It was his opinion that our system requires more than that.[21]

The Appeal to the Supreme Court of Canada

When the appeal was filed, the Supreme Court was already wrapping up its case hearing schedule for the spring session. Opitz's appeal made its way quickly to the Supreme Court

of Canada as required by law–section 532 of the *Elections Act* says that the Supreme Court shall hear the appeal "without delay." As such, the Court took a special recess from its summer break to hear the case.

The major issues before the Supreme Court are whether Justice Lederer, in the Ontario Court of Justice (specify accurate) was *wrong* in concluding that:

- Wrzesnewskyj had satisfied his burden in establishing that there were "irregularities" under section 524 of the *Elections Act* and
- Wrzesnewskyj had satisfied his burden to establish that the irregularities affected the election results

Wrzesnewskyj, Opitz and Elections Canada made their legal arguments before the Supreme Court on July 10, 2012. The Court said that they would reserve judgment on the appeal –meaning that they would take time to further contemplate the case and come to a decision on all of these matters at a later date. In the meantime, Opitz is still the MP of Etobicoke. However, the ruling could lead to a by-election if the Supreme Court agrees with the lower's court's ruling. The Supreme Court will likely make a decision soon because it is required to expedite the case by law.[22]

Further Reading

Factum of the Appellant, Ted Opitz in Borys Wrzesnewskyj v Ted Opitz, File No 34845, Supreme Court of Canada.
Factum of the Respondent, Borys Wrzesnewskyj in Ted Opitz v Borys Wrzesnewskyj, File No 34845, Supreme Court of Canada.
Factum of the Appellant,Borys Wrzesnewskyj in Borys Wrzesnewskyj v Ted Opitz, File No 34845, Supreme Court of Canada
Factum of the Appellants,Marc Mayrand and Allan Sperling (Elections Canada) in Borys Wrzesnewskyj v Ted Opitz, File No 34845, Supreme Court of Canada
Jim Young, "**The Right to Vote**" *Centre for Constitutional Studies* (29 July 2010).

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[1]*Canada Elections Act*, SC 2000, c 9.

[2]*Wrzesnewskyj v. Attorney General (Canada)*, 2012 ONSC 2873 at para 105 :
Registration is a fundamental part of the election process and a person can only be qualified to vote by signing a registration certificate according to Section 161(4) of the *Canada Elections Act*. A voter must declare that he or she is 18 years of age and a Canadian citizen. The person also declares that they reside at the address shown on the registration certificate.

[3]*Ibid* at para 151:
Vouching is part of a process in which you can vote –you can taken an oath and have an

elector who knows you to vouch for you. Vouching is an important part of identifying electors. Those who vouch for another in the course of the preparation of the registration certificate are, by their confirmation, an essential part of the demonstration that the elector is qualified to vote.

[4]*Ibid* at para 22.

[5]*Ibid* at para 19.

[6]*Ibid* at para 20.

[7]*Ibid* at para 26.

[8]*Factum of the Appellant, Ted Opitz in Borys Wrzesnewskyj v Ted Opitz*, File No 34845 at para 39 .

[9]*Ibid*.

[10]*OSCJ decision*, *supra* note 2 at para 33.

[11]*Ibid* at para 34.

[12]*Ibid* at para 42.

[13]*Haig v Canada*, [1992] 3 SCR 163.

[14]*OSCJ decision, supra note 2* at para 56.

[15]*Ibid* at para 61.

[16]*Ibid* at para 62.

[17]*Ibid* at paras 68, 70.

[18]*Ibid* at paras 115, 123, 126, 89, 132, 153.

[19]*Ibid* at para 156.

[20]*Ibid* at para 157.

[21]*Ibid* at para 158.

[22]Leslie MacKinnon, "Stakes high in Etobicoke Centre Supreme Court hearing" *CBC News* (9 July 2012).