IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *University of Victoria Students' Society v. Canadian Federation of Students,* 2011 BCSC 401

Date: 20110218
Docket: S104638
Registry: Victoria

Between:

University of Victoria Students' Society and José Barrios

Petitioners

And:

Canadian Federation of Students

Respondent

Before: The Honourable Mr. Justice Macaulay

Oral Reasons for Judgment

In Chambers

Counsel for Petitioners:	D.B. Borins
Counsel for Respondent:	M.L. Palleson
Place and Date of Hearing:	Victoria, B.C. February 18, 2011
Place and Date of Judgment:	Victoria, B.C. February 18, 2011

[1] **THE COURT:** In reasons of February 1, 2011, reported at 2011 BCSC 122, I held that a petition submitted by students at the University of Victoria ("UVIC") to the Canadian Federation of Students ("CFS") was valid and in order, having been signed by the number of students that is necessary under the CFS bylaws to trigger a referendum on the continuing membership of the University of Victoria Students' Society ("UVSS") in the CFS.

[2] At para. 61 of those reasons, I declined to grant an additional order scheduling the referendum on specific dates on the following basis:

> Given my declarations, there is no reason to anticipate that the CFS will refuse to take the necessary steps under the bylaw to ensure that the referendum is held as quickly as possible. Hopefully there is still sufficient time to schedule the referendum during the current academic year, but I am not willing to grant the additional orders sought at this time. If consequential or ancillary relief becomes necessary, the petitioners will have leave to apply.

[3] The petitioners, the UVSS and José Barrios, have now applied for consequential and ancillary relief seeking an order scheduling a referendum on March 29, 30 and 31, 2011. The petitioners say that such relief is necessary because the respondent, CFS, has agreed to the above dates on a contingent basis only, pending the petitioners' payment of alleged outstanding membership fees in the amount of $129,058.

[4] The petitioners submit that the respondent is precluded by the doctrine of *res judicata* from raising the issue of outstanding fees, as the respondent could have but did not properly raise this issue in a timely manner in the proceeding.

[5] The respondent subsequently filed a notice of application, which has been heard concurrently with the petitioners' application for further relief. The respondent seeks orders and declarations that the UVSS owes the CFS membership fees in the above amount and that there can be no referendum pursuant to the CFS bylaws unless all outstanding membership fees are paid.

[6] In the alternative, the respondent seeks an order that the UVSS pay into court an amount equal to the outstanding membership fees as security for its claim prior to any referendum.

[7] The respondent relies on CFS Bylaw 1.6.j in support of its position that there can be no referendum unless all outstanding fees are paid:

> **Advance Remittance of Outstanding Membership Fees**
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> In addition to required compliance with Sections 6a. to i. and k. to l.,in order for a referendum on continued membership to proceed, a member local association must remit all outstanding Federation membership fees not less than six (6) weeks prior to the first day of voting.

[8] I will first address the claim raised by the respondent. If the orders and declarations sought by the respondent are granted, it would be inconsistent to grant the consequential and ancillary relief requested by the petitioners. However, if the respondent is unsuccessful, the relief requested by the petitioners is appropriate in light of the limited time remaining in the semester and the fact that the referendum dates referred to above have been approved by the National Executive of the CFS.

[9] Before addressing the merits of the respondent's claim, I must determine whether the doctrine of *res judicata* precludes the respondent from now alleging that any referendum is conditional on the payment of outstanding membership fees.

[10] The respondent appropriately notes that in a January 6, 2011, hearing on the proceeding I ruled that an affidavit alleging unpaid fees was inadmissible, as it ought to have been provided in the respondent's petition response.

[11] My ruling of January 6th, 2011, on the admissibility of the affidavit is as follows:

> THE COURT: The respondent, Canadian Federation of Students, seeks to rely on a third affidavit from Ms. Watson, who is a director of the respondent. It appears that Ms. Watson swore this affidavit on January 4th, 2011, sometime after the respondent's response to the petition, which was filed, I note, on December 10, 2010. For the first time in the proceeding Ms. Watson raises an issue respecting an alleged default in the remittance of fees on the part of the petitioner University of Victoria Students' Society. In the circumstances, I am not satisfied that this was an issue that has arisen for the

> first time in the course of the proceedings or in such a way that Ms. Watson would not have been aware of it at the time the respondent filed its initial response to the petition. It may be that the affidavit is not relevant to the main issues on the application, but it gives rise to a potential argument that the main relief sought by the petitioner is not available for the simple reason that the fees referred to in the affidavit are outstanding. To the extent that the respondent seeks to rely on the affidavit in support of that contention, it ought to have made that apparent in its substantive reply to the petition or in some other way at an earlier stage than it did. It leaves the petitioners in the unfortunate position, if this affidavit is admitted into evidence, of having to consider whether or not to seek an adjournment in order to respond to the affidavit. I am satisfied that there is a risk of prejudice to the petitioners associated with that delay and that prejudice could easily have been avoided if the respondent's position had been made known in a timely fashion. In the circumstances, Ms. Watson's affidavit number 3 is not admissible.

[12] The respondent submits that *res judicata* has no application to the current proceedings because in my reasons of February 1, 2011, I do not suggest that the respondent is estopped from pursuing such a claim and in those reasons I was not required to consider the issue of outstanding membership fees.

[13] The petitioners submit that the court has already determined that the respondent failed to raise its allegation of unpaid fees in a timely way and that the respondent was well aware that this claim could have the effect of depriving the petitioners of the main relief they were seeking, the scheduling of referendum dates.

[14] The petitioners rely on the doctrine of *res judicata*, stating that nothing has changed since the January 6, 2011, ruling. The petitioners further assert that they would suffer prejudice if the respondent was permitted to advance a claim of outstanding membership fees at this stage because this would prevent a referendum from taking place in the current academic year.

[15] In addition, the petitioners assert that entitlement to the alleged unpaid fees is at issue.

[16] There are two branches to the doctrine of *res judicata*. These were recently discussed by the British Columbia Court of Appeal in *Innes v. Bui*, 2010 BCCA 322, as follows:

> [19] There are two forms of the doctrine of *res judicata*: cause of action estoppel and issue estoppel. Both operate where the court has adjudicated a cause of action between two or more parties and one of them seeks to re-litigate on the same facts. Where the cause of action is the same, cause of action estoppel operates to prevent re-litigation of any matter that was raised or should have been raised in the prior proceeding. Where the cause of action in the two proceedings is different, issue estoppel operates to prevent re-litigation of any issue determined in the prior proceeding.

[17] The relevant question regarding the applicability of *res judicata* in the case at bar is whether cause of action estoppel applies to prevent the respondent from now raising the issue of outstanding membership fees within this proceeding.

[18] In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, the Court of Appeal referred to several authorities describing the circumstances in which cause of action estoppel arises:

> [56] This brings me to cause of action estoppel. A concise statement of this aspect of *res judicata* is found in the judgment of this Court *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.*, (1980), 109 D.L.R. (3d) 729 (B.C.C.A.), wherein Mr Justice Carrothers stated (at 734):
>
> > The maxim *res judicata* does not apply to distinct causes of action (*Hall v. Hall et al.* (1958), 15 D.L.R. (2d) 638), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action although based upon a different legal conception of the relationship between the parties: *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972) 27 D.L.R. (3d) 249 (B.C.C.A.). It also applies not only to points on which the Court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time: *Winter v. Dewar & Co.*, [1929] 4 D.L.R. 389, [1929] 2 W.W.R. 518, 41 B.C.R. 336 (B.C.C.A.). The principle of *res judicata* would also apply if the issue in the present action was one of the several issues essential for the determination of the whole of the first case, though merely a step in that decision rather than the main point of it: *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1965] 2 All E.R. 4.
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> [57] More recently, Mr. Justice Lowry said this in *Fournogerakis v. Barlow*, 2008 BCCA 223, 80 B.C.L.R. (4th) 290:
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> > [22] It is then – where the factual situation material to the determination sought in the first action is the same as the factual situation material to whatever determination may be sought in the second action – that the estoppel arises. The principle does not apply to distinct causes of action: *Lehndorff Management Ltd. v. L.R.S.*

> *Development Enterprises Ltd.*, (1980), 109 D.L.R. (3d) 729 at 734, 19 B.C.L.R. 59 (C.A.), citing in particular *Hall v. Hall* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.). It is not that litigants have to raise every cause of action they may have against each other in one action to avoid the estoppel being raised in another later action; rather it is they must exhaust reliance on any given cause of action – any one series of material facts – in an action where such facts are first put in issue and adjudicated upon. Generally, a cause of action can only be raised and adjudicated upon once. The focus of the inquiry is on whether the material facts on which the determinations sought in any two actions are the same.

In *Fournogerakis v. Barlow***,** the Court of Appeal discussed what is included in the concept of "cause of action":

> [20] What constitutes a cause of action was stated by the Supreme Court in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at para. 54:
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> > A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success.
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> [21] In *Mohl*, its meaning was defined at paragraph 24:
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> > The meaning of "cause of action" in this context is clear. In *Letang v. Cooper* (1964), [1965] 1 Q.B. 232 (Eng. C.A.) at 242-43, Diplock L.J. said, "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." In *Johnson v. Refuge Assurance Co. Ltd.* (1912), [1913] 1 K.B. 259, 82 L.J.K.B. 411 (Eng. C.A.) at 264, Kennedy L.J. said that the word "action" in its usual meaning "refers to any proceeding in the nature of a litigation between a plaintiff and a defendant".

[19] I am satisfied that the issue of outstanding membership fees insofar as it relates to the scheduling of the referendum was within the cause of action raised by the petitioners in the proceeding. As I held in my ruling of January 6, 2011, this issue "gives rise to a potential argument that the main relief sought by the petitioner is not available for the simple reason that the fees referred to in the affidavit are outstanding."

[20] I note that the petitioners clearly pled the relief of scheduling a referendum in the proceeding specifically by requesting an order that the referendum be held on January 31, February 1, 2, 3 and 4, 2011. In spite of that, the respondent did not raise, and the parties never properly joined, issue respecting the respondent's alleged entitlement to outstanding membership fees.

[21] The applicability of cause of action estoppel is not affected by the fact that my February 1, 2011, reasons did not address the issue of outstanding membership fees. As stated in *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.,* referred to above in *Giles,* cause of action estoppel is not limited to the points on which the court "was actually required by the parties to form an opinion and pronounce a judgment."

[22] The respondent should have raised the issue of unpaid fees at the outset of the proceeding, as it related directly to the main remedy sought by the petitioners. The respondent has not adequately addressed why this issue could not have been raised in a timely way.

[23] The order now sought by the respondent that there can be no referendum unless all outstanding membership fees are paid is therefore barred by the doctrine of *res judicata*. However, as the main issue in this proceeding was limited to the validity of the petition, to avoid any potential injustice, I grant the respondent liberty to seek recovery of the alleged outstanding membership fees in a separate proceeding. In this way I also avoid the unfairness to the petitioner Barrios that would flow if the referendum were not to proceed as presently scheduled. It will also afford the petitioner, the UVSS, an opportunity to properly defend the claim.

[24] In the result, I dismiss the respondent's applications without prejudice to the respondent's entitlement to seek recovery of any outstanding membership fees against the petitioner, the UVSS, in a separate proceeding.

[25] In my view it is now appropriate to grant the consequential and ancillary relief that the petitioners seek.

[26] I therefore order that the voting days of the referendum of UVSS individual members on continuing membership in the CFS be held on March 29, 30 and 31, 2011.

[27] Is there anything arising?

[28] MR. BORINS: No, My Lord.

"M.D. Macaulay, J."
The Honourable Mr. Justice Macaulay