

PATRICE NGOUANDI

v.

ASSEMBLÉE COMMUNAUTAIRE FRANSASKOISE (A.C.F.) INC.

J.C. of Regina
QBG 366 of 2018

G.A. Chicoine, J.
April 12, 2018

Jason M. Clayards for the applicant, Patrice Nguandi
Roger Lepage and Jonathan Martin for the respondent,
Assemblée Communautaire Fransaskoise (A.C.F.) Inc.

NATURE OF THE APPLICATION

On February 2, 2018, the applicant, Patrice Nguandi, filed an Originating Application returnable on March 26, 2018, seeking an order pursuant to s. 135 of *The Non-profit Corporations Act, 1995*, SS 1995 c N-4.2 setting aside the election of Roger Gauthier as president of the Assemblée Communautaire Fransaskoise (A.C.F.) Inc. [ACF] and Elyse Proulx-Cullen as Saskatoon representative, and, in their place, declaring Denis Simard as president and François Afane as Saskatoon representative, respectively. The application also seeks in the alternative an order vacating the office of president currently held by Mr. Gauthier and of Saskatoon representative currently held by Ms. Proulx-Cullen and ordering that the ACF hold a by-election for those two positions, as well as an order restraining Mr. Gauthier and Ms. Proulx-Cullen from acting as elected officers or directors of the ACF pending determination of the dispute.

The grounds for the application made by Mr. Nguandi stem from a decision made by an independent commission, established under the bylaws of the ACF to hear any appeals that might be lodged after an election, to reject 105 advance mail-in ballots that were found in a dormant mail box at the address of the district director of elections for the Saskatoon district three days after the election was held. Of these 105 advance mail-in ballots, 66 were found by the director general of elections to be valid ballots. If those ballots are included in the count, Mr. Simard has the plurality of votes for the office of president and Mr. Afane wins one of the Saskatoon district positions on the board of directors.

In support of Mr. Nguandi's application were filed his affidavit as well as affidavits of Guy Gérard Ngako, François Afane, Ibrahim Issifi Seibou, Kouame Ngoandi, and Marius Matara.

Instead of responding directly to the application made by Mr. Nguandi, the ACF filed its own Notice of Application also returnable on March 26, 2018, requesting the striking of major portions of the affidavit of Mr. Nguandi and striking completely

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the other five affidavits. The grounds for this application are that Mr. Ngouandi's application to reverse the decision of the independent commission constitutes an abuse of process because these individuals could have but did not bother to testify in front of independent commission. The ACF asks this Court to respect the integrity of the election procedures democratically established in the bylaws of the association and to treat Mr. Ngouandi's application as a judicial review of the decision of the independent commission based on the record before it and not as a *de novo* hearing. The ACF further takes the position that the portions it requests be struck from the affidavit of Mr. Ngouandi are not relevant, that they bring forth new evidence which could have been placed before the independent commission, and that they contain hearsay and speculation.

With the consent of counsel for Mr. Ngouandi, the hearing on March 26, 2018, dealt only with the application brought by the ACF. At the end of the hearing, I informed counsel that I was dismissing the application of the ACF to strike any portion of the affidavit of Mr. Ngouandi or of the other affiants in whole. I also indicated that I would be treating the application of Mr. Ngouandi as an application brought pursuant to s. 135 of *The Non-profit Corporations Act, 1995* and not as a judicial review of a quasi-judicial tribunal. I further advised that I would provide written reasons for this decision. These are my reasons.

LAW AND ANALYSIS

The ACF is the governing entity for the Francophone community in Saskatchewan. It is governed in accordance with *The Non-profit Corporations Act, 1995* and its Articles of Incorporation. Any person who has resided in Saskatchewan for at least six months, has attained the age of 16 years, understands the French language, is interested in promoting the French fact, and supports the basic aims of the ACF may become a member of the association. Every member of the ACF has the right to vote. The members elect the president of the association by universal suffrage, and community representatives are elected by members residing in various electoral districts. The president and the community representatives, being the directors of the non-profit corporation, have the authority to manage the activities and affairs of the corporation. The board of directors of the ACF is referred to in the Articles of Incorporation as the "Assemblée des député(e)s communautaire" or "ADC".

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Article 26.1 of the Articles of Incorporation provides that the province is to be divided into 12 electoral districts, each electing one community representative with the exception of the districts of Regina, Saskatoon and Prince Albert which are entitled to elect two community representatives. The geographical delimitation of the electoral districts is the responsibility of the ADC but the preparation of the electoral map is entrusted to an “independent commission”. Article 26.3 then goes on to give this independent commission responsibility for any official recount and also with responsibility to hear any “appeals” lodged following an election.

Article 27 provides that the president and the community representatives will serve for a term of three years with the election held every three years on a day in November fixed by the ADC at least 90 days in advance of the election.

Article 28 mandates the ADC to appoint an individual to be in charge of the election, referred to as “une direction générale des élections” [which I will refer to as “the director general of elections” or the “DGE”].

No further guidance regarding the appointment, powers or responsibilities of the independent commission are found in the Articles of Incorporation. The ACF does, however, have a fairly comprehensive Electoral By-law respecting elections and the holding of a referendum to approve by-law changes.

The Electoral By-law authorizes the DGE to appoint a person in each electoral district to oversee the balloting in that district, known as the “Direction de scrutin” [which I will refer to as the “district director of elections” or “DDE”].

Article 84 of the Electoral By-law is headed “Appointment of the Independent Commission” but other than to repeat Article 26 of the Articles of Incorporation which states that this commission is responsible for conducting all official recounts and to hear appeals that may be brought following an election, it does not state by whom the independent commission is appointed or the number of persons on the commission. Articles 85 to 89 of the Electoral By-law establish timelines and a procedure for a recount, but not for the contestation of the results of an election.

Article 90 of the Electoral By-law deals with contested election results. It provides that an elector can contest the results of an election at any time by application to the

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independent commission. Article 90.1 provides that the elector must submit the application to the Director General of the ACF on a prescribed form along with a \$100 deposit. Article 90.4 requires the Director General of the ACF to transmit the application to the independent commission within 48 hours. Article 90.5 thereafter requires the independent commission to consider the contestation and provide its decision in regard thereto within seven days of receipt of the application from the Director General of the ACF. Article 90.6 states that the Director General of the ACF will immediately inform the person contesting the results of the election of the decision of the independent commission.

Since the ACF has not yet responded to the initial application of Mr. Nguouandi, I do not intend to make any definitive findings of fact at this point in time. However, the genesis of the controversy which arose in regard to the election can be gleaned from the decision of the independent commission rendered on January 3, 2018, which was filed as Exhibit "D" to Mr. Nguouandi's affidavit.

Article 35 of the Electoral By-law provides that any person who wishes to vote by mail-in ballot must request the ballot from the DGE at least 15 days before the election. In this case, three people from the Saskatoon electoral district provided the DGE, Francine Proulx-Kenzle, with a list of multiple persons who wished to vote by mail-in ballot. The DGE accepted the list of names and advised these three people that she would send the mail-in ballot kits to each person on the list by mail. The kits that were mailed to each person contained an instruction sheet regarding the procedure to vote by mail-in ballot; a declaration of right to vote to be completed by the elector; a small envelope in which to place the marked ballot; a larger envelope into which the elector must place his or her declaration and the smaller envelope containing the marked ballot. The instruction sheet indicated that the larger envelope could thereafter be placed into another envelope and deposited in the mail. However, no address to which the envelope should be mailed was provided on any of the material in the kit.

The people who had provided the request for mail-in ballots soon realized that the failure to provide a return address for the mail-in ballot created a problem. These people asked the district director of elections for Saskatoon, Éric Lefol, for the address to which the mail-in ballots were to be returned. He gave one of them his business card which had the address: "212 - 308 4e avenue nord, Saskatoon,

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Saskatchewan S7K 2L7". The organizers of the mail-in ballot campaign then went about collecting the mail-in ballots from the persons to whom the mail-in ballots had been mailed by the DGE. Some of the mail-in ballots that had been collected were personally delivered to Mr. Lefol's office prior to the day of the election and others were mailed from various post offices throughout the City of Saskatoon in large envelopes that each contained a number of mail-in ballots, duly addressed to "212 – 308 4e avenue nord, Saskatoon, Saskatchewan S7K 2L7".

On the night of the election, November 1, 2017, the DGE, Ms. Proulx-Kenzle, realized that of the 179 mail-in ballots requested in Saskatoon, only 41 had been received and counted, leaving 138 still in circulation. Article 36.3 of the Electoral By-law provides that mail-in ballots can be received up to the fifth day after the election so long as they were postmarked no later than three days before the election. On November 3, 2017, Mr. Lefol informed Ms. Proulx-Kenzle that 102 envelopes containing ballots were found in a postal box belonging to the ACF in the building where his office is located at 308 4th Avenue North in Saskatoon. The number of envelopes was later determined to be 105.

Ms. Proulx-Kenzle, apparently surprised to see that the ballots sent to individual members had been returned in bunches and having also received an allegation of interference by a candidate in Saskatoon, decided on November 6, 2017, to suspend the counting of the mail-in ballots received after the election and to refer the matter to the independent commission. The independent commission responded on November 7, 2017, that it should not accept the referral from Ms. Proulx-Kenzle until after the ballots were counted. The independent commission was of the opinion that it only had jurisdiction to conduct a recount or to receive a petition from an elector contesting the results of an election once the election was completed.

Ms. Proulx-Kenzle proceeded to open the 105 envelopes on November 8, 2017, to complete the count of ballots. She rejected 18 envelopes because they did not have a postmark. She rejected 21 other mail-in ballots for other reasons, such as being postmarked too late; or the signature on the declaration of voter eligibility being different from the signature on the larger envelope; or the signature on the declaration was by a person other to whom the ballot kit had been mailed. Ms. Proulx-Kenzle accepted the other 66 mail-in ballots as duly received within the time limited by the Electoral By-law and included them in the count for the position

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of president and the count for the two positions as representatives of the district of Saskatoon. The additional mail-in ballots changed the election results in both races as compared to the results obtained on the night of the election.

After the count of ballots on November 8, 2017, the Director General of the ACF, Dominique Sarny, received seven applications to contest the results of the election in the form prescribed in Article 90 of the Electoral By-law. He immediately referred the applications to the independent commission. The composition of the independent commission was not the same as the independent commission that made the decision that it had no jurisdiction to undertake a review of any complaint prior to the opening and counting of all of the mail-in ballots. One of the three commissioners recused himself because he had signed the nomination form of one of the candidates for president. A new commissioner was appointed. The material filed to date does not disclose how or by whom the members of the independent commission are chosen.

As has been previously noted above, the Articles of Incorporation and the Electoral By-law give very little guidance regarding the appointment, powers or responsibilities of the independent commission. Article 26.3 of the Articles of Incorporation simply grants to an independent commission responsibility for any official recount and responsibility to hear any “appeals” lodged following an election. The Electoral By-law does not state by whom the members of the independent commission are appointed. The timelines for the filing and hearing of an application to contest the results of an election are all contained in Article 90. There does not appear to be any date by which an application has to be submitted to the Director General of the ACF, but once an application is received, very tight timelines are imposed, namely, referral of the application by the Director General of the ACF to the independent commission within 48 hours and a decision by the independent commission within seven days. That decision is then to be transmitted immediately to the person contesting the election results.

At para. 10 of its decision rendered on January 3, 2018, the independent commission acknowledges that it formulated its own process for the holding of a hearing to deal with the six applications to contest the results of the election (one applicant having withdrawn his application) based on “principles of natural justice” and in accordance with legal advice received by the ACF. The applicants were deemed to be plaintiffs and anyone against whom allegations were made was deemed to be a respondent. At

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para. 15 of its decision, the independent commission states that the ACF has delegated to the independent commission a very wide mandate to deal with questions arising from an election. It claims to be independent from any potential conflicts of interest which might otherwise exist between the staff and/or the elected candidates of the ACF.

On November 29, 2017, the new independent commission caused to be sent to deemed plaintiffs and to the deemed respondents (Appendix 2 to the decision rendered on January 3, 2017) requesting them to provide written submissions in regard to the applications to contest the results of the election. The deemed plaintiffs were to file their responses to two questions formulated by the independent commission by December 1, 2017. Those submissions were then to be provided to the deemed defendants by the end of that day, and the deemed defendants had until the end of the day on December 2, 2017, to file their responses. The deemed plaintiffs and the deemed defendants were also asked to file with their responses copies of all documents they intended to rely on to prove their case; to advise if they intended to attend the public hearing on December 6, 2017; and to provide a list of witnesses they intended to bring to the public hearing.

The independent commission also prepared an agenda for the public hearing setting forth the procedure that would be followed (Appendix 3 to the decision rendered on January 3, 2017). The agenda suggested that each of the parties would have five minutes for opening remarks, followed by presentation of the evidence of the deemed plaintiffs and the deemed defendants not to take more than two hours in total; followed by argument not to exceed two minutes by each party. The independent commission anticipated rendering a decision within two weeks of the public hearing. The decision was actually rendered four weeks after the public hearing.

As I have noted above, the ACF asks this Court to respect the integrity of the election procedures democratically established in the bylaws of the association. It also asks this Court to treat Mr. Ngouandi's application as a judicial review of the decision of the independent commission and to apply the common-law rules for judicial review, starting with an obligation to pay deference to the decision of the independent commission. The ACF argues that s. 135 of *The Non-profit Corporations Act, 1995* only allows a Court to review an election of members of a board of directors if there has been an "irregularity" in the election process. Section 135 states as follow:

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135(1) A corporation or a member or director may apply to the court to determine any controversy respecting an election or the appointment of a director or an auditor of the corporation.

(2) On an application pursuant to this section, the court may make any order it considers appropriate, including:

- (a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;
- (b) an order declaring the result of the disputed election or appointment;
- (c) an order requiring a new election or appointment and including directions for the management of the activities and affairs of the corporation until a new election is held or appointment made;
- (d) an order determining the voting rights of members and of persons claiming to have membership interests

In *Kroczyński v. Regina Soccer Association Inc.*, 2016 SKQB 133 [*Kroczyński*] Barrington-Foote, J. of this Court set out a two-part test for a court to intervene in a disputed election under the *Act*. He stated, at para. 28 that the test is as follows:

28 In order to set aside an election pursuant to s. 135 of the *Act*, I must be satisfied that two criteria have been met. First, I must be satisfied that there were irregularities in the election process. Second, I must be satisfied that those irregularities were calculated to affect the outcome of the election: see, for example, the analysis of this issue by R.S. Smith J. in *Mowat v University of Saskatchewan Students' Union*, 2006 SKQB 462, at paras 43-47, 287 Sask R 166 [*Mowat*], affirmed on other grounds at 2007 SKCA 90, 304 Sask R 236. As McLachlin J. (as she then was) put the matter in *Leroux v Molgat* (1985), 67 BCLR 29 (QL) (BCSC):

3 An election will be set aside only if substantial irregularity, calculated to affect the result, is shown: *Anderson v. Stewart and Diotte* (1921), 62 D.L.R. 98 (N.B.S.C. - App. Div.). If the plaintiff establishes irregularities, the onus shifts to the defendants responsible for the conduct of the election to show that those irregularities were not calculated to affect the result: *Re the Queen ex rel. Marquette and Skaret* (1981), 119 D.L.R. (3d) 497 (Alta Q.B.); *Rex ex rel. Henry S. Ivison v. William Irwin* (1902), 4 O.L.R. 192; *Giesbrecht et al. v. District of Chilliwack* (1982), 18 M.P.L.R. 27 (B.C.S.C.). Thus the main issues are whether irregularities

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are established, and, if so, whether the defendants responsible for the conduct of the election have shown that such irregularities did not affect the result.

Counsel for the ACF in their brief of law argue that unless the court finds that there has been an irregularity the court has no jurisdiction to intervene in the non-profit corporation's electoral process. They are of the view that the independent commission's decision to declare that Mr. Gauthier was elected as president and not Mr. Simard, and that Ms. Proulx-Culen was elected as the representative for Saskatoon and not Mr. Afane is unimpeachable because the applicant, Mr. Ngouandi, has not established that the independent commission acted contrary to the Electoral Bylaw, or that it acted illegally or in a manner contrary to the principles of natural justice. Counsel for the ACF take the position that because Mr. Ngouandi has failed to establish any "irregularities" in the manner in which the independent commission arrived at its decision, there is no basis to proceed to the second step of determining whether the irregularities affected the outcome of the election. More specifically, counsel for the ACF suggests (at para. 25 of their brief) that this Court is not authorized to re-examine those issues that were considered by the independent commission, but should simply determine whether the independent commission followed the rules set forth in the Electoral By-law of the ACF. They are of the opinion that the legislature did not intend by enacting s. 135 to establish a judicial review mechanism which would supersede the articles and by-laws of the non-profit corporation on the manner of holding a proper election.

In support of their proposition, counsel for the ACF rely on the decision of R.S. Smith J. of this Court in *Mowat v University of Saskatchewan Students' Union*, 2006 SKQB 462 [*Mowat*]. In that case, the Elections Board refused to ratify the results of a referendum because of irregularities. The governing council of the USSU decided to ignore the report of the Elections Board and to proceed as if the referendum result was valid. In the end result, however, Justice Smith decided that the issue was not to be determined under s. 135 of *The Non-profit Corporations Act, 1995* but instead under s. 225(1) of the *Act*, being the remedies for oppressive and unfairly prejudicial by the corporation against any member, director, officer. Justice Smith declared the referendum results to be invalid. This decision was upheld by the Saskatchewan Court of Appeal in *Federation of Canadian Students v Mowat*, 2007 SKCA 90 [*FCS v Mowat*]. The ACF argues that the *Mowat* decision stands for the proposition that

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the internal procedures established by the non-profit corporation for the review of election results must be respected.

Counsel for Mr. Nguandi rightly point out, at paras. 34 to 37 of their brief, that the Mowat decision was not decided under s. 135 of the *Act*, but under s. 225, which imports the statutory concepts of oppression, unfairly prejudicial actions and actions which unfairly disregard interests. The Court of Appeal at para. 30 of its decision in *FCS v Mowat* stated that administrative law concepts should be imported into an analysis under s. 225 only with considerable care and only for the purpose of giving meaning to the statutory terms found in the section itself.” I am satisfied that the common-law concepts of judicial review should not supersede the statutory right granted under s. 135 which gives a corporation or a member or director the right to apply to the court to determine any controversy respecting an election. For these reasons, I find that the *Mowat* decision does not stand for the proposition that the common law concepts of judicial review, including giving deference to the internal electoral mechanisms adopted by the corporation, take precedence over the statutory right to request a court to determine any controversy respecting an election.

In this regard, I also am of the view that the Articles of Incorporation and the Electoral By-law of the ACF give very little guidance in regard to the establishment, powers and procedures of the independent commission. It is evident by the fact that the members of the independent commission felt compelled to compose a letter to send out to the various parties setting out the process that they would use to conduct a hearing. There are no provisions in the Articles or the Electoral By-law that authorize the independent commission to establish rules of procedure or to establish time-lines within which arguments or documents must be filed. The Electoral By-law mandates the independent commission to decide any controversy referred to it within seven days of receiving the application from the Director General of the ACF. In this case, the independent commission took a number of weeks to render a decision. I also note that there does not appear to be any statutory or legislative basis, in *The Non-profit Corporations Act, 1995* or otherwise, empowering the members of the independent commission to require that evidence be given by statutory declaration or under oath. I am disinclined to grant the independent commission the status of a quasi-judicial administrative tribunal given the absence of any legislative empowerment or authority of the type normally granted to an administrative tribunal.

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CONCLUSION

For all of the above reasons, I dismiss the application of the ACF to strike any of the affidavits filed by Mr. Ngouandi in support of his application, in whole or in part. Mr. Ngouandi's application will be dealt with as an application under s. 135 of *The Non-profit Corporations Act, 1995*. This means that this Court will have to determine firstly whether there were irregularities in the election process and secondly, whether those irregularities were calculated to affect the outcome of the election. All of the remedies referred to in s. 135(2) may be considered as the circumstances require. This Court will not be bound by any finding of fact, or of fact and law, made by the independent commission. This Court's decision will be based on the evidence, documents and material submitted by the parties.

COSTS

The issue of costs of this preliminary application will be costs in the cause.

TRANSLATION

The hearing of this application and the material filed in support was in both French and English. In view of the need for a decision before April 13, 2018, this decision has been released in the English language only. A translation of this fiat in the French language will be provided in due course.

 J.