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**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**Citation:** *Cummings v. North River (Town)*, 2022 NLSC 52

**Date:** March 25, 2022

**Docket:** 202101G6401

**BETWEEN:**

**JAMES CUMMINGS**

**APPLICANT**

**AND:**

**THE TOWN OF NORTH RIVER**

**FIRST RESPONDENT**

**AND:**

**SHEILA HALL, RETURNING  
OFFICER**

**SECOND RESPONDENT**

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**Before:** Justice Garrett A. Handrigan

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**Place of Hearing:**

St. John's, Newfoundland and Labrador

**Dates of Hearing:**

February 14, 18, and 21, 2022

**Summary:**

James Cummings was a candidate in the municipal general election held in the Town of North River on September 28, 2021. Mr. Cummings was assigned the last council seat when the votes were counted on election night. Two days later, following a recount Mr. Cummings lost his seat when his nearest rival overtook him by six votes. A subsequent judicial recount confirmed the outcome following the first recount. Mr. Cummings applied under the

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*Municipal Elections Act* to void the election and for an order requiring it to be held again, alleging irregularities in how the election was conducted.

The Court dismissed the application. Mr. Cummings failed to prove that any irregularities which may have occurred affected the outcome of the election. It ordered each party to bear its own costs.

**Appearances:**

Iain R.W. Hollett                      Appearing on behalf of the Applicant

David R. Power                        Appearing on behalf of the Respondents

**Authorities Cited:**

**CASES CONSIDERED:** *Warrington v. Lunenburg (Municipality)*, 2006 NSCA 78

**STATUTES CONSIDERED:** *Municipal Elections Act*, S.N.L. 2001, c. M-20.2; *Municipal Elections Act*, R.S.N.S. 1989, c. 300

**REASONS FOR JUDGMENT**

**HANDRIGAN, J.:**

**INTRODUCTION**

[1] North River is a town of about 550 residents, lying along the river that gives the town its name, in the Conception Bay area, on the east coast of the Province of Newfoundland and Labrador. It is just off Veteran's Memorial Highway, by which it has access to the Trans-Canada Highway. A Town Council governs North River at the municipal level and the Town held a municipal general election on September 28, 2021, as part of the province-wide election that took place on that date. North River did not hold a separate vote for mayor, but followed its usual practice of selecting its mayor from the seven councillors elected.



[2] James Cummings was one of eleven candidates who contested the seven seats. When the votes were counted on election night, Mr. Cummings learned that he received 110 votes, enough for the seventh and last seat on Council. Mr. Cummings polled three more votes than his nearest rival, Brian Hurley, who received 107 votes.

[3] At Mr. Hurley's request, the Council held a recount on October 1, 2021, following which 10 votes were added to his previous total, for a new total of 117 votes. Meanwhile, Mr. Cummings also added 1 vote to his count, for a new total of 111; but he did not get enough by the recount to unseat Mr. Hurley who was declared elected in his place. A judicial recount took place on October 1, 2021. Each of Mr. Cummings and Mr. Hurley lost 1 vote by the judicial recount but Mr. Hurley retained the seat on Council that was assigned to him following the first recount.

[4] Mr. Cummings does not accept the outcomes of the recounts and he still believes that he should be a member of North River Town Council. In fact, Mr. Cummings also believes that some unknown person or persons deliberately tampered with the election ballots between election night and the first recount from which Mr. Hurley received more votes than he did. To that end, Mr. Cummings filed a Petition in this Court on November 10, 2021 asking to void the election under section 81(1)(c) of the *Municipal Elections Act*, S.N.L. 2001, c. M-20.2.

[5] I heard Mr. Cummings' Petition over several days, starting on February 14, 2022 and finishing on February 21, 2022, when I reserved my judgment until now.

## THE ISSUES

[6] Mr. Cummings' Petition raises one issue:

- 1) Should the municipal election in the Town of North River be voided under section 81(1)(c) of the *Municipal Elections Act*?



## THE LAW

### Statute

[7] Mr. Cummings relies on several sections of the *Municipal Elections Act*:

68(1) A petition complaining of

(a) an unlawful return or election of a councillor

...may be presented to the court by a candidate for the election or another person who had the right to vote at the election.

[8] Section 68(1) authorizes a candidate to file a petition, as Mr. Cummings has done here; and Section 80 of the *Act* sets out the procedure that applies when a petition is filed. It reads:

80(1) Whether an answer is or is not filed, the petition is at issue after the expiration of the time for filing the petition, and the court may afterward, upon the application of either party, fix the time for the trial of the petition.

(2) Notice of the time and place at which election petitions are to be tried shall be given by the petitioner not less than 10 days before the day on which the trial is to take place.

(3) The trial may be adjourned from one place to another where cause is shown, supported by an affidavit, and where special circumstances exist that, in the opinion of the judge make it desirable to do so, but the trial, where practicable, shall be proceeded with from day to day until concluded.

[9] Section 81(1)(c) on which Mr. Cummings relies specifically for the relief that he is seeking reads:

81(1) At the conclusion of the trial the judge shall determine...

(c) whether the election is void.

[10] The remaining subsections of section 81 are also relevant:

81(2) The judge shall immediately certify in writing a determination made under subsection (1) to the minister, appending to it a copy of the notes of the evidence.

81(3) The determination of the judge as certified under subsection (2) is final.

[11] Neither counsel referred to section 95 of the *Act* but it, too, is relevant. It reads:

95. An election may not be declared to be invalid

(a) for non-compliance with the provisions of this Act...as to the counting of the votes;

... or

(c) because of a mistake or irregularity in the proceedings at or in relation to the election,

where it appears to the court, by which the validity of the election or a proceeding in relation to it is to be determined, that the election was conducted in accordance with the principles laid down in this Act, and it does not appear that the non-compliance, mistake, or irregularity affected the result of the election.

### Case Law

[12] The Nova Scotia Court of Appeal considered sections 158(1) (allowing the court to declare an election void “that has not been conducted in accordance with the Act”) and 164 (saving the election if it was “conducted in accordance with the principles of this Act and...the irregularity, failure, non-compliance or mistake did not affect the result of the election”) of the Nova Scotia *Municipal Elections Act*, R.S.N.S. 1989, c. 300 in *Warrington v. Lunenburg (Municipality)*, 2006 NSCA 78, which are quite similar to sections 81(1) and 95 of our *Act*.

[13] Fichaud, J.A. offered some guiding principles in *Warrington v. Lunenburg* for applying the comparable sections of the Nova Scotia *Municipal Elections Act*. His

guidance assists in this matter and the principles that I draw from paragraphs 14-21 of his judgment are:

1. The Court may void an election not conducted according to the *Act*, but only after it finds both that the election was not conducted as directed in the *Act* and that the failure affected the result of the election.
2. The onus of proving both is on the Petitioner.

(Underlining mine)

[14] This is the law I will apply to the issue I stated above. I turn now to analyze that issue, starting with the background to it.

## ANALYSIS

### Background

[15] James Cummings filed a Petition with this Court under section 68(1) of the *Municipal Elections Act* asking to void the results of a municipal election that took place in the Town of North River on September 28, 2021. Mr. Cummings alleges that there were “certain irregularities [during the election] that compromised the validity of the result” (Paragraph 1 of his Petition). He says that he was one of the seven councillors declared elected when the votes were counted on election night; that he received 110 votes; and that he out-pollled his nearest rival, Brian Hurley, by 3 votes.

[16] The Town recounted the ballots at Mr. Hurley’s request on October 1, 2021, by which Mr. Cummings gained 1 additional vote, increasing his total to 111, but from which Mr. Hurley gained an additional 10 votes, thereby out-polling Mr. Cummings by 6. The Returning Officer declared Mr. Hurley elected to council after the recount, replacing Mr. Cummings. Additionally, a judicial recount took place on October 15, 2021, by which each of Mr. Cummings and Mr. Hurley lost 1 vote,



putting their totals at 110 and 116 respectively, so that Mr. Hurley remains as councillor.

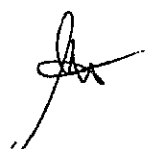
[17] In his Petition, Mr. Cummings does not allege any “intentional wrongdoing” by any person associated with the election. Mr. Cummings filed an affidavit in support of his Petition and affidavits from 3 other persons to the same effect. In his affidavit, Mr. Cummings stated categorically that “I do not allege intentional wrongdoing by any particular individual” (Paragraph 14 of his affidavit, dated November 6, 2021). Each of the other affidavits contains the same statement.

[18] However, and as I noted earlier, while Mr. Cummings does not allege any “intentional wrongdoing,” he does claim that there were “irregularities in the voting process,” and he offers 4 examples to support his claim in paragraph 30 of his Petition:

30. The Petitioner further says that there were irregularities in the voting process as follows:

- a. At least one voter, who is not resident of the Town, was permitted to vote;
- b. Another non-resident voter was given a ballot when she accompanied a voter to the poll. She returned the ballot unmarked.
- c. An unlawful ballot (because it contained 8 votes) was counted on election night and during the first recount; and
- d. The ballot box was not properly sealed before it left the Council Chambers on election night.

[19] In paragraph 31 of his Petition, while Mr. Cummings, as I noted earlier, “...does not allege any intentional wrongdoing by any particular identifiable individual”, he says in paragraph 32, “[b]ased on the foregoing, the Petitioner says that there was an invalid election for the Town Council of North River”. Mr. Cummings does not specify what he means by the “foregoing”, but he seems to be referring to more than the 4 examples of “irregularities” that he sets out in paragraph 30.



[20] Earlier in his Petition, Mr. Cummings discusses the counting of the votes on September 28, 2021, election night, at the recount on October 1, 2021 and at the judicial recount on October 15, 2021. He also notes that "...10 ballots were set aside by counsel for the Petitioner [at the judicial recount], as raising concerns with the consistency of the markings used to indicate the voter's preferred candidates". (paragraph 23 of the Petition)

[21] Then Mr. Cummings noted that he "...has engaged a forensic document examiner to review those ballots and expects to call expert evidence on this issue". (paragraph 24 of the Petition). The "10 ballots" were released to Mr. Cummings' counsel and he submitted them to a document examiner who filed a report with the Court and testified about her observations from examining the ballots.

[22] To enable this examination, I issued an order on December 7, 2021, directing Sheila Hall, Town Clerk of North River and Returning Officer for the election, to "...provide the original sealed envelope containing the 10 contested ballots, as it was sealed after the judicial recount, to the solicitor for the Petitioner".

[23] Counsel for Mr. Cummings sent the sealed envelope by "secure courier" to a document examiner of his choosing, who examined them. The document examiner resealed the ballots after she examined them and returned them by "secure courier" to Mr. Cummings' counsel who passed them on, still sealed to Ms. Hall. I will be reviewing the evidence of the document examiner in detail later in these reasons.

[24] Sheila Hall, as I just noted, is the Town Clerk of the Town of North River and was the Returning Officer for the municipal election. Ms. Hall lives in North River and has worked with the Town for the last 20 years. She noted when she testified before me that "...I just got my 20-year award". She was, of course, Returning Officer for the election because of her position with the Town. The 2021 election was the fifth one Ms. Hall has overseen during her 20 years of service.

[25] Ms. Hall said she received a "guide for municipal elections" from the Provincial Department of Municipal and Provincial Affairs. She described the



“guide” as a “step by step process” and confirmed that she followed it closely. She also noted that she had the benefit of a “workshop” that the Department presented, at which “they walk us through the election”.

[26] Ms. Hall hired Kay Mercer for poll clerk on Election Day. In prior elections in North River, a Gail Fillier served as poll clerk, but Ms. Fillier was not available for Tuesday, September 28, 2021; and Ms. Hall only learned she would have to replace Ms. Fillier late in the afternoon on the Friday, immediately before the election.

[27] Ms. Hall arrived at the Town Hall around 7:45 am on Election Day and Ms. Mercer came there about the same time. Ms. Hall gave Ms. Mercer a quick introduction to her role as poll clerk, although Ms. Hall thought that “there wasn’t really much to it”: “It’s a voter’s list, you cross off a name as they come in and you write their name in the poll book. So as much of a discussion as that could be, yes.”

[28] Polls opened at 8:00 am and Ms. Hall thought that Brian Hurley, the candidate who replaced Mr. Cummings after the recount on October 1, 2021 was the first voter. Ms. Hall said she referred to her “portable phone” for the times to open the polls at 8:00 am and then to close them at 8:00 pm, later the day. She felt that voting was “a little bit heavier than usual” and noted that 312 voters cast ballots before 8:00 pm. She denied that she allowed anyone to vote after 8:00 pm and claimed that “I went out and I locked the door [as soon as 8:00 came]”.

[29] Ms. Hall remembered that the last person to vote was a Marty Gregory and that he was not on the voter’s list; so, he followed the procedure prescribed by Municipal Affairs: “Sign a sworn affidavit that they are a resident and that they are entitled to vote. They fill that out and they get a ballot, and they can go ahead and cast their ballot”. Ms. Hall witnessed Mr. Gregory’s signature on the affidavit. She insisted that it was done, and that Mr. Gregory cast his ballot before 8:00 pm.



[30] Ms. Hall said she and Ms. Mercer began to count the votes within 5 minutes of when she locked the door at 8:00 pm. All candidates but 2 were present for the count. Ms. Hall and Ms. Mercer followed this procedure, as Ms. Hall described it:

A. I take them out one at a time, I read the names on the ballot. I use my thumb to guide down through, but I read the names on the ballot, then I call it out and Kay records it on the tally sheet.

....

Q. After you read – you take up a ballot and you read the names on the ballot, what do you do with that ballot after that?

A. I just put it to one side on the table.

Q. And then you get the next one.

A. Yes.

Q. And then when you come to the end of the ballots, what happens first?

A. Kay is usually doing her tally and I just put all the ballots into an envelope and down into the box.

Q. So Kay does her tally.

A. Right.

Q. And then is there – how do you inform the candidates of the results? Is there a particular way to do that or do you just say what each person got?

A. No, Kay has a tally sheet. She's doing up her totals and then she gives the totals for me and then I read them out.

....

Q. After you read out the totals, after you've read out the totals, then what happened?

A. Well, most of them in there are broken up into small groups and they were chit chatting and whatever and I was doing up the box, throwing things into the box, getting ready to call it a night, come out and finish off the reports.

[31] Ms. Hall then noted what she did before she left the Council Building that evening:

- Placed all ballots in envelopes and put them in the ballot box.
- Placed the voter's list, the poll book and the tally sheets in the ballot box.
- Closed and taped the box, by putting a single strip of packing tape "down over the front of the box", using about "5 or 6 inches of tape" and placed it in her office.
- Completed "two or three reports for Municipal Affairs".
- Left the building around "quarter to 10" and was the last one to leave, noting that Ms. Mercer departed "about 15, maybe 20 minutes" before she did.
- Locked the door to her office and the main doors to the building, to which she alone has the keys.

[32] Ms. Hall returned to work the next day, and found nothing awry. She confirmed that everything she left in her office the night before was still there and intact – as she expected to find it.

[33] Brian Hurley, who lost out to Mr. Cummings emailed Ms. Hall the same day asking for a recount. Ms. Hall notified all 11 candidates for the election of Mr. Hurley's request, mostly by email, except Mr. Cummings, whom she telephoned she said, "because he has no email".

[34] The recount took place on October 1, 2021 in the Council Chamber. Nine of the 11 candidates were present, the exceptions being Blair Hurley and Dwight Snow. Robert Simmonds, Q.C., Mr. Cummings' lawyer attended with him, and Kay Mercer was also there. Ms. Hall said the recount proceeded "[e]xactly the same as...on election night". She described the process thus: "I took... [the ballots] one by one, read off the names that were on there, Kay put them on her tally sheet and just



continued with each ballot until they were all done, and then waited for Kay to do the totals”.

[35] Ms. Hall said the ballot box was in the same condition for the recount as it was when she left it in her office on election night, from where she retrieved it for the recount. She expressed “surprise” at the result of the count on election night but none at the result from the recount.

[36] She explained why she was surprised: “Well, when it came to Mr. Cummings because I’ve been here for the past five elections and his numbers doubled, which to me was surprising that that many people there in North River didn't want him elected before”. Of course, Mr. Cummings lost out to Mr. Hurley by 6 votes from the recount. Ms. Hall had no explanation for the change: “I could not possibly explain it. I’d call out a name and it’s X’d off on a tally sheet”.

[37] Counsel for Mr. Cummings questioned Ms. Hall about the change in Mr. Cummings’ vote when he cross-examined her:

Q. You were surprised [by] the first recount because Jim Cummings’ vote total doubled?

A. Correct.

Q. But it didn’t surprise you at all that Brian Hurley’s vote total increased by 10 on a recount.

A. No, it didn't, because his was on par with previous election results.

Q. I’m not going back to previous elections. I’m going from this one. You go from on election night to on the recount night and the thought didn't cross your mind “oh my, how did we miss Brian Hurley’s total by 10 votes on election night”?

A. The count is the count. All I can do is read it out.

Q. But you weren't even surprised.

A. No.



Q. You indicated you had no idea how it changed?

A. No. I don't count them.

Q. Could it be possible, Ms. Hall, that you weren't surprised that it changed by 10 because you knew it was going to change by 10?

A. No, I'm not Kreskin, I don't know things.

[38] Kay Mercer served as poll clerk for the North River election. Ms. Mercer lives in the Town and retired a few years ago. She worked in "sales" previously, at a managerial level and is 68 years old. She explained how Ms. Hall "hired" her for the position:

Yes, I was classified as poll clerk. I was contacted on Friday previous to the election and I was asked by the Town Clerk, Sheila [Hall], if I could work the election. The person who she had in previous elections had hurt herself and she needed a replacement. So, the Mayor at the time was here at the house on Friday and she wondered where I was because she was looking for somebody to replace the person who normally did it. So, I contacted Sheila [Hall] on the weekend and said that I would be willing to do it. I had never done it before, but I was willing to certainly help if I could.

[39] Ms. Mercer had little training for her role:

On Friday or when I called her back, she just asked me if I would be willing to be poll clerk and that if I could meet her Tuesday morning at the Town Hall where the election was, at quarter to 8:00 and she would then tell me basically what it was I had to do. So, I didn't have any training previous to that. I met her at quarter to 8:00 on Tuesday morning. The day before that was the day, I got sworn in. I just popped down to the council office and I got sworn in. I met her quarter to 8:00 on Tuesday morning and she just told me that I was to be a poll clerk. She gave me the list of voters and she asked me if I could take a record of anybody that came in there so that would have it for COVID. And that was the training that I had.

[40] Ms. Mercer had worked on federal and provincial elections previously and had training for them but none for municipal elections, other then she had for the North River election.

[41] Ms. Mercer confirmed that Ms. Hall had three people check the ballot box “to make sure the box was empty and everything was the way it should be so we could start the election at 8:00 which is the time it’s supposed to start”. She said Ms. Hall called on an Elsie Morrissey, who she identified as “one of the councillors”, Ms. Morrissey’s husband and “Joanne Morrissey who was the Mayor at the time” to confirm the ballot box was empty before residents began to vote.

[42] Ms. Mercer described her role during the day, as voting proceeded. She said while she had no “poll book”, she did have a “voter’s list” and she “marked people off the list” as they came into the building. She knew some of them personally and from them she asked no proof of identity but simply marked their names off the list; from those she did not know she asked for proof of identity, such as a driver’s licence. She also wrote all voters’ names on “the COVID list” and recorded their phone numbers for contact tracing.

[43] Ms. Mercer noted, in particular, a Ms. Morrissey, an older lady whose daughter, “Colleen” accompanied her to the polling station. Ms. Mercer knew that “Colleen” was not from North River but was home with her family because of “an incident, a death”. Ms. Mercer wrote Ms. Morrissey’s and her daughter’s name on the “COVID” list and marked Ms. Morrissey’s name off the voter’s list as well. Then she sent both of them along to Ms. Hall who gave both a ballot.

[44] Shortly after they received their ballots, Ms. Mercer says she heard “Colleen”, with “a ballot in her hand, say ‘I can’t vote, I don’t live in North River’”. To which Ms. Hall replied: “That’s okay, just bring back the vote, nothing wrong”. Ms. Mercer responded to Ms. Hall’s mistake with, “it sort of struck me as a little bit strange”.

[45] Ms. Mercer was also ambivalent about when voting closed, as she explained in this exchange with counsel during direct examination:

Q. So what time did polling close that night?

A. It was supposed to close at 8:00.

Q. Do you know what time Mr. Gregory came in?

A. I can't say for sure. I know he was the very last person that voted but I can't say for sure what time it was. But I'm assuming it had to be at least 8:00 because all the candidates were there and they're not – you know, they would be there for the vote to see how the tally went and how the people went. But I can't say for sure what time he came in.

[46] Ms. Mercer described in detail the procedure she and Ms. Hall followed to count the votes:

A. Okay. So, when Ms. Hall took a ballot out of the box, she would read the names that were listed that we're x'd on the ballot, or ticked, as long as there was something in the little round square, the little round thing that would say (unintelligible). So, each person that she called out, I would find that person on the tally sheet and put the little X in the box. I did that with each person that she called out for the ballot and then continued each ballot. When I got down to that I had a full column filled out for any one person. For example, if Kelly Hall was the one that had – I filled out her section first. I laid that tally sheet to the side, and I started a brand-new tally sheet, so I was going to be going back and forth from sheet to sheet. So, I did the same thing with each ballot that Sheila [Hall] called out the names, I put a X in each individual person. Like, if she called out David Wicks, I put an X or Ryan Gates and on and on it goes. So, I did that with the second sheet and the third sheet because each time I wanted to make sure that I wasn't going back and forth from sheet to sheet, so we would have a correct tally of what went on.

So, after every name was called and every ballot was gone through, Sheila took the [ballot] box and shook it out and made sure there was nothing left in the box. And then I took my three tally sheets and each particular time the first name I would add down and put that on the bottom of the tally sheet. And I did that with each individual person that was there on each individual tally sheet. Then I took a sheet of paper, and I wrote down, let's say, for example, Ryan Gates, I would put Ryan Gates and add up the three different amounts that I got from each individual tally sheet and then add that up. And I did that with every one of the people that were there. When I did that, I confirmed again on each sheet and then tallied it up again and added it up. At that point I said I would like somebody to confirm my Math for me. Nothing moved. So, I just said, okay, I really want for someone to check my Math, you know, I'm not perfect but I would like for someone to check my Math. Nobody didn't and then Sheila [Hall] said okay, I'll take your sheets, the tallies that you have, the amounts that you have are what we will be going by. So, I gave it to Sheila [Hall] and basically, she went through, and she said who were the one that

had gotten the most votes and she read the names out and then congratulated the people and that was the end of what happened.

(Underlining mine)

[47] Ms. Mercer said that Ms. Hall took the ballot box to her office. She did not see Ms. Hall seal the box by taping it and she was unsure if it was sealed. However, whether it was sealed or not, Ms. Mercer clearly believed that "...as co-clerk, [I] should have signed it and I didn't sign it. But then again, like I said, municipal elections may be different, and I didn't know if that was the procedure for there".

[48] Ms. Mercer attended the Town Hall on a Friday, October 1, 2021, for the recount. She noted that they followed practically the same procedure as on election night, except for one change:

Ms. Hall drew a ballot from the ballot box, read the names of those for whom the voter who cast the ballot voted and Ms. Mercer marked a vote for each person on her tally sheet. There was, however, this difference: Mr. Simmonds [Mr. Cummings' lawyer] was sitting across from Sheila [Hall], across from us I guess, and the first ballot came out, the first – so Sheila started to read them, he said "No, we should see them". So, she then showed them around the building, around the room and each individual one that was called out, same procedure.

[49] After Ms. Mercer tallied all the votes, she added them up and said, "I'd like for someone to please check my addition, I want to make sure that I do have this correct". Nobody offered to check her calculations and Ms. Hall, as she did on election night, said: "That's okay. The counts that you have are the counts we would use". (Underlining mine)

[50] During cross-examination, counsel for the Respondents drew Ms. Mercer's attention to the tally sheets that she filled out at the recount on October 1, 2021. He noted the entry on a MEF-15 form, marked as "Tally Sheet No. 1 Page 3 of 5" for the name Dwight Snow and this exchange followed:



Q. The total of that column you've got as 24.

A. Um-hm.

Q. And would you agree with me that there are actually 29 squares?

A. There is 29 squares X'd, yes.

Q. Yes, okay, that's what I want to clarify. And that was I guess – you spoke about someone wanting to check or clarify your addition, is that maybe an example that you were referring to?

A. Well, I was thinking more of the total addition. I didn't realize there was 29 in that. But I was asking for people to confirm all my addition and that would have been picked up I guess if it had been picked up.

(Underlining mine)

[51] David Wicks also testified at the hearing. He ran unsuccessfully in the election, polling the second fewest votes. He noted that he has attended all “court appearances” to deal with this matter but he claimed that he has “no agenda, other than as a resident of North River”. Mr. Wicks says he went to the Town Office just before the polls closed. He estimated that he arrived around 7:55 pm and was there for the recount. He says that Martin Gregory arrived around 8:02 pm and still voted, even though it was after 8:00 pm.

[52] Mr. Wicks also confirmed that he took the picture of Mr. Gregory's house under construction in North River that Mr. Cummings attached to his Petition, and Mr. Wicks believed from the house's unfinished state that Mr. Gregory did not live in North River. Mr. Wicks also believed that Ms. Hall did not seal the ballot box on election night when she removed it from the Council Chamber. He acknowledged that it was sealed somewhat at the recount, but not nearly as securely as it was for the judicial recount.

[53] Ryan Gates was also a candidate in the election. Unlike Mr. Wicks, Mr. Gates was elected to Council. He polled the second highest number of votes and the other 6 councillors elected him Mayor of the Town. Mr. Gates attended just two council meetings before resigning, first as Mayor and then as councillor. Like Mr. Wicks, Mr. Gates was present in the Council Chamber when votes were counted on election



night, and he kept his own tally. He confirmed that his totals were different from the totals that Ms. Mercer recorded for 6 of the candidates including Joann Morrissey, Kelly Hall, Dwight Snow, and Peter Boleska, although he and Ms. Mercer had the same number for Dwight Snow. Mr. Gates acknowledged that he was not surprised at the variances on election night and noted them when the results were posted after the election.

[54] Mr. Gates did not know if the ballot box was sealed, but he sent an email to Ms. Hall the next day asking if the ballot box was stored in a “tamper-proof” place. He said he simply “wanted to make sure that things were going to be done right”. Mr. Gates believes that Martin Gregory entered the Council Chamber to vote around 8:03 pm on election night. By this time, Mr. Gates said, voting had finished, and they were all inside waiting for the count to begin.

[55] Brian Hurley also testified in this matter. Mr. Hurley, of course, was the candidate who finished 3 votes short of Mr. Cummings in the count on election night but 6 votes ahead of him after the recount, a result that was confirmed at the judicial recount. Mr. Hurley is a resident of North River and has lived there all his life. He is currently the Mayor. Mr. Hurley was first elected to the Town Council in 2005 and ran successfully in each of the 4 next elections until his short-lived defeat on September 28, 2021.

[56] Mr. Hurley was dealing with a serious family matter at the time of the election and had little time to spend at the Town Office during the election. He voted early on September 28, 2021 but did not stay around, nor did he attend after the polls closed to watch as the votes were counted. As well, Mr. Hurley did not attend either of the recounts, although he asked for the first one.

[57] Mr. Hurley said he received two phone calls the day after the election, one from his nephew, Blair Hurley who was elected to Council and the other from Elsie Morrissey, who was also elected to Council. Ms. Morrissey told him his vote count from the previous evening was wrong and that she had recorded 115 votes for him. Based on those two calls, Mr. Hurley said he decided to ask for the recount. Mr. Hurley said he had no access to the Council Building and denied that he had

tampered with the ballots between election night and the first recount on October 1, 2021.

[58] The last witness to testify at this trial was Elsie Morrissey. Ms. Morrissey was in the Council Chamber when the votes were counted on election night. She arrived about 7:50 pm, saw the polls close at 8:00 pm and noted that the counting started a few minutes later. Ms. Morrissey says she started to keep track of the numbers but fell behind and could not say with certainty how many votes Brian Hurley polled. She noted that Ms. Hall put all the ballots in the ballot box after she finished counting them and sealed the box with tape. Ms. Hall did this when everyone was present, and Ms. Hall thought that everyone, as she did, could see Ms. Hall seal the ballot box.

[59] Brenda Petty is a Certified Questioned Document Examiner, designated so by the International Association of Document Examiners. Ms. Petty lives in Duncan, Oklahoma, USA and testified by video from her home. Ms. Petty examined the 10 ballots from the North River election that counsel for Mr. Cummings set aside as questionable at the judicial recount. I noted earlier that the original 10 ballots were released by consent to Mr. Cummings' counsel who forwarded them to Ms. Petty by secure courier and that Ms. Petty returned them by the same method.

[60] I allowed Ms. Petty to give opinion evidence in the field of forensic document examination, based on her CV, the training and study she did in the field, her history of giving evidence on related matters, but only after I held a *voir dire* to deal with the admissibility of her evidence. Overall, I was satisfied that Ms. Petty's evidence was relevant, that it was necessary, that it was not subject to an exclusionary rule and that she was a properly qualified expert. However, I reserved to myself a discretion to exclude parts or all of her evidence even if it met those requirements and to assign as much weight to it as I feel is appropriate.

[61] Ms. Petty examined the 10 original ballots, first visually, unaided and then with a microscope. She filed a report with the Court and testified in detail about her findings. I will provide a brief synopsis of her evidence for each of the ballots.

**Ballot #1:**

[62] This ballot displayed checkmarks, one for 5 of the 11 candidates on the ballot: James Cummings; Ryan Gates; Kelly Hall; Dwight Snow; and Brian Hurley. The checkmarks for James Cummings and Ryan Gates, were as Ms. Petty noted "...similar in formation and would lend to the probability of one author". The checkmarks for Kelly Hall and Dwight Snow "...were similar and would lend to the probability of one author". The checkmark for Brian Hurley "...was completely different and easily identifiable from the other checkmarks". Ms. Petty concluded: "Ballot 1 had the probability of three (3) different authors.

**Ballot #2:**

[63] This ballot displayed checkmarks and X's, although Ms. Petty believed the "checkmarks were formed and then changed to appear as X's". 6 votes were cast by that ballot, 1 for Peter Boleska, James Cummings, Ryan Gates, Kelly Hall, Dwight Snow and David Wicks. Ms. Petty believed that "...all checkmarks and X's were written by the same hand except the last X...beside the name of David Wicks". She also believed "...that the same hand that wrote the checkmarks on Ballot 1 beside the names of Kelly Hall and Dwight Snow ...authored the checkmarks turned into X's beside the names of Ryan Gates and Kelly Hall" on Ballot 2. Ms. Petty concluded: "There is the probability of two (2) different authors on Ballot 2".

**Ballot #3:**

[64] This ballot displayed X's only, one for 5 of the 11 candidates on the ballot: Peter Boleska; James Cummings; Ryan Gates; Brian Hurley; and John Newell. The X's marked for Peter Boleska, James Cummings, Ryan Gates and John Newell "...had similarity of being written by one hand/one pencil". The X marked for Brian Hurley was "...written with a different pencil and had a different formation". Ms. Petty concluded: "There is a probability of two (2) different authors on Ballot 3".

**Ballot #4:**

[65] This ballot displayed X's only, one for 6 of the 11 candidates on the ballot: Peter Boleska; James Cummings; Ryan Gates; Kelly Hall; Brian Hurley; and David Wicks. This is what Ms. Petty said about the marks: "Though the X's looked similar in formation, the X's under the microscope looked different in pencils and the lead. The X's marked...[for Ryan Gates and Kelly Hall] were similar and point to one author. The X's...[marked for Peter Boleska, James Cummings, Brian Hurley and David Wicks] was (sic) different and each written with a different pencil; ...[the X marked for David Wicks] was the most different. The probability exists that there could have been five (5) different authors on Ballot 4".

**Ballot #5:**

[66] This ballot displayed X's only, one for 7 of the 11 candidates on the ballot: James Cummings; Ryan Gates; Kelly Hall; Brian Hurley; John Newell; Dwight Snow; and David Wicks. This was 1 of only 2 of the 10 ballots that had a full complement of votes marked on it. Ballot 8 was the other one. Ms. Petty said about the marks on Ballot 5: "The X's that were similar in pencil were...[marked for James Cummings, Ryan Gates and John Newell]. The X's...[marked for Kelly Hall, Dwight Snow and David Wicks] were similar in pencil. The X that was the most different...[was] written beside...Brian Hurley. There is the probability of three (3) different authors on Ballot 5".

**Ballot #6:**

[67] This ballot displayed X's only, one for 5 of the 11 candidates on the ballot: Peter Boleska; Ryan Gates; Kelly Hall; Brian Hurley; and Dwight Snow. Ms. Petty said about the marks: "The X...[marked for Peter Boleska] was a different pencil than used to write...[the X's for Ryan Gates, Kelly Hall and Dwight Snow]. The X...[marked for Brian Hurley] was written with a different pencil....There is the probability of three (3) different authors on Ballot 6".

**Ballot #7:**

[68] This ballot displayed X's only, one for 5 of the 11 candidates on the ballot: James Cummings; Ryan Gates; Kelly Hall; Brian Hurley; and Dwight Snow. Ms. Petty said this about the marks: "The X's...[marked for James Cummings, Ryan Gates, Kelly Hall and Dwight Snow] have probability of being authored by one hand. The X...[marked for Brian Hurley] was authored by a different hand and pencil. There is a probability of two (2) different authors on Ballot 7".

**Ballot #8:**

[69] This ballot displayed X's only, one for 7 of the 11 candidates on the ballot: James Cummings; Kelly Hall; Blair Hurley; Brian Hurley; Elsie Morrissey; Joanne Morrissey; and Dwight Snow. Ms. Petty said this about the marks: "The X's...[marked for Kelly Hall and Joanne Morrissey] were written by the same pencil...and...[the X's marked for Blair Hurley, Brian Hurley, Elsie Morrissey and Dwight Snow] were written by the same pencil....[The X marked for James Cummings] was a different pencil. There is a probability of three (3) different authors on Ballot 8".

**Ballot #9:**

[70] This ballot displayed X's only, one for 4 of the 11 candidates on the ballot: Peter Boleska; Kelly Hall; Brian Hurley; and Dwight Snow. Ms. Petty said this of the marks: "The X's...[marked for Peter Boleska and Brian Hurley] were written with two (2) different pencils. The X's...[marked for Kelly Hall and Dwight Snow] were written with the same pencil. There is a probability that there were three (3) different authors on Ballot 9".



**Ballot #10:**

[71] This ballot displayed X's only, one for 3 of the 11 candidates on the ballot, the fewest number of votes on any of the 10 ballots: Ryan Gates; Blair Hurley; and Brian Hurley. Ms. Petty said of these marks: "Ballot 10 was the only Ballot examined that had one author".

**Summary for Ballots 1-9:**

[72] Ms. Petty summarized her findings for the nine ballots for which she found multiple authors this way: "Ballots 1-9 all contained more than one hand as author of the checkmarks and/or X's. There was one author that could be tied to four (4) ballots. Those ballots are Ballot 3 #4, Ballot 5 #4, Ballot 7 #4 and Ballot 9 #3. These X's were all placed beside candidate Brian Hurley". [My note: #4 on Ballots 3, 5 and 7, and #3 on 9, refers to the numbers that Ms. Petty assigned to the votes on each ballot].

[73] This is the background to this matter. I turn now to discuss the issue I stated earlier in these reasons, against this background.

**DISCUSSION**

[74] Mr. Cummings asks in his Petition for an "order pursuant to s. 81(1)(c) of the *Municipal Elections Act* voiding the election". He claims that it was an "invalid" election, and he points to "irregularities in the voting process" that support his claim the election was invalid. I note, for example, these claims: a non-resident (Mr. Gregory, of course) voted; another non-resident ("Colleen", with her mother, the elder Ms. Morrissey) received a ballot but did not vote; an unlawful ballot (the one rejected at the judicial recount because eight names were marked off) was submitted; and the ballot box was not sealed before it left the Council Chambers on election night.

[75] It is convenient here to restate the guidance for voiding an election that I drew from Fichaud, J.A.'s judgment in *Warrington v. Lunenburg*: The Court may void an election not conducted according to the *Act*, but only after it finds both that the election was not conducted as directed in the *Act* and that the failure affected the result of the election. (Underlining mine) The Petitioner must prove both; and in civil matters, as here, the burden of proof is on a balance of probabilities. While some of the "irregularities" that Mr. Cummings highlighted in his Petition did not comply with the *Municipal Elections Act*, none of them singularly or even collectively, affected the outcome of the election. Let me explain.

[76] It is unclear whether Martin Gregory is a resident of North River. He was building a house in the Town when he voted on September 28, 2021, albeit after he swore an affidavit claiming to reside there. Sheila Hall, the Town Clerk and Returning Officer for the election, said that Mr. Gregory was one of 23 people whose names were not on the voter's list. The other 22 like Mr. Gregory, swore affidavits before they were allowed to vote. There was also some discussion about whether Mr. Gregory, who voted last that day, did so before or after 8:00 p.m.

[77] Counsel for Mr. Cummings cross-examined Ms. Hall closely on both points. As to the residency requirement, this was the exchange between them:

Q. Do you know where he listed as his residence when he filed for the building permit?

A. I believe it would have been Clarke's Beach, a couple of years ago.

Q. So, let me ask you this. If you knew a candidate was not eligible to vote, but they were prepared to sign a statutory declaration would you allow them to vote?

A. If they signed that under the guidelines, that's it, I have to let them vote.

[78] As to when Mr. Gregory voted that night, this was the exchange:

Q. Now, let's talk a bit about Martin Gregory. Do you recall if you locked the door after Mr. Gregory voted or before he voted, after he came in, do you recall?





A. It was locked after he cast his ballot.

Q. So he voted and then the door was locked?

A. Correct.

Q. Were the candidates who were there for counting the ballots, were they in before 8:00 or after Mr. Gregory voted?

A. They were in before. I told them all to make sure they were here before 8:00 because the doors would be locked.

Q. Okay. And you weren't going to let anybody in after 8:00, even the candidates?

A. After 8:00, no, the doors are locked as per the guidelines.

[79] There is evidence from other witnesses about when Mr. Gregory arrived at the polling station and whether he lived in North River on election day but none of it displaces Ms. Hall's evidence on both points. For example, both David Wicks and Ryan Gates expressed "beliefs" about when Mr. Gregory arrived to vote and Mr. Wicks, who took the picture of Mr. Gregory's house under construction, also believed that Mr. Gregory lived elsewhere than in North River. But their evidence, went no further than "beliefs" on these points and they offered no support for their views beyond their uncertainty.

[80] There is no doubt, however, that Ms. Hall handed a ballot both to Colleen (née Morrissey) and her elder mother, Ms. Morrissey, until Colleen recognized Ms. Hall's mistake and returned the ballot to her. Nor is there any doubt that someone cast an "unlawful" ballot by checking off the names of 8 candidates, when only 7 votes were allowed. As to whether the ballot box was taped when Ms. Hall transferred it from the Council Chambers to her office for storage overnight after the election, the evidence varies but once again does not displace Ms. Hall's clear evidence that it was taped, if only modestly.

[81] I accept Sheila Hall's evidence on these several points. With the exception of Kay Mercer, Ms. Hall's poll clerk on that day, Ms. Hall was focused primarily on administering the election. She had charge of the voter's list, she was responsible for

opening and closing the polls, and she was responsible for properly securing the ballots and ensuring that only eligible persons voted, and within the times allowed.

[82] For example, Kay Mercer was unsure when Mr. Gregory came into the building. She also says he told her, when she questioned him about his residency, that he was building a house in North River, but did not live there; but she could not say if Ms. Hall heard him when he said that to her. In any event, Ms. Hall says she relied on Mr. Gregory's sworn affidavit that he was a resident.

[83] If Martin Gregory was a non-resident when he voted in the election or if he voted after the time when the polls should have closed, his one vote did not affect the outcome. Colleen did not use the ballot that Ms. Hall passed to her by mistake and the "unlawful" ballot was pulled out at the judicial recount and removing it still did not affect the outcome of the election. I will discuss the impact of if and how Ms. Hall sealed the ballot box when I discuss the *real* issue that underlay Mr. Cummings' Petition to set aside the election. To which I turn now.

[84] It became clear to me as this matter proceeded that, despite Mr. Cummings' claim that the aforementioned "irregularities" invalidated the election, he was not, in fact, relying on them to void the election. Mr. Cummings' attention throughout this matter, even though he did not testify at the hearing, has clearly been on the alleged "irregularities" in the 9 ballots that were examined by Ms. Petty and their implications for the overall vote. As I will show.

[85] Mr. Cummings has a theory about how his vote count shifted from 110 votes after they were counted on election night to 111, after the first recount, by which he lost out to Brian Hurley. Mr. Hurley, of course, went from 107 votes on election night to 117 after the first recount, winning with 6 votes over Mr. Cummings. This is Mr. Cummings' theory: He thinks that someone, or possibly several people may have tampered with the ballots between September 28 and October 1, 2021. He thinks that Ms. Hall did not tape the ballot box securely before she removed it from the Council Chambers and stored it in her office. Mr. Cummings also believes that Ms. Hall preferred to have Brian Hurley to him on Council.



[86] Mr. Cummings' theory relies on Ms. Petty's evidence for its heft but he finds support for it in other quarters, as I will explain more fully later in these reasons. But first to Ms. Petty's analysis of the 10 ballots that Mr. Cummings submitted to her for review. Ms. Petty opined that 9 of the 10 ballots had multiple authors, ranging from 2 authors for ballots 2, 3 and 7, to 3 authors for ballots 1, 5, 6, 8 and 9, to as many as 5 authors for ballot 4. Ms. Petty expresses the likelihood of multiple authors as "probabilit[ies]"; and she also notes that one author "...could be tied to four (4) ballots (3, 5, 7 and 9); and, in each instance that author "...placed [X's] beside the candidate Brian Hurley".

[87] Mr. Cummings does not speculate about how multiple authors were able to mark on the ballots. He suggests that Ms. Hall did not tape the ballot box securely or at all and simply implies that persons unknown had ready access to it because of its compromised state. Thus, and presumably, they removed the ballots and marked them after the election, voting for candidates of their choice, most popularly Mr. Hurley.

[88] I tried to envision how this might have happened and this is the best I can come up with: The election took place on Tuesday, September 28, 2021. The recount took place on Friday, October 1, 2021. Sometime in the 48 hours between Wednesday morning and Friday morning, 1 group of 5 persons or 3 groups of 2, 3 or 5 persons, maybe separately or even together, had access to the ballot box, removed its contents and selectively marked X's on ballots of their choice for candidates whose names had not already been marked.

[89] The conspirators were limited to ballots on which all 7 candidates had not already been selected for fear of spoiling the ballot by adding 2, 3 or 5 more votes (and that raises the question if they made that mistake on the ballot that was removed at the judicial recount?). Of course, if Brian Hurley was the candidate of choice, they also had to vigilantly avoid ballots on which his name had already been selected. I articulate the preceding scenario with a healthy scepticism. Save for Ms. Petty's evidence there is no more to support it. While the scenario stretches the boundaries of logic and reason and common sense, what of Ms. Petty's evidence?

[90] I note when reviewing Ms. Petty's findings for the 10 ballots that she examined, a variation in how she approached her analysis. For ballots 1 and 2, she comments on the "formations of checkmarks and X's". From Ballot #1, for example she says: "Four (4) out of the five (5) checkmarks had different formations. Document examiners are taught that formations of checkmarks and X's usually become writing habits just as formations of letters become habits". For Ballot #2, for example, she says that "[t]he formation of the 'transformed' X's have the same formation as the hand that authored the checkmarks beside the names of Kelly Hall and Dwight Snow".

[91] But for Ballots 3 to 9, Ms. Petty shifts her analysis from commenting on the "formation" of the marks to the kinds of pencil (or even leads) that the authors used to make the marks. Thus, for Ballot #3, Ms. Petty notes that she examined the marks with a microscope and was interested in "which part of the X is made first and which is made last", rather than on the shape or "formation" of the marks.

[92] She says she can tell from microscopic examination which leg the author of the X mark put down first, by the way one "leg" of the mark is superimposed over the other. So, for example, following this method she concluded that the #4 X on Ballot #3, "...even though it crossed on the right the pencil that wrote it was different than the pencil that wrote the other X's. This would point towards a different hand as author".

[93] Ms. Petty does not explain why she changed her focus from how the marks were formed on the first two ballots, to what they were formed with on the next seven ballots. I acknowledge that there is some focus on the "process of formation" in identifying which legs of the X were put down first but it is nonetheless a significant shift from focusing on how the marks were "formed". Most of the marks on Ballots #1 and 2 are checkmarks, not X marks and it may be easier to identify who authors checkmarks from their formation than from which pencil and when it was used to make them; but Ms. Petty did not say so.

[94] Ms. Petty's analysis of Ballot #10 is even more perfunctory and simply conclusory, rather than demonstrative. She merely says of it that "[o]ut of the ten

(10) ballots, Ballot 10 is the only one that has one author". Ms. Petty does not say how she came to that conclusion whether by the "formation" of the three X's (1 for Brian Hurley) that appear on Ballot #10 or by examining the X's under a microscope to see which leg its author put down first.

[95] Ms. Petty's analysis, as I noted, progressed from commenting on the formation of the marks on the ballots to when the legs of the X's marks were laid down. However, she only explained how the latter process worked for the X's that appear on Ballot #3. For the next 5 ballots she simply reported her conclusions rather than how she came to them by examining the X's that appear on each of those 5 ballots.

[96] Ms. Petty noted the following points when counsel for North River cross-examined her:

- She did not examine the pencil marks on Ballot #1 under the microscope; but she should have done and included her observations in her report.
- The same person marked on Ballots #1 & 2 but she omitted to include that in her report.
- She was "most surprised" about Ballot #4 because it may have had as many as "five authors" mark on it.
- Different pencils may yield different marks even if the same person uses them.
- Checkmarks and X-marks are more difficult to compare than handwriting because they have so few strokes.
- She worked with a very small sample size.
- This was the first time she worked with original pencil marks.

[97] I have other misgivings about Ms. Petty's evidence. For example, she used the words "probability" and "probabilities" liberally throughout her report and again during her oral testimony. I thought she did so to describe the degree of certainty about her findings that she drew from examining the ballots. Both counsel asked Ms. Petty what she meant by the words and she never provided them a satisfactory answer.

[98] This exchange occurred between Ms. Petty and Mr. Cummings' counsel when he examined her about Ballots #7 and 8:

Q. Now, on this one [Ballot #7] you indicate that there's only a probability of two different authors. Given the variations that you've noticed on some of the other ones, when you've described this you've, you know – there's definitely two more authors and I think at one point you said certainly that there was more than one author. But on this one it's only a probability, can you explain to me why this one you would say probability as opposed to definitely or certainty that you've given on some of the other ones?

A. I think that there is a – it probably should have noted more of an X (unintelligible) instead of a probability on this. But at the time I probably was – just knowing how I am with the examination process, I'm giving a chance that perhaps someone did pick up a different pencil, you know. But the X's are formed so differently until - this is another one that I would really have to be convinced if someone said that only one author, I would have had to have stated because the X, number 4's X is so different. And so probably the probability of two different authors is what I really feel about this is that there are two different authors on this and it probably should have been more clearly stated. That I probably gave the thought of maybe, you know, something happening with a pencil or picking up a different pencil. But this is just so different until I think that there should have been probably a higher opinion given than just probability.

Q. Okay. Ballot 8. Indicate to the court what your conclusions were with respect to this ballot.

A. Okay. So a probability of three different authors. The X (unintelligible) with 1 is a different pencil than what wrote 2 and 6. And what is labelled 3, 4 and 5 and 7 on the same pencil. So 3, 4, 5 and 7 were the same pencil but the pencil that wrote number 1 and the pencil that wrote 2 and 6 were different. So, that would lead me to think that there could be a probability of three different authors because of the different leads in the pencils.



[99] I read and reread that exchange several times but quite frankly, I cannot understand with any clarity what it is that Ms. Petty is saying about the certainty of her findings for those two ballots. This lack of clarity permeated Ms. Petty's evidence and I struggled both throughout her testimony and when I reviewed her transcribed evidence to understand the bases that she relied on for the findings she reported.

[100] Counsel for the Town cross-examined Ms. Petty about the Ballot #1 and if she had examined the pencil marks under the microscope to ascertain in what order the marks were made:

Q. But you've determined that 1 and 2 are the most alike, even though number 1 is entirely in the box and number 3 is entirely in the box, as is number 5.

A. That is correct.

Q. I don't see any analysis here concerning the pencil leads in Ballot 1, you didn't get into that at all?

A. You are correct and I apologize for that, I just realized that. It was not intentional but you are correct and I just realized that.

Q. So you have no – you didn't put your mind to whether there was a change in pencils (unintelligible).

A. I would have to go back and look at my microscopic images that I took pictures of and I do apologize.

Q. It's not included in your report in any event.

A. It is not and that – it should have been.

Q. So, it appears to me that your opinion as to the authors of this ballot is based entirely on the way the - the similarity in the shape of the stroke, is that right?

A. It would be – yes, it would be.

(Underlining mine)



[101] In other instances, Ms. Petty said she relied on microscopic analysis of the X marks to determine the order in which the marks were made and also if their authors stroked down or up in making it. She also conceded that different pencil marks did not necessarily mean more than one author as she confirmed for the Town's counsel in this exchange:

Q. Ms. Petty, a different pencil doesn't necessarily mean a different author, correct?

A. That is correct, yes.

(Underlining mine)

[102] Finally, I note Ms. Petty's inexperience working with pencil marks, as noted in this exchange with me, near the end of her testimony:

Q. The other question I have is how much experience do you have with pencil strokes?

A. I do not have very many cases with pencil strokes, and this was a very valuable case for - because of that. So, I was very glad to get it because of that because we don't often have cases in this generation with pencil, you know, like there would have been in a previous time.

Q. I don't have very many cases, you say, now how many would it have been? Can you think in your career if you've had other instances of pencil strokes examination?

A. As far as original documents where I'm allowed to see the originals, I believe that this was my first examination. I've had other examinations that involved pencils with copies but not getting to see the originals.

Q. How many would you have had - again, I wouldn't hold you to it so to speak but I mean in general terms, how many did you have where you were examining copies of documents with pencil strokes on them?

A. I would say probably three or four.

(Underlining mine)

[103] I will not rely on either Ms. Petty's report or her *viva voce* evidence to find that multiple authors marked on 9 of the 10 ballots she inspected because: She was



inconsistent in her analysis of the ballots, employing two methodologies, one based on the formation of the strokes and the other based on which leg the author of the X marks laid down first; she was inconsistent in how she reported her conclusions from examining the ballots, explaining only a sample in detail and then summarizing the bases of her conclusions for the rest; she worked with a very small sample; she had limited or no experience examining pencil marks; she agreed that the same person can make different marks by using different pencils; and she was “surprised” at some of her conclusions, the number of authors on Ballot #4, in particular.

[104] Additionally, there are two other factors to consider: First, Ms. Petty’s report does not displace the profound doubts I expressed earlier about the inference that Mr. Cummings wishes me to draw that the ballots were tampered with between election night and the first recount two days later, of which there is no other evidence than what may be inferred from Ms. Petty’s report; and further, perhaps most importantly, the differences in the numbers of votes for Mr. Cummings between election night and the first recount can be explained by another cause: human error, as I will show.

[105] Sheila Hall, as I noted above, is the Town Clerk for North River and was Returning Officer for the election on September 28, 2021. Ms. Hall hired Kay Mercer as Poll Clerk and to help her carry it through. Ms. Hall and Ms. Mercer arrived at the Town Hall just before 8:00 am on election day. Ms. Hall gave Ms. Mercer rudimentary instructions for her job that day and opened the polls to voting at 8:00 am. Essentially, Ms. Hall directed Ms. Mercer to mark voters’ names off the voters’ list as they came in to vote and get their contact information for COVID tracing, if needed. Ms. Hall handed voters a ballot, then retrieved it from them and placed it in the ballot box when they filled it out.

[106] After Ms. Hall closed the polls, she and Ms. Mercer started counting the votes cast for each councillor. Ms. Hall drew the ballots from the ballot box and read the names of the councillors that appeared on it and Ms. Mercer “tallied” them up to get the total for each of them. Ms. Mercer noted her discomfort with the methodology they employed, both for the count on election night and the first recount, Ms. Mercer called on Ms. Hall or someone present to “check her Math”. I set her concern out earlier in these reasons, but it bears repeating here:



I would put Ryan Gates [for example] and add up the three different amounts that I got from each individual tally sheet and then add that up. And I did that with every one of the people that were there. When I did that, I confirmed again on each sheet and then tallied it up again and added it up. At that point I said I would like somebody to confirm my Math for me. Nothing moved. So, I just said, okay, I really want for someone to check my Math, you know, I'm not perfect but I would like for someone to check my Math.

(Underlining mine)

[107] This is how Ms. Mercer expressed her concern after counting the votes on election night and she did the same after the first recount. In each instance, Ms. Hall declined her request and simply pressed on.

[108] Ms. Mercer may have been prescient in observing the possibility of making mistakes in counting the votes or “tallying” her numbers or she may simply have been exercising an abundance of caution; because she did make a mistake at the first recount, albeit not as to Mr. Hurley or Mr. Cummings, but about the number of votes she credited to Dwight Snow; and again not so as to affect the outcome of the election or even the result for Mr. Snow who polled the third largest number of votes.

[109] This, however, is the relevance of Ms. Mercer’s mistake: It demonstrates the susceptibility of their process to error. Ms. Hall and Ms. Mercer had been at the Town Hall for more than 12 hours before they counted the ballots on election night; they had received over 300 ballots, with the number of votes exceeding 1500, and the votes were distributed over those ballots and then they had to assign the votes amongst the 11 candidates.

[110] And they did all that manually. It is reasonable to anticipate error and I am not surprised that mistakes happened. Statistically, the 6 votes by which Mr. Cummings lost out to Brian Hurley after the first recount represents 0.004% of the votes that were cast in the election. This was the first time that Ms. Mercer had worked on a municipal election but she had previous experience with federal and provincial elections. In those other instances, Ms. Mercer received more extensive training for her duties and this, no doubt, influenced her concern to have someone “check her Math” after counting and recounting the votes in the municipal election.



[111] Ms. Mercer compared the training she received for the federal election to what she had for the municipal election in this excerpt from her testimony:

Q. And I understand that you didn't really have a lot of training for municipal elections prior to this one?

A. I had no training other than the few minutes that morning of the election and that was the only training I had.

Q. You had training for federal elections before?

A. Yes, I did.

Q. Had you actually acted as poll clerk for a previous federal election?

A. I didn't act as poll clerk, but like I said, I was supervisor and I had to be trained on poll clerk, returning officer, all the positions that would be available for the federal election. I got the training for every one of them. So, being supervisor, I had to know the position, I had to know exactly what had to be done. So, if there was a question throughout the day, even though I didn't act as a poll clerk and do the duties, I had to be 100 percent knowledgeable on what was supposed to be done that day.

[112] It also bears noting that the results of the recount were consistent with the results that the judicial recount established, save only for the single vote that both Mr. Cummings and Mr. Hurley lost on the latter when a ballot was rejected because it had X marks next to 8 names when only 7 votes were permitted.

[113] Counsel for Mr. Cummings implied that Ms. Hall, or someone known to her may have altered the number of votes that Brian Hurley received because she wanted Mr. Hurley to be on council, as an exchange between counsel and Ms. Hall during cross-examination that I quoted earlier in these reasons shows. There is no evidence to support that Ms. Hall altered the number of votes that Mr. Hurley received or even knew of any altering, nor that she had any motive to do so, all which she resolutely denied.

[114] And that brings me to the last point that is relevant to what happened to cause a change in the number of votes between election night and the first recount: If the

number of votes changed because ballots were altered between the two counts, whether by one person doing so, or 2, 3 or even 5 persons, that required deliberate action and it may have been a complicated process to achieve it, depending on the number of people who were involved in altering the ballots. There is, as I have repeatedly stated throughout these reasons no evidence that ever happened, nor even that anyone was ever motivated to do it; save for the circumstantial evidence of Ms. Petty's report and her testimony, which I reject.

[115] My finding there is no evidence of tampering with the ballots aligns symmetrically with what Mr. Cummings has said repeatedly during these proceedings, as it first appeared in paragraph 31 of the Petition he filed on November 10, 2021: "31. The Petitioner does not allege intentional wrongdoing by any particular identifiable individual" (Underlining mine). Mr. Cummings said the same ("14. I do not allege intentional wrongdoing by any particular identifiable individual.") in the affidavit he filed to support his Petition as did candidates David Wicks and Ryan Gates, and Mr. Cummings' counsel for the recount process Robert Simmonds, Q.C., in the affidavits all three filed to support Mr. Cummings' Petition.

[116] In the absence of intentional wrongdoing, the most probable cause of the difference in the numbers of votes Mr. Cummings received from the count on election night and from the recount was human error. The recount corrected the error and the judicial recount affirmed the result.

[117] Overall, I find that Mr. Cummings failed to prove on a balance of probabilities that the manner in which the election was conducted violated the *Municipal Elections Act*, or even if it did, that the failure affected the outcome of the election. I dismiss his Petition.

## COSTS

[118] Mr. Cummings seeks his costs as part of the relief he asks for in his Petition. There was some uncertainty about the outcome of the election and it is in the best

interests of the governance of the Town of North River that it was addressed, at some considerable cost to Mr. Cummings, no doubt. I make no order for costs

### **SUMMARY AND DISPOSITION**

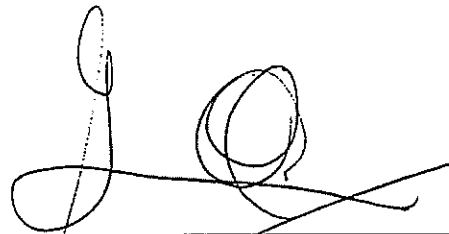
[119] James Cummings was a candidate in the municipal general election held in the Town of North River on September 28, 2021. Mr. Cummings was assigned the last council seat when the votes were counted on election night. Two days later, following a recount Mr. Cummings lost his seat when his nearest rival overtook him by 6 votes. A subsequent judicial recount confirmed the outcome following the first recount. Mr. Cummings applied under the *Municipal Elections Act* to void the election and for an order requiring it to be held again, alleging irregularities in how the election was conducted.

[120] The Court dismissed the application. Mr. Cummings failed to prove that any irregularities which may have occurred affected the outcome of the election. It ordered each party to bear its own costs.

### **ORDER**

[121] In the result, I order that:

- 1) The Petition is dismissed.
- 2) Each party will bear its own costs.



**GARRETT A. HANDRIGAN**  
Justice