QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2006 SKQB 462**

Date: **20061013**
Docket: Q.B.G. No. 655/2006
Judicial Centre: Saskatoon

IN THE MATTER OF AN APPLICATION UNDER SECTIONS 135 AND 225 OF *THE NON-PROFIT CORPORATIONS ACT, 1995*, S.S. 1995, c. N-4.2

BETWEEN:

ROBIN MOWAT

APPLICANT

- and -

UNIVERSITY OF SASKATCHEWAN STUDENTS' UNION

RESPONDENT

- and -

THE CANADIAN FEDERATION OF STUDENTS and
THE CANADIAN FEDERATION OF STUDENTS-SERVICES

ADDED RESPONDENTS

Counsel:

J. Pereira and M. Alexandre	for the applicant
G. J. Scharfstein, Q.C. and S. Buhler	for the respondent
T. J. Burke and A. McKennan	for the added respondents

FIAT — R. S. SMITH J.
October 13, 2006

Introduction

1) In October, 2005 a referendum was held within the student body of the University of Saskatchewan to determine if the University of Saskatchewan Students Union should join The Canadian Federation of Students and its related corporation, The Canadian Federation of Students-Services. The result favoured joining the federation.

2) The applicant applies under *The Non-Profit Corporations Act, 1995*, S.S. 1995, c. N-4.2 ("*Act*") seeking sundry relief, the net result of which would set aside the outcome of the referendum.

Background

3) The Canadian Federation of Students ("CFS") is a federal non-share capital non-profit corporation which, among other things, advocates on behalf of university students across Canada. Its affiliated corporation, The Canadian Federation of Students-Services ("CFS-S") is a federal non-share capital non-profit corporation. CFS-S assists students by pooling resources in order to provide a range of services and benefits.

4) In or about November, 2004, the executive council of the University of Saskatchewan Students Union ("USC") passed a motion which authorized USC to take steps on behalf of the University of Saskatchewan Students Union ("USSU") to become a member of CFS and CFS-S (hereinafter collectively "CFS"). After initial interaction between USC and CFS, USSU was awarded prospective membership and advised that in order to achieve full membership in CFS it was necessary for the USSU to conduct a referendum within its student body.

5) Under the CFS constitution, any organization wishing to join it must hold a referendum in accordance with CFS rules and procedures for referenda. This is somewhat anomalous as the USSU, as a long-standing organization, had its own rules and procedures for referenda. The existence of two protocols for referenda would prove to be an issue as events unfolded.

6) The CFS referendum procedure required the creation of a Referendum Oversight Committee ("ROC") which consists of two members appointed by CFS, in

effect, their organizers. The balance of the ROC is made up of two members from the local student organization, in this case, the USSU.

7) The USC was also aware that a referendum was necessary under its own rules. The USSU constitution, specifically Article 11, requires a referendum for the purpose of establishing or eliminating a dedicated student fee. As membership in CFS exacted a $9.00 per annum fee from each student, the USSU's own constitution mandated a referendum on the question.

8) The USSU had also adopted, as part of its general governance, an elections and referenda policy. That policy sets out the rules respecting the conduct of a referendum such as notice, campaign registrations, spending limits and the like.

9) In early September, 2005, the USC appointed its representatives to the ROC which held its first meeting on September 11, 2005. Within a few days thereafter, the USC met and passed a motion declaring it was in support of the referendum to join the CFS. However, it was clear at that USC meeting that there was not unanimity among the council members regarding the question.

10) At a September 22, 2005 meeting, members of the USC became alive to the issue that there were operational conflicts between the USSU elections and referenda policy and the rules dictated by CSF. In particular, the USSU's elections and referenda policy did not contemplate the creation of an ROC.

11) There was some discussion about changing the USSU elections and referenda policy in order to give authority to the ROC for the purpose of the specific referendum dealing with CFS. In the end, the debate was postponed until September 29, 2005.

12) The USC benefited from legal advice and resolved on September 29 to take steps to meld the USSU's elections and referenda policy and those procedures mandated by CSF. Specifically, the USC voted to amend the USSU elections and referenda policy by providing a new section which read:

> 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 USSU Representatives on the Oversight Committee and that the Elections Board must ratify the results of this referendum.

13) The Elections Board is an entity that existed within the elections and referenda policy of the USSU governance documents. Extracts from that policy germane to the Elections Board and the debate at bar are:

> IV. REFERENDA
>
> AUTHORITY
>
> 1. Elections Board shall have authority over the activities of the USSU membership as they relate to referenda.
>
> ...
>
> V. ELECTIONS OFFICIALS
>
> ELECTIONS BOARD
>
> 1. EB shall exist as outlined in Article 10 of USSU Bylaw 1: Governance Procedures.
> 2. The EB shall be responsible for the following:
>
> (i) Conducting elections and referenda as outlined in Article 8 and Article 11 of the USSU Constitution and Article 10 of USSU Bylaw 1: Governance Procedures;
>
> (ii) Being knowledgable [*sic*] about other procedures and policies necessary for a proper election;
>
> (iii) Interpreting and enforcing the Elections and Referenda Policy as it pertains to all members of the USSU;

(iv) Appointing DROs; and,

(v) Presiding over the vote-counting mechanism and election data.

...

VII. VIOLATIONS & COMPLAINTS

1. All violations of election procedures, arising from the first day of campaigning up to the date of the final ballot count shall be investigated by the CRO and dealt with by the EB.
2. Prior to the start of campaigning, the EB will create a schedule for election violations and discretionary punishment of violations such that will standarise the process.
3. The Elections Board has the right to disqualify a candidate, if it deems that this is an appropriate punishment for violations committed by the candidate.
4. All complaints arising out of any election must be submitted in writing to the USSU office, within five (5) days immediately following the date of the final ballot count. Each complaint shall be dealt with by the EB, which may declare any election invalid and shall be empowered to take such steps, as it deems necessary.
5. In the event of any discrepancies, the EB is considered to be the ultimate decision making authority. All disputes and/or complaints must be submitted in writing, and no member outside of this body is permitted to enforce policy or procedure.
6. Registered campaign committees shall be liable for any campaign violations, however they occur. Likewise, the said campaign committee is also responsible for any actions of any individual or group working on behalf of the campaign committee.

14) Accordingly, by September 29, 2005, approximately a week before the referendum was to be held, the USC was confident it had appropriately fused the referenda procedure of the USSU and the CFS.

15) The ROC created a protocol regarding the referendum, although, in fairness, the document was being drafted "on the fly". Changes and additions were being made from time to time respecting the procedure for the referendum. The evidence is somewhat unclear, however, it would appear that the final protocol for the referendum was not settled until December 3, 2005, well over a month after the vote.

16) Notwithstanding the issues confronting the USC over the governance documents respecting the referendum, it is clear from the material that within the student body the debate was lively and active, at least from September 19 forward. I conclude that any student who was interested had available to him or her a significant exposure to both sides of the issue.

17) The referendum was scheduled to be held on October 4, 5 and 6, 2005. It is worth noting that the question on the ballot read: "Are you in favour of membership in Canadian Federation of Students?" The fact that the ballot lacked a reference to the requirement of an annual fee is part of the cafeteria of wrongs alleged by the applicant in the conduct of the referendum by USC and CFS through its creation, the ROC.

18) As Article 11 of the USSU constitution mandates a referendum when establishing a dedicated student fee, it is, in my opinion, somewhat anomalous that the referendum question would not reference the fact of such fee.

19) The results of the referendum were:

1,968 in favour of federating with CFS;
1,584 against federating with CFS;
10 spoiled ballots.

20) The voter turnout for the referendum was approximately 20% of the student body. In the affidavits filed on behalf of USC, it is suggested that this is a higher than usual turnout as 15% is the norm for USSU general elections.

21) For those members of the student body engaged in the debate of whether to federate with CFS, passions ran high. Throughout the course of the campaign there was considerable *sturm und drang*. After the referendum, the ROC met and considered a smorgasbord of complaints each side had about the other and of the ROC itself. The ROC concluded:

> 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.

22) However, the report of the ROC was not the end of the matter. The September 29, 2005 resolution of the USC required that the Elections Board *must* ratify the results of the referendum. The Elections Board received and considered the report of the ROC and then set about its independent task of reviewing what transpired through the course of the referendum. The relevant portions of its report are taken from Exhibit "CC" to the Affidavit of Lucy Watson. It sets out, in part:

> 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.
>
> 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.

23) Although the Elections Board refused to ratify the referendum result, it did recommend that another referendum be held with ground rules that were better settled and broadly disseminated.

24) The decision of the Elections Board came before the USC on February 9, 2006. The USC decided to canvass the matter with their solicitor and again addressed the matter at the USC meeting on March 30, 2006. The minutes of that meeting clearly demonstrate that much of what was worrying the USC were the legal consequences of not ratifying the vote.

25) In the end, the USC decided to ignore the protocol it had established for the referendum and dismissed the decision of the Elections Board. It then substituted its own judgment and ratified the referendum. In due course CFS was advised and at that juncture both USC and CFS assumed the table had been set for the USSU to become part of CFS federation.

26) The applicant, a student in his final year at the University during the 2005/2006 academic year, took considerable umbrage at the conduct of the USC, CFS and ROC in relation to the referendum. In May, 2006, he brought an application under the *Act*. The notice of motion, as amended, sought the following relief:

> 1. An order pursuant to s. 135(2)(b) of *The Non-Profit Corporations Act, 1995* declaring the referendum deciding the question, "Are you in favour of membership in the Canadian Federation of Students?" held at the University of Saskatchewan between October 4 and 6, 2005 invalid.
> 2. An order pursuant to s. 135(2)(a) of *The Non-Profit Corporations Act, 1995* restraining the University of Saskatchewan Student's Union from joining the Canadian Federation of Students until the above noted issue is determined.
> 3. Or in the alternative, an order pursuant to s. 135(2)(c) of *The Non-Profit Corporations Act, 1995* requiring a new referendum be held in compliance with the University of Saskatchewan Student's Union Election Protocol and further declaring that any ceding of referendum organizing authority or oversight to an external third party with a direct, material financial interest in the outcome of the referendum is in violation of the University of Saskatchewan Students' Union Constitution and Election and Refenda [*sic*] Policy.
> 4. Or further in the alternative, an order pursuant to s. 225(2)(a) of *The Non-Profit Corporations Act, 1995* restraining the University of Saskatchewan's Student Union from joining and/or participating as a member of the Canadian Federation of Students until the validity of the referendum is determined.

27) At the hearing of the matter, the motion was further amended to include relief under s. 225(1) of the *Act* seeking an order declaring the referendum to be of no force or effect.

28) The motion brought by the applicant joined only the USSU as a respondent. The CFS brought its own motion asking that CFS (meaning CFS and CFS-S) be joined as parties to the application. The CFS also sought an order permitting it to cross-examine the applicant, Robin Mowat. There was also the inevitable applications by all the parties applying to strike portions of affidavits submitted on behalf of others because they were scandalous, argumentative or irrelevant.

29) A number of the applications were dealt with on a preliminary and very summary basis. After modest argument, I ordered that the CFS be added as a party respondent to the application. Rule 39 of *The Queen's Bench Rules of Court* governs the situation and provides:

> 39 Where a person who is not a party claims:
>
> (a) an interest in the subject matter of the action;
>
> (b) that he may be adversely affected by a judgment in the action; or
>
> (c) that there exists between him and one or more of the parties a question of law or fact in common with a question in issue in the action;
>
> he may apply to be added as a party, and the court may add the person as a party and may give such directions and impose such conditions or make such order as may seem just.

30) There is no question CFS had an interest in the subject matter and could be adversely affected by the judgment. In my view, it would be counterintuitive not to add CFS as a party to the application.

31) I dismissed the application by CFS to cross-examine the applicant, Robin Mowat. In this jurisdiction such relief is discretionary. I concluded that there was nothing Mr. Mowat could add in cross-examination that would assist in the resolution of the issue.

The burden lies on the party seeking the right to cross-examine to show the examination will assist in resolving the issue before the chambers judge. That bar was not cleared.

32) With respect to the applications to strike the offending portions of the affidavits, I conclude, as a result of my analysis on the larger question, it is not necessary to address those complaints.

33) The substantive issues distill to:

(i) Does Robin Mowat have standing under ss. 135 or 225 of *The Non-Profit Corporations Act, 1995* ("*Act*") to bring the within application?

(ii) If the applicant does have standing, is he entitled to the relief sought?

Applicant's standing

34) Section 135 of the *Act* reads:

> 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.

35) Other relevant sections from the *Act* are in Division XVIII – Remedies, Offences and Penalties. Those portions which are germane are:

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 any application pursuant to this Division.

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:
>
> (a) restraining the conduct complained of;
>
> ...
>
> (h) varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract.

36) The position of the USSU and CFS is that s. 135 is not applicable to the complaint raised by the applicant. Although there is no definition of an "election" in the *Act*, the respondents argue that a plain and usual reading of s. 135 would confine the ambit of the word "election" to that of an election of a director or auditor. They suggest that it would be an error, and a clear misreading of the section, to provide an expansive definition of election so as to encompass a referendum by a non-profit corporation seeking membership in a third party.

37) The USSU asserts the applicant has another barrier which he cannot clear. He convocated from the University of Saskatchewan in the spring of 2006. As this matter was argued in September, 2006, he is no longer a member of the USSU, nor is he a director. In sum, the USSU says the applicant has no standing to bring an application under s. 135 of the *Act*.

38) The applicant replies that notwithstanding his graduation from the university in May, 2006, he continued to be a member of the USSU until August 31, 2006. Membership for USSU members who have paid their dues are by convention, he asserts, still members until August 31, 2006. Buttressing his position is the fact that many of the benefits associated with USSU membership continue in force until August 31, 2006 such as coverage under the health and dental plan. Additionally, the applicant

argues that he gave notice of intention to seek judicial review as early as April 3, 2006 and therefore at the initiating steps of the matter he was a "member" even by the respondent's definition.

39) The applicant submits that if the Court employs a narrow definition of election, then a member of an organization in his circumstance is without remedy in the face of an improperly conducted referendum which affects the organization.

40) I agree with the respondent's interpretation of s. 135(1). To read the word "election" in the section as anything other than referring to the election of a director or auditor requires interpretive contortions beyond my ability.

41) However, divining the true meaning of s. 135 is academic given the relief available to the applicant under s. 225. Section 225 addresses an application by a complainant. A complainant is defined in s. 222 and can be a former director. It is common ground, by all, that the applicant is a former director.

42) In my view, the conduct complained of by the applicant falls within the ambit of s. 225(1). He complains about the manner in which the activities or affairs of the corporation have been conducted. The authority in s. 225(2) gives the Court the necessary power to address such wrongs and are sufficiently broad so as to subsume an order declaring a referendum of no force or effect.

Should the referendum be set aside?

43) When addressing the relief requested by the applicant, the Court must first determine what approach it should take in the context of overturning a vote. I conclude the case law clearly directs that my mind set must be very circumspect.

44) In *Abrahamson v. Baker and Smishek* (1964), 50 W.W.R. 664 (Sask. C.A.), the Court addressed an application to declare an election invalid due to irregularities and observed at page 672:

> ...to be successful on a petition based upon the irregularities therein-stated, it must be shown to the satisfaction of the Court that the election was not conducted in accordance with the principles of the Act and that such non-compliance did affect the result of the election. The onus for establishing these two requirements rests upon the petitioner. That being so, the petition must include not only the allegations of irregularities but also allegations of the effect thereof on the election....

45) In *Reaburn v. Lorje*, 2000 SKQB 81, (2000), 190 Sask. R. 235 (Q.B.), the Court articulated that the overriding theme that emerges from controverted elections case law is that the Court's approach to its jurisdiction over the democratic process should be one of significant caution. The Court should hesitate to intervene with the will of the electorate unless an application shows, on its face, that non-compliance with election rules affected the ultimate result.

46) The Court in *Re Bennett*, (1972) 2 Nfld. & P.E.I.R. 543 (Nfld. S.C.), set out the common law rule respecting controverted elections by quoting from *Crozier v. Rylands* (1869), 19 L.T.R. 812. At pages 547 and 548 of *Re Bennett*, the Court noted:

> ...before a judge upsets an election he ought to be satisfied beyond all manner of doubt that the election was thoroughly void....
>
> I think the law to be clear: if the election was carried out properly and in substantial manner in the spirit of the Act, and if the voters were able to express their choice clearly and decisively without any obstruction or hindrance an election should not be set aside because of some failure to observe the letter of the *Act*. This admits of only one qualification, and that is, that if the failure to observe the letter of the Act in the opinion of the election court

> could have altered the result of the election then it may be set aside. I would add to this that by the result, I mean the ultimate election of one of other of the candidates, and not the number of votes which one received more than another.

and further at page 549:

> This view I think accords with the general proposition of law which says that where the voters have had a free and unfettered opportunity to express their choice, then the Court should not interfere without being satisfied that there was in fact no true election....

47) The respondents also referred to *Leroux v. Molgat*, [1985] B.C.J. No. 45 (B.C. S.C.) (QL), where Justice McLachlin (as she then was) of the British Columbia Supreme Court summarized the relevant legal principles with respect to the setting aside of the results of an election at para. 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 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.

(See also: *Byers v. Wakefield*, 2004 SKQB 26, (2004), 242 Sask. R. 228 (Q.B.); *Maurice v. Daignault*, 2001 SKQB 247, (2001), 206 Sask. R. 239 (Q.B.); and *Goos v. Saskatchewan* (1986), 53 Sask. R. 64 (Q.B.))

48) The respondents urge the Court to stand back from election results even in the face of irregularities or problems. They argue that if, and only if, the Court is satisfied that the irregularities prevented the voters from having a "free and unfettered" opportunity to express their choice, then the Court should not insert itself into the process.
49)

50) The applicant joins issue with the respondent's approach. He asserts the analysis in cases dealing with controverted elections for elected office are not easily transferrable to the within debate. The applicant urges the Court's focus should be on the following:

(i) Has the non-profit organization acted in good faith?

(ii) Has the non-profit organization acted illegally?

(iii) Has the non-profit organization acted within the rules of natural justice?

51) The applicant suggests the Court should seek guidance from *Walton (Litigation Guardian of) v. Saskatchewan Hockey Association* (1998), 166 Sask. R. 32 (Q.B.). Justice Rothery agreed with the Supreme Court of Newfoundland in *Mugford et al. v. The Newfoundland Amateur Hockey Association et al* (unreported 1982 No. C.B. 408) where it held:

> I think it is relevant to consider the function of a Court, which is to redress or correct or rectify an injustice or an unlawful act or where there has been a breach of a right. The Court is not interested in running the affairs of non-profit organizations or athletic associations or any other associations where they have acted in good faith, where they have not acted illegally or unlawfully, and have acted in accordance with the rules of natural justice ...

52) The applicant also invokes the Supreme Court of Canada in *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 S.C.R. 602 where Dickson J. opined at para. 75:

> ...The fact that a decision-maker does not have a duty to act judicially, with observance of formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly which involves importing something less than the full panoply of conventional natural justice rules. In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework....

53) Similarly, in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, at paras 21 through 28, under the heading "Factors Affecting the Content of the Duty of Fairness", the Supreme Court of Canada has provided guidance on how the duty of fairness may arise and be applicable in various circumstances. The following summary is found in the Supreme Court Reports headnote, at page 819:

> The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

(See also: *Kanigan (Guardian Ad Litem) v. Castlegar Minor Hockey Association* (1996), 141 D.L.R. (4th) 563 (Ont. S.C.); *Beauchamp (Litigation Guardian of) v. North Central Predators AAA Hockey Assn.* (2004), 247 D.L.R. (4th) 745 (Ont. S.C.); and *Mirimichi Minor Hockey Club Inc. v. New Brunswick Amateur Hockey Assn.*, [1999] N.B.J. No. 631 (N.B. Q.B. T.D.) (QL))

54) The applicant submits that the USC's flagrant and arbitrary changing of the rules of the game, in relation to the ratification by the Elections Board, must be clearly determinative on the issue of breach of duty of good faith and natural justice.

55) On September 29, 2005, the USC, with forethought, laid down a protocol for the referendum. The protocol was not precipitously created but was a focussed attempt to dovetail the existing USSU rules for referenda and the requirements of the CFS. A critical part of the protocol for the CFS referendum was that the Elections Board "must ratify the results of this referendum".

56) The applicant submits that the entire referendum was put into question and the process tainted beyond redemption by the USC's response to the report of the Elections Board. When the Elections Board had the temerity to act deliberatively and render a decision at odds with the wishes of the USC, the USC simply changed the rules and substituted its own ratification for that of the Elections Board.

57) The respondents acknowledge, *prima facie*, the treatment of the Elections Board result was not consistent with the September 29, 2005 resolution. However, they remind the Court that the Elections Board is a creature of the USSU and as a result its function could be changed by the USC. The applicant replies that such power does not

permit the USC to change the Elections Board function from critical last step to meaningless final charade.

Conclusion

58) I am in accord with the judicial line of thought that the Court should be hesitant to involve itself in the democratic process. The question should always be: notwithstanding the missteps in the process, can it be said those missteps affected the result?

59) It is telling that the Elections Board, which was much closer to the ground than any Court could possibly be, concluded that it could not, in good faith, ratify the referendum result. It stated its underlying concern was whether any of the problems "**would have significantly affected the will of the voters**". From its decision, I must conclude it did. If I employ the analysis from the controverted elections cases, the Elections Board's report would lead to a conclusion that there should be an order directing the referendum result should be set aside.

60) However, on balance, I do not believe the test emanating from the controverted elections cases is applicable. I believe that in debates of this type, the preferred guidance is from the test articulated in *Walton (Litigation Guardian of) v. Saskatchewan Hockey Association*, *supra*, and the related cases dealing with non-profit organizations.

61) 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?

62) 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?

63) 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.

64) Accordingly, I conclude that the USC breached its obligation to act in good faith and conducted itself in a fashion inconsistent with natural justice. The applicant is entitled to a portion of the relief he seeks. The portion I am willing to grant is limited to the effect of the referendum. I order that the referendum held by the USSU on the issue of whether it should join the CFS is of absolutely no force or effect.

65) In all of the circumstances, I decline to award costs.

_____ J.

R. S. Smith