PARK WEST SCHOOL DIVISION

Learners Today, Leaders Tomorrow

Tim Mendel
Superintendent/CEO

Don Cochrane
Chairperson

Darren Naherniak
Vice Chairperson

September 15th, 2014

Lelond vs Park West School Division

During the final year of the previous school board's mandate that ended in 2010, a motion was passed that created strong disagreement between the sitting trustees. The disagreement centered around the question of whether an action was a suspension of policy or a reversal of decision.

While on the outside this might appear as an irrelevant point, the distinction between the two was needed to determine the requirements of passing the motion. While the public schools act stated that a reversal of decision required only simple majority, the board's own policy manual stated that suspension of policy required a two thirds majority. The board was not able to unanimously agree on the requirements of the motion and as such trustee Lelond sought a legal ruling on the matter. This board tried on several occasions to reach a solution with Trustee Lelond, however they were unsuccessful.

Please see the attached court documents which state the rulings of the court. The division has paid approximately $33,500.00 in court costs related to this case. It is our intention in posting these for public view, that future boards and individual trustees will use the lessons learned to guide their decision making efforts.

Park West School Division Board of Trustees

Attachment: Lelond VS Park West School Division court documents

Date: 20140724
Docket: CI 12-01-77815
(Winnipeg Centre)
Indexed as: Lelond v. The Park West School Division
Cited as: 2014 MBQB 157

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
EDWARD LELOND	)	William S. Gange
	)	for the Applicant
Applicant	)	
	)	Curran P. McNicol
- and -	)	for the Respondent
	)	
THE PARK WEST SCHOOL DIVISION	)	
	)	Judgment delivered:
Respondent	)	July 24, 2014

BRYK J.

Background

[1] The applicant, Edward Lelond ("Lelond"), seeks an order quashing two resolutions passed by the Board of Trustees ("Board") of The Park West School Division ("Park West") relating to the transportation of students.

[2] Lelond is an elected school trustee in Park West for a ward which includes the Minitonas School.

[3] Park West was created pursuant to ***The Public Schools Act***, C.C.S.M., c. P250 (the "***PSA***").

[4] Section 33(1) of the ***PSA*** mandates that "each school board shall pass by-laws establishing rules of procedure for the guidance of the school board in the conduct of its meetings."

[5] On September 2, 2009, Park West passed Procedural Bylaw No. 01-09 pursuant to s. 33(1) of the ***PSA*** establishing rules of procedure for the guidance of the Board and the conduct of its meetings. Bylaw Articles 4.10 to 4.17 deal with motions at regular Board meetings. Article 4.24 deals with the reversal of decisions by the Board. Article 4.29 provides for the giving of notice for the purpose of reversal of a decision previously made by the Board and suspension of policy.

[6] Park West adopted Policy BFF – Exception to Policy ("Policy BFF") on July 1, 2003, which provided that the Board could make an exception to a policy that is not grounded in law, regulation or negotiated agreement/contract provided that it is supported by a two-thirds majority vote *of those members present*.

[7] Park West adopted Rule JFB-R – School of Choice/Open Enrollment Administrative Procedures ("Rule JFB-R") on August 12, 2003. It provides for the making of application to a school of choice, the consideration process for students wishing to exercise school of choice, and others relating to that issue. Article 8 deals in part with the transportation of students within Park West who elect to exercise a school of choice.

[8] In complying with Rule JFB-R, Park West has not extended school bus routes or added routes to accommodate school of choice students.

[9] At a Board meeting on May 19, 2010, at which three of the nine trustees ("Board members") were absent, the agenda specifically made reference to school of choice transportation requests which Park West had received from five students who were requesting transportation on Park West buses to Hamiota Elementary School and Hamiota Collegiate and for one student who was requesting transportation to Birtle Elementary School. The agenda had been prepared in advance of the meeting by Paulette Koroscil ("Koroscil"), Chairperson of the Board, with the assistance of Joe Arruda ("Arruda"), Chief Executive Officer of Park West, and Gerald Puhach ("Puhach"), Secretary-Treasurer of Park West, and distributed among the attending Board members, of which Lelond was one.

[10] The motion relating to the transportation of the five students to Hamiota schools ("R133-10") was tabled because, according to Koroscil's affidavit, sworn October 5, 2010, the Board members "recognized that notice for reversal of a Board decision had to be given from one meeting to another." This was specifically discussed by the Board members present at the meeting.

[11] According to Koroscil's affidavit, there were also discussions regarding the request for transportation to Birtle Elementary School and it was decided to put the matter over to the next regular Board meeting, to be voted on together with R133-10.

[12] The next regular Board meeting was scheduled for June 1, 2010. In advance of the meeting, Koroscil, Arruda and Puhach prepared an agenda which specifically made reference to the aforementioned school of choice transportation requests and to the ability of the Board to suspend policy and grant the requests for transportation by

passing motions, for which wording was provided. All of the Board members received the Board agenda and all nine were present on June 1, 2010.

[13] Motion R133-10 was carried, with five of the nine Board members voting in favour. Immediately following, Lelond made a motion ("R148-10") that all children receive school of choice transportation. It was defeated. The next motion ("R149-10"), relating to the provision of transportation to and from Birtle Elementary, was also carried by a majority of five of the nine Board members.

[14] Both motions, R133-10 and R149-10, were similarly worded in providing that "we suspend policy on a without prejudice basis and provide transportation to ...."

[15] There was no objection raised by any Board member with respect to the notice that had been provided relating to R133-10 and R149-10. No issue with procedure following the said motions having been carried was raised. Policy BFF was not raised by any Board member.

Applicable Law

[16] The following provisions of the ***PSA*** are applicable:

> **Rules of procedure**
> **33(1)** Subject to the provisions of this Act and the regulations, each school board shall pass by-laws establishing rules of procedure for the guidance of the school board in the conduct of its meetings.
>
> **Reversal of decisions**
> **33(2)** Subject to subsection (3), a question once decided by a school board shall not be reversed unless
> (a) written notice of a proposal to reverse the decision has been given from at least one meeting to another; and
> (b) a majority of the total number of trustees for the division votes in favour of the reversal.

[17] Procedural Bylaw No. 01-09 of Park West includes the following:

PROCEDURAL BYLAW
THE PARK WEST SCHOOL DIVISION
BYLAW NO. 01-09

BEING A BYLAW to regulate the proceedings of the Board of Trustees of The Park West School Division, (hereinafter called "the Board") and the Committees thereof:

WHEREAS Section 33 (1) of The Public Schools Act provides that "each school board shall pass by-laws establishing rules of procedure for the guidance of the school board in the conduct of its meetings",

NOW THEREFORE be it and it is hereby enacted as a Bylaw of The Park West School Division that, unless they shall at any time be contrary to the overriding provisions of The Public Schools Act, the following Rules of Procedure shall regulate the operation of the Board:

. . . . .

Rules Apply To All Meetings

2.10 All rules for meeting procedures and debate shall apply to all meetings of the Board.

. . . . .

REGULAR BOARD MEETING AGENDA

Agenda Preparation

3.1 .... Any variation of the foregoing order of business requires a two-thirds (2/3) majority vote of the members present, which shall be without debate.

. . . . .

REGULAR BOARD MEETING PROCEDURES

. . . . .

Voting Method

4.24 Reversal of Decisions

(i) Subject to subsection (ii), a question once decided by the Board shall not be reversed unless:

(a) written notice of a proposal to reverse the decision has been given from at least one meeting to another; and

(b) a majority of the total number of trustees for the Division votes in favour of the reversal (4).

. . . . .

Giving of Notice

4.29 Written notice may be given by a trustee from one meeting to the next for the purpose of the following:
(i) reversal of a decision previously made by the Board.
(ii) introduction of a by-law.
(iii) suspension of policy.

[emphasis added]

[18] Policy BFF provides:

THE PARK WEST SCHOOL DIVISION **POLICY: BFF**

EXCEPTION TO POLICY

When members present at a duly constituted meeting of the Board deem that there are extenuating circumstances requiring re-consideration of a Board policy, and that policy is not grounded in law, regulation or negotiated agreement/contract, the Board may make an exception to the policy for the particular instance and circumstances identified provided that such is supported by a two-thirds majority vote of those members present.

Issues

[19] In their motion briefs and oral submissions, counsel for both parties identified the following issues:

1. Does Lelond have standing to bring this motion?

2. What is the appropriate standard of review?

3. Were motions R133-10 and R149-10 actually motions to exempt pursuant to Policy BFF rather than motions to suspend the transportation policy?

4. Is Policy BFF in conflict with s. 33(2)(b) of the ***PSA*** and therefore void?

5. Does the Board have authority to suspend the transportation policy as it purported to do?

6. Did the Board properly pass resolutions R133-10 and R149-10? and

7. Are resolutions R133-10 and R149-10 subject to judicial review?

[20] The first issue requiring determination is that of standing.

[21] Park West argues that Lelond does not have standing to bring this application. In support of this contention, Park West relies on the decision of Slatter J. of the Alberta Court of Queen's Bench in ***Alberta Liquor Store Association et al. v. Gaming and Liquor Commission (Alta.) et al.***, 2006 ABQB 904, 406 A.R. 104 ("***Alberta Liquor***"). Lelond agrees that ***Alberta Liquor*** sets out the criteria the court should consider to determine whether or not a litigant has standing in a legal proceeding. Lelond argues that he meets all of those criteria.

[22] In ***Alberta Liquor***, Slatter J. concluded that it is within the sole discretion of the court whether or not to grant public-interest standing to an applicant.

[23] Continuing, he observed that the overall criterion that needs to be met is that the person seeking standing must be "aggrieved." He goes on to identify the factors to be weighed in determining whether a party is aggrieved (at para. 9):

> The courts have always weighed a number of factors in determining whether a party is "aggrieved". An important factor is "the relationship between the applicant and the challenged decision", or how directly the challenged administrative act will affect the legally-recognized interests of the applicant. Thus, if the applicant's property rights, economic rights, or legally recognized personal interests (such as the applicant's liberty) will be affected by the administrative decision, the applicant will likely have standing. So, for example, if the applicant's license has been revoked, resulting in a direct impact on the interests of the applicant, the applicant is bound to be granted standing. There is no finite list of interests that the law will recognize in determining issues of

> standing, but business, professional, employment and property interests have traditionally been recognized. Thus, if the applicants are operators of businesses subject to the same regulatory regime as the one being challenged, that will usually reveal a sufficient legal interest. ....

[24] He continues (at para. 10):

> It is in this context (that is, how directly the administrative act will affect the applicant) that the courts have examined whether the applicant has an interest in the legality of the challenged administrative act that is greater than the interest of the public at large. To the extent that the applicant's interest is no different than that of any other citizen, the applicant is unlikely to be "aggrieved": **Canadian Union of Public Employees, Local 30 v. WMI Waste Management Canada Inc.** (1996), 178 A.R. 297; 110 W.A.C. 297; 34 Admin. L.R. (2d) 172 (C.A.), at para. 18. On the other hand, if the challenged administrative act will have a greater impact on the applicant than the average citizen there is a greater chance that the applicant's legally-recognized interests are engaged, and the applicant is more likely to be aggrieved. ....

[25] He then makes the following general observations (at para. 13):

> The legal limitations on standing are partly to promote the efficiency of government administration, by keeping the administration free from artificial or academic challenges to administrative action. They also however serve to respect the rights of third parties. In many cases where the applicant for judicial review cannot show that it is directly affected or aggrieved by the challenged administrative act, there will in fact be third parties in the community who are directly affected or aggrieved. The general policy of the court is not to decide issues in the absence of the parties whose rights are most directly affected by the court's decision. The Court will not adjudicate rights in the absence of those whose rights are at stake: **Finlay v. Canada**, [1986] 2 S.C.R. 607; 71 N.R. 338; [1987] 1 W.W.R. 603; **Canadian Council of Churches v. Canada et al.**, [1992] 1 S.C.R. 236; 132 N.R. 241; 88 D.L.R. (4th) 193, at para. 36. If those who are most directly affected by the administrative decision are content to live with it, the court is disinclined to allow more vigilant inter-meddlers to bring applications for judicial review. If, on the other hand, those most directly impacted or "aggrieved" are inclined to challenge the administrative decision, it is they who should be allowed to carry the proceedings, and not the curious busybody.

[26] Park West points out that Lelond's property rights, economic rights or legally recognized personal interests were not affected by the Board's administrative decision

and, on that basis, he cannot be considered to be "aggrieved." Within the community, there were persons who were more directly affected or aggrieved who have not sought the court's adjudication. Therefore, in these circumstances, Lelond should not be considered an aggrieved person and should be denied standing.

[27] Lelond recites the following factors, which he says qualify him for standing in this proceeding. He is a trustee for the ward in which the Miniota School is located. That is the school from which several of the students were departing in order to attend a different school. He argues that schools are funded based on the number of students and, as a trustee, he has legitimate concerns about the financial impact on the Miniota School. Further, a decrease in the number of students attending Miniota School has a potential deleterious effect upon its viability. As the elected representative of the families attending Miniota Elementary School, Lelond claims a real and substantial connection to this issue. Lelond further argues that, as a member of the Board, he is required to know what rules apply to the proper conduct of Board meetings.

[28] Lelond refers the court to the decision in ***Minister of Justice (Can.) v. Borowski***, [1981] 2 S.C.R. 575 ["***Borowski***"], a decision of the Supreme Court of Canada, in support of his assertion of having standing in this proceeding. The case involved Joe Borowski seeking a ruling on the validity of legislation. The subject-matter was therapeutic abortion provisions of the ***Criminal Code***. Borowski, as the owner of a natural food store and a long-time advocate against therapeutic abortions, was deemed to be directly affected or having a genuine interest as a citizen in bringing the issue before the court. What distinguishes that case was the fact that Borowski was

challenging the validity of legislation. In the present case, legislation is not being challenged and, in my view, the principles enunciated in ***Borowski*** do not apply.

[29] On the facts before me, I find that Lelond has failed to satisfy me that he is an aggrieved person in that he fails to fall within the criteria identified by Slatter J. in ***Alberta Liquor***. On that basis, I would deny him standing in this application. As a result, the court has no jurisdiction to deal with any of the remaining issues presented.

[30] However, in the event that I am in incorrect in my conclusion on standing, I will address some of the remaining issues which were raised. As some are interrelated, I will address them as an amalgam rather than individually.

[31] From a practical point of view, this decision will have no impact whatsoever on the students involved. Of the six students affected by R133-10 and R149-10, one is no longer attending school, while the remaining five continue to be transported in accordance with the arrangements reflected in R133-10 and R149-10. Moreover, Park West has implemented an entirely new transportation policy.

[32] Lelond's original position was that R133-10 and R149-10 were actually exceptions to the transportation policy and that, accordingly, the provisions of Policy BFF should have been followed. In other words, in order to be carried, the motions required a majority of two-thirds of the Board members present, whereas each motion had only five Board members voting in favour and, therefore, should have been declared defeated. Lelond further argues that the Board had no jurisdiction to suspend policy and that their intention clearly was not to reverse the transportation policy, as evidenced by the defeat of Lelond's motion R148-10 to that effect. Lelond argues that

there are clear distinctions between reversals of policy, suspensions of policy and exceptions to policy. The Board's intention clearly was to except the six students from the existing policy.

[33] It should be noted that the Board members relied on the wording provided to them by Arruda and Puhach. One must assume that they were both familiar with Park West's Bylaws, Policy BFF and the transportation policies. It is clear that the question they were dealing with was a request from certain students to attend other schools and to find a manner in which that could be accomplished in compliance with the existing transportation policy.

[34] Park West's Bylaw, and specifically Article 4.29, provides for the suspension of policy and mandates that written notice must be given from one meeting to the next before suspension of policy can be considered by the Board. Written notice is not required from one meeting to the next where exceptions under Policy BFF are to be considered.

[35] Koroscil's evidence satisfies me that the concept of suspension of policy and not exception to policy was discussed at the May 19, 2010 meeting when the two requests were first considered. The requests were tabled in order to comply with the notice provision of Article 4.29 of the Bylaw. The utilization of Policy BFF in dealing with the request was never discussed or even raised by any Board member at either of the May 19, 2010 or June 1, 2010 meetings, both of which Lelond attended. It is apparent that this issue became important to Lelond only at some point in time after the June 1, 2010 meeting.

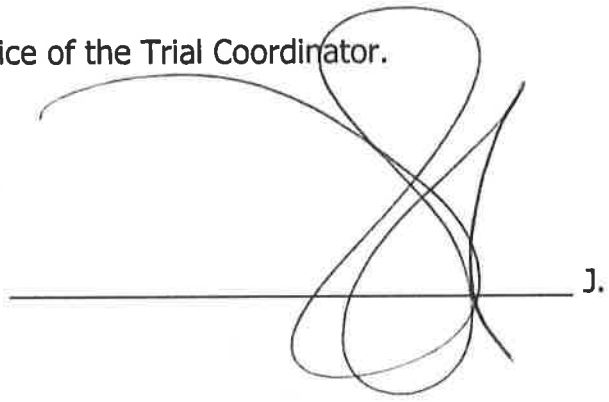
[36] I agree that the wording used in R133-10 and R149-10 could have been more precise. Notwithstanding, I am satisfied that the clear intention of those motions from the outset was to suspend the transportation policy only as it affected those students from whom requests had been received.

[37] Park West argued that Policy BFF was in conflict with s. 33(2)(b) of the ***PSA*** and therefore void. That position was subsequently adopted by Lelond in support of the argument that if Policy BFF was void, then R133-10 and R149-10 must be quashed because of (a) the Board's lack of jurisdiction to suspend policy, and (b) its rejection of Lelond's motion R148-10 to reverse the transportation policy.

[38] Having determined that the Board had jurisdiction to suspend policy and did so in accordance with its Bylaws in passing R133-10 and R149-10, the question of whether or not Policy BFF is void becomes moot. However, I note that there is a potential for conflict between Policy BFF and s. 33(2)(b) of the ***PSA***, as illustrated by the example put forward by Park West. Potentially, in a situation where only six Board members were present at a meeting (the quorum being five), a vote by four of the six Board members could carry a motion making an exception of policy. Section 33(2)(b) of the ***PSA*** requires any reversal in policy to be approved by a simple majority of all of the Board members, that being five of the nine. In those circumstances, Policy BFF would be in conflict and any decisions made would be void. Park West might want to consider revisiting Policy BFF and ensuring that circumstances where it would conflict with s. 33(2)(b) of the ***PSA*** could not arise.

Costs

[39] The issue of costs was not addressed at the hearing. If counsel are unable to agree, they are invited to either provide me with brief written submissions or, alternatively, to arrange for a further appearance for oral submissions. Those arrangements would be made through the office of the Trial Coordinator.



J.

File No. CI 12-01-77815

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

EDWARD LELOND,

Applicant,

- and -

THE PARK WEST SCHOOL DIVISION,

Respondent.

JUDGMENT

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THE QUEEN'S BENCH
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THE HONOURABLE MR. JUSTICE BRYK	)	Thursday, July 24, 2014

BETWEEN:

EDWARD LELOND,

Applicant,

- and -

THE PARK WEST SCHOOL DIVISION,

Respondent.

JUDGMENT

THIS APPLICATION, made by the Applicant for an order quashing Park West School Division Motion R133-10 and Motion R149-10, was heard on May 16, 2014, at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Notice of Application, affidavit of Edward Lelond, sworn August 24, 2010, affidavit of Joan Clement, sworn October 5, 2010, and

affidavit of Paulette Koroscil, sworn October 5, 2010, and on hearing the submissions of counsel for the Applicant and counsel for the Respondent;

1. THIS COURT ORDERS THAT the application be and is hereby dismissed.

2. THIS COURT FURTHER ORDERS THAT if costs of the application cannot be agreed upon by the parties, they may be spoken to.

August 18, 2014

C. LANIUK
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH
~~Bryk J.~~ FOR MANITOBA

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