

Citation: *Yeung Racco v. Martow et al.*, 2014 ONCJ 498

**ONTARIO COURT OF JUSTICE**

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B E T W E E N :

SANDRA YEUNG RACCO

Applicant

- and -

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GREG ESSENSA, CHIEF ELECTORAL OFFICER OF ONTARIO,  
ANNA DI RUSCIO, RETURNING OFFICER FOR THE ELECTORAL  
DISTRICT OF THORNHILL,

SHARON ROSSI, ELECTION CLERK FOR THE ELECTORAL  
DISTRICT OF THORNHILL,

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GENE BALFOUR, DAVID BERGART, ERIN GOODWIN, CINDY HACKELBERG

- and -

GILA MARTOW

Respondents

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A P P L I C A T I O N F O R R E - C O U N T

BEFORE THE HONOURABLE JUSTICE P.D. TETLEY

on June 18, 2014

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at Hamilton, Ontario

APPEARANCES:

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J. Siegel, M. Francis Counsel for the Applicant

G. Janoscik Counsel for G. Martow

J. Ayres, J. Batty, S. Lemke Counsel for Elections Ontario

WEDNESDAY, JUNE 18, 2014.

R E A S O N S F O R J U D G M E N T

5 TETLEY, J: (Orally)

Background Information:

10 In new judge's school they tell you that there  
are a couple of rules you should follow. One is  
try not to sit after 4:30 in the afternoon and  
never make a decision after that point in time  
if you can avoid it. Tonight the exigencies of  
15 the moment prevent studied deliberation of the  
matter in issue. I was thinking, when I read  
the materials that you have collectively managed  
to put together in very short order, that many  
of you were also wishing there was a little  
enlargement of time permitted by the Act itself.  
20 Consequently, I am indebted to all of you. I  
appreciate this is an unusual circumstance that  
brings us all together. It is an unusual  
procedure, generally, and in fact a unique one  
in my experience.

25 This is not the stock and trade of a criminal  
court judge but the thought process involved and  
the analysis is something that we apply on a  
daily basis. I have certainly been aided and  
30 assisted by the high quality of the materials  
you have all provided. I want to thank you for  
the materials. I am mindful that they were

prepared in very short order. I am certain that behind every one of you is one or two others that have been working hard over the course of the last few nights to bring this application before the court.

I am also mindful of the fact that there are a lot of people that have a direct or indirect interest in this Application. Fortunately, the outcome of the election doesn't turn on this decision. In a democracy that might well be the case when we know the results of the election. The future of the two people most directly involved in the application, their immediate future will be impacted, along with those that have supported them throughout the election process.

More importantly I am mindful of the fact that we are dealing with 50,000 voters. 50,000 individuals chose to exercise their franchise by voting in this election. Of particular concern are the 44,000 plus that cast their votes in favour of the two candidates most directly affected by the results of this application.

This will be a true oral judgment. I will provide written reasons in a more coherent fashion subsequently. I will endeavour to do that in short order.

I will briefly review the application record

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itself. I propose to cite the highlights of the affidavit material that has been filed on behalf of the respondent and the election officials which has been helpful in making the determination that I have made.

I am also indebted to our Law Clerk here at the Ontario Court of Justice, Sara Amini, for her help. This matter, as you know, has unfolded fairly rapidly this afternoon. I was minding my own business - at least I thought I was - when the assignment came my way shortly after 3:00. So I have had a crash course in the Elections Act. I have managed to take a look through the Act. I don't know why I never did that before. It is quite an interesting piece of legislation that covers almost everything one can think of to do with elections. We will focus primarily on a limited portion of that Act.

The Application:

The Applicant, Sandra Yeung Racco, makes application for an order seeking a recount of ballots in respect to the recent general election in the Province of Ontario which was held on June 12, 2014. The application is based on Section 71 of the Election Act. A claim for costs was also made but I suspect the primary focus of the application is the request for the recount itself.

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The background information is not in dispute; it is set out in the application record. A 2014 general election in the Province of Ontario, as we all know, was conducted on June 12<sup>th</sup>. Ms. Yeung Racco was a candidate for the Liberal party in the electoral district of Thornhill and Gila Martow was the candidate for the Progressive Conservative party in the same electoral district. There were four other candidates for election in the electoral district of Thornhill.

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Ms. Anna Di Ruscio - and I apologise if I'm doing a disservice to the pronunciation of any of the names - is the returning officer for the electoral district in issue and Sharon Rossi was the election clerk for that same electoral district.

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Following the close of polls on June 12, 2014, Elections Ontario officials advised Ms. Yeung Racco's campaign that it received tallies from all polls and that Ms. Yeung Racco, based on the tallying of the votes cast, had been elected with 21,837 votes compared to the 21,752 votes received by Ms. Martow, the apparent second place finisher. Those results, I gather, were posted by the election officials on their website and it was believed, I think by all concerned and widely reported, that Ms. Yeung Racco had in fact been elected.

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The total votes cast, as I indicated at the outset, between the two candidates was 44,069. There were 275 polls election day. Some of the polls, I gather, feature multiple polling stations and four advanced polls. A total of approximately 50,090 votes were cast in all during the course of the provincial election in Thornhill. The vote differential between the two candidates was widely reported as being 85 votes. That was the recorded differential on election night when the results were posted shortly before midnight, on Election Ontario's website. It appeared, as I've noted, that the victor was Ms. Yeung Racco.

The votes that were reported, as I understand the affidavit material that has been filed, particularly from election officials, were unofficial results. The official tabulation that takes place in every election, was held the following day, June 13, 2014 pursuant to the provisions of Section 65 and 67 of the Elections Act.

Both Ms. Yeung Racco and Ms. Martow had their respective campaign managers in attendance. Their representatives were provided with copies of the election night returns, a document that is entitled *Unofficial Return From The Records*. We have a copy of that document in the affidavit materials. This document confirmed the election night results and indicated the unofficial

results that showed Ms. Yeung Racco to be the victor by 85 votes.

During the subsequent official tabulation the Elections Ontario officials read out the hard copy tally reports returned from the deputy returning officers in charge of each poll. I gather these are a summary of the votes from each poll. The ballots cast are not reviewed individually. The summary, or tally of the votes, is noted on an envelope that contains the ballots. The vote totals are read out and added. At the conclusion of the reading of these reports it was determined that there was an 85 vote difference in the tallies received, but this time the tallies totalled as follows: Ms. Yeung Racco 21,783 and Ms. Martow 21,868. This discrepancy, surprisingly and perhaps coincidentally, totalled 85 votes but this time in favour of Ms. Martow. As a consequence Ms. Di Ruscio declared that Ms. Martow had been officially elected.

Subsequently, officials from Ms. Yeung Racco's campaign, based on reports from scrutineers present for the counting of the ballots on election night at the various polls, identified what the application record suggests, are numerous inconsistencies between the tallies for Ms. Yeung Racco and Ms. Martow. These so called "inconsistencies" were included in the vote tallies in the election night tabulation results

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report. Two ballots cast in favour of Ms. Yeung Racco were asserted to have been improperly rejected. These ballots are referenced in the affidavit material of Ms. Yeung Racco's campaign manager.

The existence of these assertions of material fact is supported in the affidavit of Milton Chan who was, and is, I gather, Ms. Yeung Racco's campaign manager. Mr. Chan was in attendance at the official tabulation the following day.

In addition another scrutineer, Paul Crisostomo, has provided affidavit evidence in the applicant's materials that a ballot cast in one of the polls, that indicated a contended clear intention to vote for Ms. Yeung Racco, was improperly rejected because of an incidental mark in the vicinity of the name of another candidate.

The Jurisdiction of the Court:

Section 70 and 71 of the Election Act provide that a judge of this court may appoint a time and place to recount votes cast at the election in an electoral district. A recount may be ordered upon the application of a candidate or an elector if it is made to appear in the affidavit material, (Section 71(1)(a) and (b)) that, (a) "A deputy returning officer has

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improperly counted any ballot or improperly rejected any ballot or made an incorrect statement of the number of ballots cast for any candidate." Or, (b) "The returning officer has improperly tabulated the votes." Or, and I should reference Subsection (c) in passing which refers to Subsection 67(2) of the Elections Act, which is not applicable here, that directs that, "When a difference between two candidates is 25 votes or less the returning officer must make the application for a recount." The returning officer is mandated to make the application in those circumstances.

Consequently, the applicant, this is not disputed, is entitled to bring this application and the court has jurisdiction to hear the application. I am satisfied the appropriate parties have all been notified. We have affidavits of service confirming that.

The applicant contends that the sworn affidavit evidence, provided by the applicant or on her behalf establishes that the conditions of both Subsection 71(1)(a) and 71(1)(b) have been met. Namely that the deputy returning officer has improperly rejected a ballot, or more than one ballot, and that the returning officer has improperly tabulated the votes. I have indicated the affidavit material filed in support of the application, which I have read, including affidavits from Mr. Chan, the campaign

manager, and Paul Crisostomo. I have considered the contents of these affidavits.

In response, in addition to oral argument, I have an affidavit received from Haley Gotfrid, who is the campaign manager for Ms. Martow. Ms. Gotfrid indicates in her affidavit that she had understood the result of the Ontario Provincial election for the riding of Thornhill was that the election had been won by Ms. Yeung Racco. I must say I would think that assessment would be shared by most of the voters of that riding, at least on election night, and that Ms. Martow had placed second by a margin of 85 votes.

Ms. Gotfrid indicates that on June 13<sup>th</sup> she attended at the official tabulation of results conducted by the returning officer for Thornhill. While attending the official tabulation the returning officer read out the results of each poll, as indicated by the *Statement Of Polls*. As the results were being read out Ms. Gotfrid indicated she compared the results to the certificates of result of polls that her campaign scrutineers had been provided on election day. It was evident to her that there were inconsistencies between the statement of polls and the certificates of result of polls. As a result, the candidate for whom she was the campaign manager, had in fact received 85 more votes than Ms. Yeung Racco. Ms. Gotfrid concludes her affidavit, and it was a point that

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forms the essence of the submission in response, that there was no dispute taken by the applicant to the tabulation of the statements and polls by the returning officer. By that I take it to mean there is no dispute regarding the mathematical calculation or tabulation of the results which now see Ms. Martow the winner of the election by 85 votes. There is reference in the affidavit to the fact that a recount is a costly proceeding, not only for the elections officials who bear primary responsibility for the process, but also to Ms. Martow. I have not lost sight of that fact.

In addition to the affidavit materials filed and submissions received from both applicant and respondent, helpful information has been received from the election officials themselves. I have reviewed and considered the materials filed on behalf of the Chief Electoral Officer of Ontario and I am indebted to the counsel that have attended here today on behalf of the Chief Electoral Officer.

From the review of those materials, the process with respect to the determination of the official and unofficial election results is along the following lines. After the June 12, 2014 election, once the returning officer received the required reports from all of the polling stations, the returning officer conducts a tabulation. Subsequently, at the official

5 tabulation, which occurred in this case the following day, the returning officer compiles the results for each candidate from the reported results from each polling station. Ballots are not counted at the official tabulation. The ballots are sealed and secured on election night immediately after they are counted by election officials on site at the various polling locations within any given electoral district.

10 Candidates and their scrutineers are entitled to be present at the official tabulation. I don't think the candidates were present but they both had their campaign managers or close representatives taking part in the official tabulation process. At the conclusion of the official tabulation the returning officer declared the candidate with the most votes to be elected and the returning officer reported these results to the Chief Electoral Officer and returned the election documents to that office.

25 At the official tabulation the unofficial election results previously submitted by the election officials from the various polling stations via telephone on the night of the election, are reviewed. It was these unofficial results that were erroneously, if the current count is correct, reported on election night. Reliance on these unofficial vote tabulations led to the Liberal candidate being concluded to have won the election when the official count

the next day showed a different result.

The differences between the two tallies are referenced in the materials filed. The discrepancies in the vote totals are attributed to transposition and other minor clerical errors without further explanation.

At the conclusion of the official tabulation, the returning officer, as I have indicated declared the candidate with the most votes to be elected. That resulted in Ms. Martow being declared the winner of the Thornhill riding.

The affidavit of Ms. Di Ruscio, the returning officer for the electoral district of Thornhill, indicates that she conducted the official tabulation as required pursuant to Section 65 and 67 of the Elections Act on June 13, the day following the election. The returning officer didn't declare an elected candidate before this time although the media did. After the polls were closed the unofficial tabulations were made available due to public interest. As I have indicated, this occurred shortly before midnight on the night of the election. These unofficial results were, I gather, telephoned in to Ms. Di Ruscio's office and were in turn made available to the public on the Elections Ontario website. The vote tallies indicated Ms. Yeung Racco as having the most votes by a plurality of 85. On June 13<sup>th</sup>, at the commencement of the

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official tabulation after 2:00 p.m., the returning officer provided the representatives with their unofficial candidate vote total. Over the next couple of hours they compared those results with the actual forms filled out by election officials in order to catch any clerical errors. The returning officer noted that there were some data entry errors and reviewed them with the representatives. At the conclusion of the official tabulation the returning officer declared Ms. Martow to be the winner by the same 85 vote plurality.

That is a rather imprecise summary of the evidence adduced on the application. I apologise to all concerned that I am not able to do greater justice to the materials presented in the brief time permitted. The applicant asserts that there are two main grounds for the application to be granted: First the question of a prospect that some ballots have been improperly rejected or that have not been counted as they might have been. It is asserted in the material and the affidavit evidence filed to support this submission that certain ballots were rejected that might be subject to dispute. Accordingly, given the closeness of the race, a consideration of those ballots, two are referenced specifically, should be given and a recount ordered.

I think the respondent's position in reply is a reasonable one. There must be spoiled ballots in every election, ballots where while one candidate appears to be indicated there is a mark in relation to another candidate's name that might make it difficult to ascertain the voter's intention. I gather, and it is conceded by the applicant, that as a matter of course there are a number of people who attend to vote but actually don't cast a vote. Their ballots are returned without any candidates being indicated. That much is conceded by the applicant. If that were the only ground I would accept the respondent's position with respect to the inadvisability of a recount on those grounds alone.

The more difficult issue arises from the dichotomy between the unofficial and the official tallies. The unofficial tallies manifested themselves shortly before midnight. This count would have seen the Liberal candidate the victor by 85 votes. These vote totals were subsequently found to be unreliable on the next day when a further official count was conducted. Based on a review of the tally of the votes cast, it may be that a minor clerical error or some other transposition of numbers might have accounted for the discrepancy between the official and unofficial vote totals. The basis for that conclusion is not made clear, even in the material of the returning officer.

Applicable Legal Considerations:

I'll turn now to the legal considerations that apply to the determination of the application. In a judgment of Justice DiGiuseppe on a similar application back in 2007 involving John Rafferty as the applicant. (See Rafferty v. Mauro, 2007 ONCJ 573). I do not believe there is any dispute that the applicable process is properly set out in the analysis in that judgment. I don't propose to read it but I will read some of the highlights.

Section 71 of the Election Act states as follows,

"For the purpose of determining the candidate who obtained the highest number of votes and within the four days, Sunday being excluded, following the official tabulation made by the returning officer, a judge may appoint a time and place to recount the votes cast at the election, in the electoral district upon the application of a candidate or elector if it is made to appear by affidavit that (a)...", and I'll just read (a) and (b) because they are the Subsections that apply here, "...a Deputy Returning Officer has improperly counted any ballot or improperly rejected any ballot or made an incorrect statement of the number of ballots cast by any candidate."

While I appreciate the campaign manager for the Liberal candidate may suggest that that is exactly what happened and has proffered a couple of examples to support the contention, I do not

5 think the *Act* should be interpreted as broadly as to suggest whenever a circumstance involving a disputed ballot occurs, that a recount automatically ensues. I can't imagine that is the law or we would be having recounts, as the respondent's counsel suggests, in probably every election with respect to every candidate.

10 I think we are primarily concerned here with Subsection (b) of Section 71. That is, whether or not a *prima facie* case has been established that the returning officer has improperly tabulated the vote.

15 Reference to Section 67(2) which deals with margins of victory of less than 25 votes. I appreciate that section does not have application here. What is particularly germane is the fact that the margin of victory is very slight, particularly when one views the vote differential as between the two candidates amounts to 85 votes within the total of 44,000 plus votes cast for those two candidates. That is a very slim margin. I appreciate there is limited judicial guidance here because these recounts are so rare. But I have to think that consideration of such a close vote has to be a significant factor in the deliberations of the presiding judge in the determination as to whether or not discretion might be exercised to direct a recount, particularly when the count of those votes, unofficial or not, is found to vary

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from morning to night.

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The onus is on the applicant to establish one of the grounds set out in Section 71(1). The onus is discharged, I accept counsel's submission that it is a relatively modest standard, if "it is made to appear by affidavit" that one of the enumerated grounds exist. How the words 'made to appear' are to be interpreted are referenced in a citation from Justice Roach in another decision, Swanson Election, [1963] 20R 525 Court of Appeal. And Justice Roach states as follows,

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"The statute requires that it be made to appear that one or other of those matters in fact occurred. He must...", in this case she must, "...establish a *prima facie* case, and he does not do that by merely stating the he believes that one or other of them occurred."

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One has to be mindful, when there is reference to ballots that might have been counted that perhaps weren't counted, that those are ballots that in the view of a campaign official or a party official, that should have been counted. I do not think that is what the test in Section 71(1) was designed to address.

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One has to look at the facts objectively and consider whether or not the *prima facie* threshold has been met. One has to consider the affidavit materials in their entirety. There are a litany of errors that were cited by Justice DiGiuseppe in the *Rafferty* case. The

vote differential between the two candidates in that election was even less: 41.

In the case before me, it is difficult to ascertain from the affidavit material, including reference to the affidavit material from the independent party, if I can characterise the elections officials in that way, as to exactly what happened here. I appreciate we can speculate on that issue. Perhaps the phone call to the election official detailing the results on the night of the election were erroneous or a number got transposed or there were, as referenced in the returning officer's affidavit, perhaps minor clerical errors. Having read all the materials, and I did have a chance to read all the materials, one cannot ascertain exactly what transpired.

It is interesting to note in the legislation that even if the "threshold" consideration has been met there is still discretion in the Court, an overriding discretion, as to whether or not to order a recount. In an admonition from Justice Walker, the Saskatchewan Court of Appeal, in another case called Goos v. Lampard, [1986] Carswell Sask. 156 (Sask.Q.B.) I note,

"Recount proceedings will not be ordered as a matter of course. It is the duty of the Court to prevent unnecessary proceedings."

Particularly, and I'll add, costly ones like

this. "But there can be no hard and fast rule as to the exercise of this judicial discretion, for the moment that happens the judicial discretion of the judge is fettered."

This case provides direction that not every close election warrants a mandatory recount, unless there is a mandated review. Even in those circumstances the judge has discretion even if the vote differential is only 25.

The conclusion I have reached here is that the discrepancies that saw the unofficial results from the night of the election indicating an 85 vote victory for the Liberal candidate, Ms. Yeung Racco, with the subsequent official tally of these same results indicating that Ms. Martow had won the election by the exact same differential cannot be reconciled.

I appreciate one count is unofficial and it's the official result that counts. But I do not know how the electorate in Thornhill, particularly the 44,000 plus people that voted for the two candidates, can be assured that their votes were properly counted. It may well be that there was a clerical error or a mistake on the night of the election that resulted in the unofficial results being tallied incorrectly. I appreciate these results are posted on an unofficial basis. I do not wish this conclusion to be viewed as a critique of

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5 the election officials. I am not certain that anything is amiss. But isn't that what an election is all about? To determine with certainty who has been elected by the democratic will of the majority of the voters.

10 I am certain that the unofficial return from records brought great joy to the camp of Ms. Yeung Racco on the election night. The 85 vote differential similarly brought consternation to her opponent's camp.

15 It is difficult, based on the record here, to know with certainty, whether the results of polls that were officially tabulated accurately represent the will of the voters. I am none the wiser for the affidavit material filed. I found the affidavit of the returning officer to be particularly compelling. I am quite certain Ms. Di Ruscio tallied the votes accurately. She would have been surrounded by representatives, maybe not literally but they would have been on scene, of the two candidates in aid of that task. There is no dispute, as responding counsel indicates, that those were the numbers. I am just not certain we can be assured that those are the numbers.

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30 The accumulation of the concerns referenced by the applicant are persuading in my view. I do not want to unfairly minimize the ballot issue but I conclude it is a relatively modest one.

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However, when the vote is so close, in terms of one candidate being elected or not, it seems to me that the threshold consideration, as referenced in the legislation, must be given a "liberal" interpretation. I cannot imagine that those who voted for whatever candidate is subsequently concluded to have won, or alternatively lost, this election would be satisfied with anything less. I appreciate the electorate doesn't make this determination, a criminal court judge of the Ontario Court Of Justice makes this determination. That said, I am mindful of the fact that there are a lot of people interested in this proceeding who are not here, in fact there are 50,000 of them who reside just down the road.

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I conclude with a comment that is attributed to Justice Cory. It is referenced in the other case that was cited by applicant's counsel that deals with when is a ballot a valid ballot. It is a comment in the case of Hague v. Canada, Chief Electoral Officer, 1993 2 S.C.R. 995 at page 1058 in which Justice Cory indicates the following.

"The right to vote is a fundamental importance to Canadians and to Canadian democracy."

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And to that I would add that every Canadian, specifically for the purpose of this application, every voter in the riding of

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Thornhill, should rest assured that the vote they cast in the democratic process last week has been properly tabulated and the candidate who secures the most votes duly elected. After reading this application material and listening to the concerns raised by the applicant, in view of the noted discrepancies, and given that the election results hang in the balance of a relatively modest number of votes when considered in the context of the whole, I conclude the electorate cannot be assured that their democratic will has been accurately determined absent the requested recount.

In my view, for those reasons, the applicant has established a basis *prima facie* case for the requested relief. I conclude that there is, at the very least, a case to be addressed and that the only way to address that case is by the requested recount. The recount is therefore ordered in relation to the grounds referenced in both Section 71(1)(a) to a lesser extent and of more significance, for the reasons I've endeavoured to elicit without great clarity given the hour and the exigencies of time, under Section 71(1)(b). I think the electorate would demand nothing less, quite frankly, in these circumstances.

An order shall therefore issue for the reasons I've referenced in the form, if that's acceptable to all concerned, indicated at Tab 3

of the materials provided on behalf of the Chief Electoral Officer of Ontario directing that a recount be held.

M A T T E R   A D J O U R N E D

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CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

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I, **Tricia Rudy, C.C.R.**, certify that this document is a true and accurate transcript of the recording of **Yeung Racco v. Martow et al** in the Ontario Court of Justice, held at Newmarket, Ontario, on June 18, 2014 taken from Recording 4911-303091313/14 which has been certified in Form 1.

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(Date)

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(Signature of authorized person)

Transcript Order Received:	July 10, 2014
Transcript Completed:	September 16, 2014
Notified Ordering Party:	September 16, 2014

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NOTE: Photostat copies of this transcript are not certified and have not been paid for unless they bear an original signature in blue and accordingly are in direct violation of Ontario Regulation 587/91, *Administration of Justice Act*, January 1, 1990.