

**IN THE DISTRICT COURT
AT WAITAKERE**

IN THE MATTER OF THE ELECTORAL ACT 1993

AND IN THE MATTER OF an application by Paula Lee Bennett,
Member of Parliament, for an order
that a recount of electorate votes in the
Waitakere district be conducted.

**JUDGMENT (No. 2) OF JUDGE J G ADAMS
(Judicial recount process)**

[1] The success of a constituency candidate in parliamentary elections is a representative success. It represents the counting of the valid votes of all those voters qualified to vote in that electorate. It represents that all such votes for the successful candidate were of greater number than the corresponding votes for any other constituency candidate in that electorate. Most important of all, more important than any individual outcome, it represents success of the balloting process for all voters who exercised their right to vote.

[2] The right to vote is a precious right. Every voter who has been issued with a voting paper wields the same voting power as any other voter.

[3] Judicial recounts occur infrequently. I have had the rare privilege of conducting the judicial recount of the constituency candidate votes for Waitakere. This judgment shares some of my experience, for judges and others.

[4] I recorded the outcome of the judicial recount in last Friday's judgment. This judgment addresses:

- The judicial recount process.
- Rulings in this recount.
- Clear and unclear indications on the ballot paper.
- Costs.

Judicial Recount Process

The manner of the judicial recount

[5] Section 180(6) Electoral Act 1993 provides, “The recount shall be made in the presence of the District Court Judge..., and shall, as far as practicable, be made in the manner provided in the case of the original count.”

[6] Imagine a large, vacated, open-plan office. It is well-lit, day or night, and there are wall-to-ceiling windows along one side. At one end, it connects, through a door, to another similar room; at the other end, a door connects it to a large kitchen-dining area. It is not flash but the basics are provided. The room is furnished with tables made of cardboard. Four large tables have been created; achieved by pushing six tables together, three on one side and three on the other. Sellotape strips join them together, and ensure that there is no gap into which a slip of paper could disappear. A single cardboard table stands at the head of each large table – this is the place for the table leader. The folding chairs have slightly padded seats. On these seats the counters will sit for several hours each day. This is the Waitakere electorate office.

[7] Stacked against two walls, more than 60 cardboard boxes await our attention. They contain all the ballot papers for Waitakere in this election. Each box represents a category of special votes, or one polling place – except for those heavy-polling places where the number of ballot papers requires two boxes. The papers relating to dual votes; the declarations relating to disallowed special votes; the declarations relating to allowed special votes: are all available.

[8] The application is filed in the Waitakere District Court on a Wednesday morning. I have a duty to advise all candidates in writing of the time and place I fix

for the hearing. I fix 3:00 pm as the time for the recount to begin. Parliament cannot resume until this task is complete. The Returning Officer, Ms Kim Lockwood, telephones all candidates or their representatives. Only two, National and Labour, opt to appoint scrutineers. I allow each party to have three scrutineers in the room at any one time but they can have more and rotate them. Ms Lockwood sends a fax to all candidates to satisfy the legal requirement for written notice. She arranges for two tables of counting staff to be available in time. They have been on standby. I had been briefed in Wellington the previous Friday, and in the Waitakere electorate office, on Monday, two days earlier.

[9] By 2:00 pm Mr Robert Peden (the Chief Electoral Officer) and Mr Mark Johns (Manager, Operations, from the Electoral Enrolment Centre) arrive from Wellington. Ms Melissa Thorpe (Senior Project Leader at the Electoral Commission) comes too.

[10] Through the Returning Officer, I invited scrutineers to come for a briefing at 2:00 pm. It takes a little time for them to arrive. After I, and my team, talk with them about the process ahead and give them some advice about what I expect of them, it is closer to 4:00 pm than 3:00 pm. I instruct them not to interfere in any way with the counters; if they wish to draw something to my attention, they should approach me. (The next day, when we had four tables working, I instruct them to speak to the table leader first because I am then too busy to respond instantly to every call.) On only one occasion, a scrutineer, who should have known better, intervenes directly with a counter. This is immediately drawn to my attention by the Returning Officer's assistant, effusive apology accepted and the line is never crossed again.

[11] The boxes fall into three groups: the shared polling places (which have smaller numbers of ballot papers); the ordinary polling places; and the three boxes of special votes. After discussion with the Returning Officer, I decide to start with the small polling booths. It will be good to start easy and work our way into the task. Despite my preparation, this is new for me.

[12] Two tables are set up – between six and eight counters, and a leader. It is the candidate vote that is at issue. Most counters at the table will count for one candidate, but a couple of them will manage two of the lower-polling candidates.

[13] The Returning Officer's chief assistant brings one of the boxes to each table leader. The sealed envelope containing ballot papers is taken out. The votes have already been counted more than once; the last occasion having been the official count. They emerge, already in candidate piles. There is also a pile called "Candidate informal" for ballot papers that the returning officer treated as not clearly indicating a voter's intention for one candidate.

[14] Each counter receives their pile. They are not told figures from the last count. This recount starts with a clean slate, although it will immediately be compared with the official count by the Returning Officer's assistant. The first task of each counter is to turn over each ballot paper to check if it is truly in the correct candidate pile. They do this silently and carefully. Any paper that varies from a clear single tick for their candidate is placed on a pink sheet for me to check.

[15] One table is dealing with a very small polling place. Within the first half-hour I discover that seven votes had been miscounted in the official count as Sepuloni votes when they should have been three to Bennett, three to Tollestrup (Green), and one to Bradford (Mana). This alone would reduce the margin to one vote. Scrutineers on both sides are naturally affected by this event but it proves to have been exceptional. Only one other instance of notable magnitude turns up, at the end of the second day; there, four votes had been incorrectly allocated,.

[16] On the third day, there is one vote less, in the count for overseas votes, than in the official count. This is rechecked, and rechecked again. All other counts in that box tally with the official count. I conclude that the official count was incorrect and accordingly there is one fewer vote for Bennett.

[17] For about five boxes, the judicial recount at first produces an unexplained difference compared with the official count. The Electoral Commission's manual expects this to occur sometimes and details how to reconcile the outcome.

A complete fresh count is commenced, sorting the votes by party; then recording the splits (how each voter for a party voted in their candidate vote); then re-sorting into candidates and counting again. At each stage, votes that appear to have any possibility of being considered informal are set aside for me to check and to rule upon. If I regard the presentation as less than completely straightforward, I draw the matter to the attention of at least one scrutineer from each party, often obtaining their comments. In every case we encounter, the full count reconciles the answer and I am able to record the outcome with confidence.

[18] As a result of the two larger errors (seven, and four) and several small errors among the more than 30,000 votes, the final count results in a win to Bennett by the small margin of nine votes.

Special votes; declarations

[19] On election night, ballot papers from the polling places are counted to give an indicative result. No special votes are counted at that stage. Before the official result is announced, a great deal of work is undertaken by Returning Officers, by the Electoral Commission, and by the Electoral Enrolment Centre. The Electoral Commission manages the election and employs the Returning Officers. The Electoral Enrolment Centre maintains current electoral rolls. If a person is not on the roll, they are not qualified to cast a valid vote – so it is important that intending voters ensure they get enrolled.

[20] A voter who casts a special vote must make a valid declaration. The declaration explains why they cannot vote in their electorate on election day. Special votes fall into three categories: advance votes (voting early, often in your own electorate), votes cast in other electorates on election day, and overseas votes. There is also provision for “takeaway” votes on election day, say, where a voter is ill or infirm. All of these types of vote require a valid declaration. Declarations for overseas voter or “takeaway” votes can be made in front of family members; other special votes require an official or person authorised to take declarations.

[21] Each special vote is placed in a special sealed envelope with two compartments: one contains the declaration, the other contains the ballot paper. When special votes are processed, the declaration is considered first because, if the declaration is invalid, the vote cannot be counted. But once again, the Act is not too picky, because where the declaration has been taken by an official, and the official has failed to do their part correctly, the vote can still be counted. On the other hand, where the voter fails to sign the declaration, the vote cannot count and the pocket containing the ballot paper is never opened.

[22] All the polling place records are collected and a thorough check is made in order to discover if anyone has been given more than one ballot paper; this is referred to a “dual votes”. Where dual voting seems to have occurred the Returning Officer conducts a check – even having her staff call to the home of the voter – so that the voter can shed light on the matter. The rule is that dual votes are both disallowed but if enquiry shows that the real voter received only one paper, their vote is allowed.

[23] Those are not the only checks done before the official count. The Electoral Enrolment Centre checks whether special voters are on a roll. If they are on a roll for a different electorate than that where their vote was cast, their party vote counts but their candidate vote cannot count. In Waitakere, as in every other electorate, there is a box of “party votes only” – irrelevant for the candidate recount.

[24] The policy and practice of the Electoral Enrolment Centre is to enfranchise voters. Where a person declares they are entitled to vote, checks are made widely in order to ensure that all proper votes count. Old rolls, telephone books, different spellings or name order, are all tried. I was impressed at the efforts taken by both the Electoral Enrolment Centre and the Returning Officer, to ensure, where votes can be validated, they are validated. In Waitakere, 393 people who cast votes were found not to be enrolled anywhere so their votes remained unopened, never counted. Those votes did not form any part of the official count.

[25] In Waitakere, 32 other special votes had been disallowed for various reasons. I came to these on the third day of recounting. Two of this cluster of 32 had been

disallowed by the Returning Officer because there was no official issuing stamp on the documentation. I decided that the defect must be official error, and therefore I allowed them. At that point I had only read the declarations; the actual ballot papers were still sealed in their compartments. So I got to tear them open and reveal the papers: one for Bennett, one for Sepuloni. One each reflected the tenor of this recount, a very even contest. (In the case of a tie, the Electoral Commission is obliged to “determine by lot” the outcome: s 179(6). Fortunately, we are spared that.)

[26] Apart from the two votes I allowed (one falling to each major contender) from the group of 32, none of the others had any hope of counting. Apart from debate about the overseas vote I have mentioned, all the scrutineers seemed to agree with that proposition.

[27] The careful checking of votes against the rolls, undertaken before the official count, usually reveals some dual votes. In Waitakere, 12 suspected cases were discovered. One proved to be a case of a brother and sister with almost identical names. The brother was enrolled so his vote had counted in the official count; the sister was not, so hers did not count. There were instances where an elderly voter had voted in advance, or by takeaway vote, and had also voted at the polling place; possibly confusion, although it raises a question as to whether someone may have personated the voter. I am afraid that in three instances I was suspicious that someone had voted twice; in a couple of others that remained a possibility too. I checked each of these and reported on them in detail to the scrutineers, being careful to not disclose names, to preserve voter secrecy.

[28] One of the dual votes concerned an overseas voter who had validly downloaded a ballot paper and declaration electronically, completed the papers on 14 November and posted them to the Electoral Commission. That would have been a valid vote had it not been for the voter’s subsequent actions. She completed an additional set on 16 November – from the presentation it seemed to have been obtained from an Embassy – and they too were received by the Electoral Commission, albeit late, so the second vote could not have counted in any event. The documentation was in all respects identical; no attempt was made to cover up. I

wondered whether the voter had sent an additional set out of caution. I drew this to the attention of all scrutineers. None of the scrutineers knew for which candidate, the vote, if allowed, would count.

[29] The ruling provision is s 176(2)(c). If “it appears that the same voter has received more than one ballot paper” the vote must be disallowed. That the voter “received” one of them via the internet does not seem to alter that position. I was referred to Regulation 34 of the Electoral Regulations 1996 which states that where the vote is received late (later than 7pm on the tenth day after polling day) “the Returning Officer shall disallow the vote.” That regulation cannot prevent the returning officer from opening the mail. Once opened, it became clear that the voter had “received” two papers; that was undeniable, in my view, and s 176(2)(c) is uncompromising. I do not think the vote could have been saved even if the voter had contacted the Electoral Commission. At that stage the voter would already have cast a valid vote so I expect the answer would be that it was too late to do it again. Voters in the polling place get only one go.

Rulings in this Recount

[30] The scrutineer teams were ably led by Peter Kiely (National) and Mike Williams (Labour). Mr Kiely asked me to record my rulings in this judgment.

[31] Most issues that arose concerned specific markings of ballot papers. I dealt with these as they arose. By the end of it, I must have made a couple of hundred calls or more, and I involved the scrutineers whenever the presentation was different to what we had been encountered before.

[32] A few papers had no official stamp at the top. After discussion with the Chief Electoral Officer and the Returning Officer I inferred that these were the result of official oversight. In one polling booth there were several such for each of the two major contenders. I allowed all of the votes with this defect.

[33] We had a sit-down meeting on Thursday morning where Mr Kiely made submissions regarding the process. Another sit-down meeting occurred on Friday

afternoon when we discussed the dual votes, the disallowed 32 votes, and discussed declarations.

[34] I took my direction from the statute, in particular s 180(6). It was my task to replicate the functions of both Returning Officer and Justice of the Peace at the official count. What the Returning Officer could do, I could do. What the Returning Officer could not do was beyond my scope. Accordingly I ruled that I would not attempt an audit of those who were not on a roll. The Returning Officer must accept the work of the Electoral Enrolment Centre about that.

[35] Similarly, on the Friday, I rejected a Labour Party suggestion that I might look into complaints about practices concerning votes from rest home residents: in my view the Returning Officer is not equipped to hold hearings and receive evidence on these sorts of matters which are properly the subject of an electoral petition rather than a judicial recount.

[36] I expressly agree with the approach taken by Judge Unwin in *Wellington Central Electorate Recount* [1992] DCR 178 in refusing to permit scrutineers to photocopy declarations. This is partly to preserve voter secrecy, partly because it is not a practice that occurs at the official count, and partly out of pragmatism. The recount could become bogged down if every declaration relating to votes allowed was gone into in detail.

[37] I did not have to rule specifically on the bounds of such an enquiry because, by Friday afternoon, neither party wished to go into declarations relating to votes that had been allowed. I accept that the allowing of those votes is a function of the Returning Officer, so it is a task that may be visited. Mr Williams had gone into such matters in the 1999 Tauranga recount and found it yielded nothing of partisan value. In this case, the issue did not ultimately require a “bright line” ruling so I did not confront what limitations I would place on declarations. I had thought about starting with a representative sample in order for parties to test whether the investigation of the declarations was worth their while.

[38] An interesting feature of declarations arises because they had been separated from their votes. This meant that a declaration could be investigated but the party scrutineer would not know who would be advantaged by the vote it had been attached to (which could be found, but it would have taken some time for each such vote to be located).

[39] In response to Mr Kiely's submission that copies of declarations would aid a party in a subsequent electoral petition, I observed that such a petition was a different process; a petitioner could ask the Full Court of the High Court for discovery. It was not a matter for the judicial recount process to be concerned about.

[40] Before midday on Wednesday the National Party applied to adjourn the start of the recount until Thursday because their scrutineers were unavailable. I issued an email ruling that expedition was important as was the opportunity to have scrutineers available. I stated that the applicant should not delay a prompt start by appointing scrutineers who were unavailable. I pointed out that they could have scrutineers on Wednesday and replace them on Thursday.

[41] In the event, two of the three scrutineers appointed by the applicant attended on Wednesday together with a couple of local scrutineers. The Labour Party started with one, and moved to three on Thursday.

[42] At approximately 8:15pm on the Wednesday evening a National Party scrutineer, Mr Mark Brickell, requested that I ask police to guard the building. He submitted that, if word leaked out that the vote seemed closer than the official count, there might be an attempt to interfere with the voting forms. I saw no evidence of any such risk; the suggestion had not been made earlier; the police were likely to have more productive tasks on hand; the building seemed secure. I provided a hand-written decision which gave my reasons. I permitted either party to employ security guards to attend outside the building provided they notified me, and I gave them my cellphone number for that purpose. I received no call. In the morning the ballot papers were still where I had left them.

[43] I have recorded elsewhere my rulings about the extent of the recount.

[44] Each party asked me to record specific rulings on votes I held to be informal. I shall do this below.

Clear and Unclear Indications on the Ballot Paper

[45] Although the prescribed method of voting is to mark the ballot paper with a tick within the appropriate circle (s 168(1)(b)(ii) Electoral Act 1993), the Act is not picky so long as the intention of the voter is clearly indicated (s 178(5)(a)(ii)). I think this is just as well because now, with last week's judicial recount behind me, I appreciate the individuality with which some voters mark their ballot papers.

[46] In most cases, the voter clearly indicates their intention, even those who do not tick. Many adopt a cross; some colour in the appropriate circle; some mark it with a decisive dash, horizontal or vertical; a few place a firm dot in the circle. Some merely circled or highlighted the party logo relating to a candidate and, in most cases, I regarded that as sufficiently clear.

[47] The voter who emphasised a tick vote for the National Party by adding "JON KEY" (yes, that was the spelling) within the long rectangle containing that party's name raised no doubt, although it raised a smile with all the scrutineers, and that voter's tick for Paula Bennett seemed consistent. My favourite was the voter who emphasised their tick for Carmel Sepuloni by drawing a little orange heart in the rectangle containing her name.

[48] A number of voters made a mark on only one side of the ballot paper, choosing to vote only for a party, or only for a candidate. A few indicated their intention not to vote, such as those who crossed out all parties and candidates, and wrote in the official orange pen in large letters "No confidence" or similar.

[49] Some voters marked the paper in more than two places, on one or both sides (party and/or candidate). The rare presentation where two clear ticks appeared, one for each of two candidates, may have been produced by confusion about the sign on the paper: "YOU HAVE 2 VOTES", but there were few instances of this; those votes were equivocal and therefore could not count. Most of the occasions where

more than one mark had been made on the candidate side of the ballot paper disclosed a clear indication by the voter, although a few caused me to pause and assess the marks within the context of the particular ballot paper. This was the case, for example, where a voter placed two neat ticks, side by side, for one set of party and candidate, and another similar set of ticks for another set of party and candidate but with an extra strike through the ticks. After consideration, I decided that the voter had struck out one selection and had clearly indicated the other selection before depositing their ballot paper. Quite a few voters had made ticks that they had scribbled over with the orange pen, but left a clear tick in another circle, which I took to be clear indication of their preference. It seems that voters are shy of admitting they have spoiled their paper, because they could easily have obtained another. This might be a fruitful area for voter education.

[50] In some cases, I was unable to work out what the voter intended. My method of assessing whether a marking clearly indicated an intention to select one candidate was to regard the ballot paper in its own context, in the light of all marks made by the voter, and to consider objectively whether the voter was expressing a clear intention for one candidate when they posted that paper in the ballot box.

[51] Mr Kiely asked me to record my decision in respect of a ballot paper that was, I think, from Birdwood School polling place. The voter had drawn two orange lines, one on each side of the page, and made no other mark. The lines were of similar length and slant from lower left to upper right. On first impression they appeared to strike out all the parties, and all the candidates. The list of parties is longer than the list of candidates. The line on the left side began about the bottom of the list of parties; the companion line on the right side began at a similar position, so it struck through several blank spaces before it hit the candidate names. A National Party scrutineer pointed out that neither line extended into the top space which was for the National Party (top left) and Paula Bennett (top right). I turned the page over to check the extent of the marks against the light. After consideration I decided that it was possible that the voter may have intended to stop the lines deliberately in order to indicate a choice for National and Bennett. It was suggested to me that the lines were deliberately drawn. I was not convinced that they were more than simple striking lines. I could see the possibility of an intention but the marking left me in

with a view that it was, at best, equivocal, and therefore I could not detect an intention that had been clearly indicated. I disallowed the vote as informal.

[52] Mr Williams asked me to record two decisions. In one, the voter had made a tick for Carmel Sepuloni, and drawn a wavering line through her name. It is possible that the intention was to highlight the choice but I could not exclude the possibility that the voter had struck out her name. For me, this decision is much closer to my line than the previous decision. My level of doubt about whether the line was a change of heart or an emphasis is high; the possibility that a vote was intended is real. Nevertheless, close though it is to the line, I could not be sure that the voter clearly indicated that choice and for lack of clarity I treated it as informal.

[53] The component parts of that presentation arose elsewhere in differing arrangements. I counted several votes where the voter ticked and either underlined or highlighted the candidate's name. I allowed votes where there was only highlighting or underlining but no tick. I allowed votes where only the logo was ticked, circled or highlighted. The combination in the vote with the wavering line left me in such doubt that I did not recognise it as a clear choice (although, like the line, I wavered).

[54] The other decision that Mr Williams asked me to note was one where the voter placed a clear party tick for Labour but in the candidate column simply entered a dot in the Sepuloni circle. I allowed plenty of dot votes where the voter placed a dot, both for party and for candidate, but in this case, where the voter demonstrated that a tick was the means of indication, I was in doubt about what the dot conveyed. It signalled that the pen touched the paper in that circle but the tick context caused me to read the dot down.

[55] I note two others, both affecting National. One of them had been overlooked as a Bennett vote because the tick was completely within the National Party logo to the right of Paula Bennett's name. I think a scrutineer spotted it. When I held it backwards to the light the tick was obvious, but it was almost indistinguishable on the face of the ballot paper. I allowed the vote. The other was a party tick (for a party other than National), and the voter had coloured in the national Party logo to

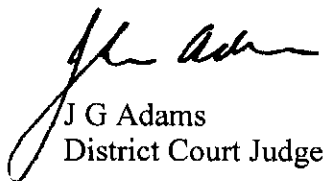
the right of the Bennett box. By turning it over against the light (a useful way of working out what strokes the voter has made) it was clear that the voter had moved the pen about to colour it in. I could not be sure that it was more than a doodle so I disallowed it as informal.

Costs

[56] No party has asked for costs. The application proved to have been justified. I order that the sum of \$1000 which the applicant was required to file shall be returned to her.

Conclusion

[57] The unsung heroes of our ballot in New Zealand are those whose quiet work supports the democratic process: the Electoral Commission, the Electoral Enrolment Centre, the Returning Officers and their excellent staff. Election Day is only the showcase. The ongoing dedication of those personnel is wonderful to witness. Voters would be gratified to observe the tables of counters, closely concentrated on their tasks of recognition and counting, devoting close scrutiny to every single ballot paper in order to enable each vote to gain expression in the count. It is this attention to every single vote that aggregates to the real success in a judicial recount.



J G Adams
District Court Judge

Dated at Waitakere on 20th December 2011