THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2007 SKCA 90 Date: 20070827

Between: Docket: 1376

The Canadian Federation of Students and The Canadian Federation of Students-Services

Appellant (Added Respondent)

- and -

Robin Mowat

Respondent (Applicant)

- and -

University of Saskatchewan Students' Union

Respondent (Respondent)

Between: Docket: 1377

University of Saskatchewan Students' Union

Appellant (Respondent)

- and -

The Canadian Federation of Students and The Canadian Federation of Student Services

Appellant (Added Respondent)

- and -

Robin Mowat

Respondent (Applicant)

Coram:

Jackson, Richards & Hunter JJ.A.

Counsel:

Todd J. Burke & Andrew W. McKenna for The Canadian Federation of Students and The Canadian Federation of Students-Services
Jennifer Pereira & Reché J. McKeague for Robin Mowat
Grant Scharfstein, Q.C. for the University of Saskatchewan Students' Union

Appeal:

From:	2006 SKQB 462
Heard:	June 11, 2007
Disposition:	Dismissed
Written Reasons:	August 27, 2007
By:	The Honourable Mr. Justice Richards
In Concurrence:	The Honourable Madam Justice Jackson
	The Honourable Madam Justice Hunter

Richards J.A.

I. Introduction

[1] These appeals concern a referendum on the question of whether the University of Saskatchewan Students' Union should join the Canadian Federation of Students (the "Federation").

[2] The referendum was held in the fall of 2005. A majority of students voted in favour of joining the Federation. The respondent Robin Mowat then applied to the Court of Queen's Bench pursuant to *The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2 ("the *Act*") and obtained an order declaring the referendum to be of no force or effect.

[3] The Federation and the Students' Union now seek to overturn that order. They argue Mr. Mowat had no standing to bring his application and that the Chambers judge made errors in his approach to the application of the relevant statutory provisions.

[4] I conclude, for the reasons set out below, that the appeals must be dismissed.

II. Background

[5] The Students' Union governs undergraduate student affairs at the University. It is incorporated pursuant to the *Act*.

[6] The Federation is an incorporated entity. Among other things, it acts as an advocate for students across Canada. The Canadian Federation of Students-Services ("Federation-Services") is also incorporated. It is allied with the Federation and operates to pool student resources in the provision of various services.

[7] Membership in the Federation and Federation-Services is governed by their bylaws. Those bylaws provide that a local student association, such as the Students' Union, must first join the organizations as a prospective member. It must then conduct a referendum on the question of whether it should become a full member. In this regard, the bylaws provide for the establishment of a Referendum Oversight Committee consisting of two members appointed by the local student association and two members appointed by the Federation. The Oversight Committee establishes the rules governing the referendum.

[8] In November of 2004, the Council of the Students' Union passed a motion pursuant to which the Students' Union obtained prospective membership in the Federation and Federation-Services.

[9] In the early months of 2005, representatives of the Federation and the Students' Union discussed issues relating to the referendum. The Students' Union had concerns about the interaction between the Federation's bylaw requirements and its own procedures. Specifically, the Students' Union had an Elections and Referenda Policy setting out rules with respect to campaigning, spending limits and so forth. The Policy did not contemplate

the creation of an Oversight Committee. Rather, it provided that a body called the Elections Board was responsible for conducting referenda. In addition, the Students' Union constitution required a referendum for the purpose of establishing a dedicated student fee and membership in the Federation entailed an annual fee for each student.

[10] The Students' Union sought legal advice and, in September of 2005, attempted to reconcile its Elections and Referenda Policy with the procedures mandated by the bylaws of the Federation and Federation-Services. This was done through the amendment of the Policy to include a new section aimed specifically at referenda concerning the Federation. It read as follows:

> In Referenda to federate in the CFS, the Oversight Committee shall have the authority over the Referendum. The CRO [Chief Returning Officer] and ACRO [Assistant Chief Returning Officer] shall act as the USSU [Students' Union] Representatives on the Oversight Committee and that the Elections Board must ratify the results of this referendum.

[11] The referendum itself was hotly contested. Voting was held on October 4, 5 and 6, 2005. Some 1,968 students voted in favour of joining the Federation and 1,584 against.

[12] After the referendum, the Oversight Committee was presented with a number of complaints from each side of the campaign. It looked into these matters and concluded as follows:

> The members of the Referendum Oversight Committee are satisfied that the referendum results are an accurate reflection of the will of the members of the University of Saskatchewan Students' Union.

[13] The Elections Board received and considered the report of the Oversight Committee. It refused to ratify the referendum result because of flaws in the referendum process which, in its view, significantly affected the outcome of the vote. It recommended, instead, that another referendum be held with better settled and more widely disseminated ground rules. The key aspects of the Election Board's report read as follows:

> As a body created under the USSU Bylaw No 1: Governance Procedures, the Elections Board (EB) normally is empowered to ensure that the USSU bylaws and policies are met in conducting a referendum or an election. In this case, the EB was given the task of ratifying the CFS membership referendum results. The USSU had indicated its support for students' approving of becoming full members of the CFS. Nevertheless, the EB has found that it could not ratify the result, given what it sees as a seriously flawed referendum process….
>
> In its assessment, the EB's underlying concern has been whether any issues in relation to the process would have ***significantly affected*** the will of voters. It restricted its considerations to the process, even though there were issues relating to campaign conduct. This report is also complemented by the documents "Elections Board's Ratification Discussion Paper" and "EB Analysis of key concerns in the Referendum Process". These reflect respectively (a) the Process Document crafted by the EB that guided its analysis of the Referendum process and (b) the EB's deliberations based on the Discussion Paper. After the EB's deliberations, it further considered whether each key concern would have significantly affected the will of voters.
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> In terms of the process, this report only highlights the key issues which the EB believed would have significantly affected the will of voters: (1) the lack of preparation or groundwork prior to establishing the ROC, (2) the fact that there was no specific call for campaign teams to register, (3) the evolving nature of the ROC Protocol, the fundamental document which was to determine the "ground rules" for campaigning and for the complaints process. [Emphasis added in original]

[14] The decision of the Elections Board then came before the Council of the Students' Union. There was significant concern that legal proceedings would be initiated by the Federation and Federation-Services if the views of the Elections Board were not set aside. After considerable debate, the Council

decided to override the decision of the Board and ratified the referendum result.

[15] Mr. Mowat was in his final year as a student at the University during the 2005-2006 academic year. He was actively engaged in the "no" side of the referendum and took exception to the conduct of the Federation, the Students' Union and the Oversight Committee. In May of 2006, he applied to the Court of Queen's Bench for an order declaring the referendum to be of no force or effect. A decision granting that relief was rendered on October 13, 2006.

III. Analysis

A. Mr. Mowat's Standing

[16] Both the Students' Union and the Federation argue that Mr. Mowat did not have standing to bring his application. In order to appreciate their concerns in this regard, it is necessary to examine the governing legislative provisions.

[17] Section 225 of the *Act* sets out the right of a complainant to seek the assistance of the courts in rectifying the effect of various kinds of corporate conduct. Its relevant features are set out below:

> **225**(1) A complainant may apply to the court for an order pursuant to this section and the court may make an order to rectify the matters complained of where the court is satisfied that the result of any act or omission of the corporation or any of its affiliates, the manner in which any of the activities or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the manner in which the powers of the directors of the corporation or any of its affiliates are or have been exercised:

> (a) is oppressive or unfairly prejudicial to any member, security holder, creditor, director or officer or, where the corporation is a charitable corporation, the public generally; or
>
> (b) unfairly disregards the interests of any member, security holder, creditor, director or officer or, where the corporation is a charitable corporation, the public generally.
>
> (2) In connection with an application pursuant to this section, the court may make any interim or final order it considers appropriate, including an order:
>
> …

[18] The meaning of "complainant" for these purposes is found in s. 222 of the *Act*:

> **222** In this Division:
>
> …
>
> **"complainant"** means:
>
> (a) a member or a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates;
>
> (c) the Director; or
>
> (d) any other person who, in the discretion of the court, is a proper person to make an application pursuant to this Division.

[19] It was common ground before the Chambers judge that Mr. Mowat is a former director of the Students' Union. His status in that regard flows from the fact he was the President of the Students' Union in 2003-2004. The Chambers judge, noting the aspect of the definition of complainant which refers to "a former director", proceeded on the basis that Mr. Mowat had standing.

[20] The Students' Union and the Federation contend it is not enough that Mr. Mowat is a former director. They variously argue that he must have been a director at the time of the alleged oppressive conduct and that there must be some connection between the alleged oppressive conduct and his status as a director. Their concerns are rooted in the fact that Mr. Mowat was President of the Students' Union in the year before referendum. They also stress that he graduated from the University in May of 2006, prior to the argument of his application in the Court of Queen's Bench.

[21] It is not necessary to work through the merits of these arguments because, regardless of how they might play out, I am entirely satisfied that Mr. Mowat is a "proper person" to bring the application as *per* s. 222(d) of the *Act* . He attended the University from the fall of 2000 to the spring of 2006. He was managing editor of the campus newspaper and served a term as a member-at-large on the Student Union's Student Affairs Board. He was a member of the Senate for three years and, as noted, was President of the Students' Union from 2003 to 2004. Mr. Mowat was very actively involved in the referendum campaign and a leading voice against joining the Federation. He was a member of the Students' Union both at the time of the referendum and at the time the actions about which he complains took place.

[22] The Federation suggests that, notwithstanding all of this, Mr. Mowat should nonetheless be denied standing in the absence of evidence he represents a meaningful portion of the current student body. This, I think, is an overly restrictive view of the relevant provisions of the *Act*. The reality is that over 44% of the students who cast ballots in the referendum voted against

joining the Federation. Mr. Mowat's efforts to overturn the referendum result must surely appeal to many of those individuals who are still enrolled at the University and, in any event, I doubt it is appropriate to reduce the issue of standing in this context to a calculus based on bare numbers as suggested by the Federation. The *Act* gives the right to make an application to a complainant, not to a complainant who speaks for a significant portion of members of a corporation.

[23] The Federation also submits that Mr. Mowat should be denied standing because he is no longer in a position to personally benefit from any order a court might make. I find this argument, as well, to be too restrictive given the particular facts of this case. Mr. Mowat was deeply involved in the referendum campaign and the events leading up to the vote. The vote occurred on October 4, 5 and 6, 2005 but the Oversight Committee report was not completed until the beginning of December. The Elections Board apparently reached its decision in respect of the referendum only in mid-February of 2006 and the Students' Union Council did not make its decision to ratify the referendum result until March 30, 2006. Mr. Mowat then immediately took steps to deal with the situation. His solicitors wrote to the Students' Union and the Federation as early as April 3, 2006 to advise of their instructions to initiate proceedings pursuant to the *Act*. All of this happened while Mr. Mowat was indisputably a member of the Students' Union. The fact that his application was ultimately argued a few months after he had convocated should not, in my view, defeat his right to bring his concerns forward. An individual's status as a student is inevitably temporary. I see no justice in denying Mr. Mowat's standing only because the process for reviewing the

referendum results played out so slowly that he was unable to bring the matter before a court prior to the date of his convocation.

B. Mr. Mowat's Entitlement to Relief

[24] The Students' Union and the Federation also contend that, even if he had standing, Mr. Mowat was not entitled to the relief granted by the Chambers judge. They say the judge took the wrong approach to s. 225 of the *Act*. In their view, he should have applied the case law dealing with controverted elections and, in that regard, focused on whether the alleged irregularities in the referendum process substantially affected the results of the vote.

[25] In light of those submissions, it is useful to briefly summarize the reasoning of the Chambers judge. He began by referring to the controverted election cases and noted that, in light of the Elections Board report, the problems with the referendum must be taken to have been of a kind that would have affected its outcome. In other words, the judge found that the line of analysis laid down in the election cases would lead to the referendum result being set aside.

[26] However, the Chambers judge went on to say that he did not believe the controverted election jurisprudence was applicable to the problem before him. Rather, relying on *Walton v. Saskatchewan Hockey Association* (1998), 166 Sask. R. 32 (Q.B.) and related cases, he concluded that the proper test for relief was whether the Students' Union had acted in "good faith and generally in accord with the concepts of natural justice". He answered that question in the negative. The relevant aspects of his analysis are set out below:

> [60] In those cases, the Court does not ask itself whether the results have been skewed, but rather has the organization acted in good faith and generally in accord with the concepts of natural justice? This does not mean, as noted in *Martineau, supra*, that there must be an exacting legal process or an application of the full "panoply" of procedural natural justice rules. The question is, has the organization acted in a fashion that meets the legitimate expectations of a fair-minded observer?
>
> [61] In this case, it is instructive to reflect upon the USC's reaction to the report of the Elections Board and the inconvenient truths noted therein. The USC's response to the report was to ignore the very process it created to ensure there was a fair referendum. Does that have the badges of good faith, fair play or the general notions of natural justice?
>
> [62] In my view, no reasonable observer could conclude that the USC approached the post-vote process in good faith or in a fashion that is in harmony with the broad rules of natural justice. When faced with a result (rendered by a procedure which it had specifically established for the referendum) which was not consistent with its wishes, the USC simply ignored its own rules and imposed its own preordained outcome.

[27] I agree with the Chambers judge that the controverted election cases are not applicable in the circumstances of this case. Section 225 of the *Act* creates and delimits a statutory remedy for particular kinds of corporate conduct, *i.e.* conduct which is oppressive, unfairly prejudicial or unfairly disregards the interests of specified persons. Those provisions, like their counterparts in *The Business Corporations Act*, R.S.S. 1978, c. B-10, are remedial in nature and should be interpreted broadly. See, for example: *Saskatchewan Housing Corp. v. Gabriel Housing Corp.* (1998), 174 Sask. R. 200 (Q.B.) at paras. 68-69.

[28] As a result, it is not appropriate to transplant into the *Act* the case law developed in the context of elections for legislative office and to consider that body of law to be of controlling effect. Such an approach runs the risk of

deflecting s. 225 from its true purpose and of unduly limiting the potential scope and flexibility of its application. At the same time, however, I do accept that the courts should, in broad terms, be slow to intervene in voting-type disputes when the irregularities complained of are minor and of no demonstrable consequence. The Chambers judge properly recognized and appreciated this point.

[29] All of that said, there is room to question the Chambers judge's decision to build his analysis on the approach taken in cases like *Walton v. Saskatchewan Hockey Association, supra.* The authorities he referred to in this regard included *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kanigan (Guardian ad Litem of) v. Castlegar Minor Hockey Assn.* (1996), 141 D.L.R. (4th) 563 (B.C.S.C.); *Beauchamp v. North Central Predators AAA Hockey Assn*. (2004), 247 D.L.R. (4th) 745 (Ont. S.C.) and *Miramichi Minor Hockey Club Inc. v. New Brunswick Amateur Hockey Association*, [1999] N.B.J. No. 631 (N.B.Q.B.) (QL). None of those cases deals with applications brought under s. 225 of the *Act* or its equivalent in other jurisdictions. They are all cases decided in the context of judicial review applications grounded on factors such as denials of natural justice, the *Charter*, the *Convention on the Rights of the Child* and so forth.

[30] In my view, it is important not to confuse the statutory concepts of oppression, unfairly prejudicial actions and actions which unfairly disregard interests, as set out in s. 225 of the *Act*, with the various aspects of the common law that typically form the basis of judicial review applications such as the one considered in the *Walton* case relied on by the Chambers judge.

Notions such as the denial of procedural fairness may inform the meaning of s. 225 to some extent in specific contexts and, no doubt, a particular action on the part of a corporation might be both "oppressive", for example, and involve procedures that in appropriate circumstance would amount to a denial of fairness. However, the assessment of an application pursuant to s. 225 of the *Act* must be measured against the concepts of oppression, unfair prejudice and unfair disregard as provided in that section. Administrative law concepts should be imported into that analysis only with considerable care and only for the purpose of giving meaning to the statutory terms found in the section itself.

[31] With that caution, I turn to the specifics of this case. The Federation and the Students' Union focus on various matters that were said by others to have been problems in the way the referendum was conducted. They take the position that none of those matters, either individually or collectively, affected the outcome of the referendum. The issues to which the Federation and the Students' Union refer in this regard include (a) lack of a formal declaration as to when the campaign was to begin; (b) failure to give proper notice of the wording of the referendum question; (c) the evolving nature of the referendum protocol and a related failure to properly notify interested parties of changes in the protocol; (d) lack of clarity or agreement about spending limits and classroom campaigning; (e) failure to resolve the inconsistencies between the referendum requirements of the Federation and the Students' Union prior to the beginning of the campaign; (f) involvement of Federation members of the Oversight Committee in the campaign; (g) the location of polling stations; (h) use of paper ballots rather than online voting;

and (i) failure to refer complaints about the referendum results to an appeals committee.

[32] For his part, Mr. Mowat emphasizes an additional point. It concerns the refusal of the Students' Union to accept or abide by the decision of the Elections Board. Mr. Mowat says the role in the referendum given to the Board by virtue of the September 29, 2005 amendment to the Elections and Referenda Policy was conferred very deliberately and was the key to addressing wide spread concern on campus about the referendum and the loss of local control of the voting process. This, of course, is the issue that formed the basis of the Chambers judge's decision.

[33] The history of the amendment bears out Mr. Mowat's characterization of it. The minutes of the September 22, 2005 Council meeting reveal considerable angst about the upcoming referendum and its legality. Among other things, the Students' Union's solicitor had warned that its constitution was not being followed in that there was no role for the Elections Board as contemplated by the Elections and Referenda Policy. In apparent response to this concern, the President of the Council proposed an amendment to the Policy that would have formally removed the authority of the Elections Board with respect to the referendum and vested that authority in the Oversight Committee. The vote on the motion was postponed for one week.

[34] The matter returned to the agenda on September 29, 2005. The specific motion before the Council involved an amendment to the Policy to provide as follows:

> In Referenda to federate in the CFS [the Federation] an Oversight Committee shall have authority over the Referendum. The CRO [Chief Returning Officer] and ACRO [Assistant Chief Returning Officer] shall act as the USSU [Student Union] Representatives on the Oversight Committee.

[35] Councillor Villeneuve proposed a motion to add the words "and that the Elections Board must ratify the results of this referendum" to the end of the proposed amendment. After further debate, the Students' Union President endorsed the amendment and offered his assessment of the situation by stating as follows:

> Councillor Villeneuve made a very good amendment. He said that the Elections Board is going to have the final authority on this from the USSU end. All of us on both sides have expressed our explicit faith in the CRO and ACRO. They are the chair and the deputy chair of the Elections Board. It is completely for members of council and members from the student body that are appointed by the Appointments Board. That can be the house of sober second thought. …

Councillor Villeneuve's amendment was then approved and the motion to amend the Elections and Referenda Policy was immediately passed.

[36] In light of this history, I agree with Mr. Mowat that the Council's decision to reject the Election Board's decision entitled him to relief under the *Act*. Having expressly amended the Elections and Referenda Policy for the specific purpose of giving the Elections Board "final authority" with respect to the referendum, it was unfair for the Council to then reverse field for purposes of endorsing the referendum result. That decision involved unfair prejudice to Mr. Mowat, and students of like mind, within the meaning of s. 225(1)(a) of the *Act*. It can also be taken to have involved an unfair disregard for their interests within the meaning of s. 225(1)(b) of the *Act*.

[37] On this point, the Students' Union contends that the Council had the power to disagree with the recommendations of one of its committees in the same way it is said that any corporate board can reject a committee recommendation. This line of argument, in my view, is not convincing. The issue in a case of this sort will rarely be whether the corporation had the power to act as it did. Rather, the question will be whether an otherwise valid exercise of corporate power amounts to oppression, unfair prejudice and so forth. That is the situation here. Mr. Mowat does not challenge the actions of the Students' Union on the basis that it lacked the root authority to do as it did. He argues that its use of power was inappropriate and gives rise to remedies under the *Act*. That issue, not the simple *vires* of the Council's decision, is the question before the Court.

[38] It is also argued that the Chambers judge erred in finding that the Students' Union Council had "imposed its own preordained outcome" by endorsing the referendum result. I agree with this submission. The record does not support the conclusion that the Council's decision was "preordained" in the sense of being inevitable. It was taken only after a significant debate featuring all sides of the issue. However, that does not affect the bottom line of my view of this case nor, I expect, was the notion of the Council's decision being preordained essential to the conclusion of the Chambers judge. The critical point is that the Council abandoned a formal process which had been put in place specifically to address the very significant concerns raised by Mr. Mowat and others about the referendum. Whether that turn of events was somehow inevitable is not the real issue. Rather, the essence of this case is the

unfairness and prejudice the Council's decision involved for those who had opposed joining the Federation.

[39] In the result, therefore, I find it unnecessary to look more closely at the specific problems that arose in relation to the referendum process. The decision of the Students' Union to override the decision of the Elections Board was itself something that warranted the granting of relief pursuant to s. 225 of the *Act*.

IV. Conclusion

[40] In the result, I conclude that Mr. Mowat had standing to bring his application and that the relief awarded by the Chambers judge was appropriate. The appeals of the Federation and the Students' Union are dismissed with costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 27th day of August, A.D. 2007.

"RICHARDS J.A."_____
RICHARDS J.A.

I concur "JACKSON J.A."_____
JACKSON J.A.

I concur "HUNTER J.A._____
HUNTER J.A.