

CANADA
PROVINCE OF SASKATCHEWAN

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

Robin Mowat

PLAINTIFF

AND:

University of Saskatchewan Students' Union

DEFENDANT

BRIEF OF LAW ON BEHALF OF THE APPLICANT,
ROBIN MOWAT

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I. CONCLUSION

1. The heart of Mr. Mowat's application is procedural fairness. University of Saskatchewan Students' Union ("USSU") members voted in a Referendum to join the Canadian Federation of Students between October 4 and 6, 2005. The USSU had empowered a Referendum Oversight Committee ("ROC") to administer the Referendum on September 29 2005. However this body struggled to compile a clear set of rules that would govern the election.
2. The USSU alleges that campaigning had begun by both sides of the "yes" and the "no" sides on or about September 19, 2005. At this time there were no clear rules governing the Referendum nor had the ROC been empowered to administer it.
3. There is no disputing that the USSU had the authority to empower the ROC with the authority to administer the Referendum. Rightly or wrongly, the ROC was a body made up of two impartial members from the USSU and two politically motivated members from the CFS. It is submitted that where there could be a reasonable appreciation of bias on behalf of the committee administering the Referendum, the USSU had to be especially careful to ensure fairness.
4. The USSU had a duty to ensure that the election rules were clearly defined for each proponent of the Referendum. Surely a fair election requires that all parties who want to participate in that election be given the opportunity to do so. Mr. Mowat was not able to obtain a copy of the Referendum Protocol until September 27, 2005, just 6 days prior to the first voting day. However even this version of the rules was not the final version relied upon by the ROC.
5. The Referendum Protocol was an involving document. It was a document that was not finalized until December 3, 2005. The lack of information available to USSU members amounts to a breach of procedural fairness and thus, natural justice. This breach is egregious enough to have affected the outcome of the Referendum and as such the Referendum should be ordered void.

6. Clearly principles of fairness require that electoral rules are provided to members in advance of any campaign period. The attempt by the USSU to grant the ROC authority to administer the Referendum retroactively violates the principle that campaign rules must be made available prior to the start of an election to ensure a level playing field to all participants.
7. It is submitted that the USSU's actions in connection to the Referendum are oppressive since the body it empowered to administer the Referendum ignored the rules of natural justice. Further, events leading up to the actual Referendum, and the USSU's ultimate failure to remain impartial throughout, indicate a lack of good faith. The Referendum should be ordered void and the USSU be placed back into the same position that it was prior to the Referendum –a prospective member in the CFS.

II. FACTS

8. A Referendum was held by the USSU on October 4th through 6th 2005, to determine whether or not it should join the CFS.
9. The USSU had to administer the Referendum in accordance with Bylaw I of the CFS constitution. As such, the USSU had to temporarily release its authority to run certain referenda to the ROC.
10. The ROC was a committee of four members, two representing the interests of the CFS and two representing the interests of the USSU. The members representing the USSU were a Chief Returning Officer, Dorinda Stahl, and an Assistant Chief Returning Officer, Martin Olszynski. Those representing the CFS were their National Deputy Chairperson, Angela Regnier, and a senior staff member, Lucy Watson. Both members from the USSU were to remain neutral in order to adhere to the USSU's Code of Ethics.

Supplemental Affidavit of Trent Evanisky, paragraph 8.

11. The motion to give the ROC authority over the Referendum was made on September 22, 2005. USSU President, Gavin Gardiner, wanted the motion passed

that night, but Council was persuaded to follow its standard procedure of giving new business a week in order for Councillors to meet with their constituents.

Supplemental Affidavit of Trent Evanisky, paragraph 9.

12. Concurrent to the USC motion granting the ROC authority to administer the Referendum, the ROC met itself on September 21st and 22nd, 2005. The minutes from these meetings state that:

At this point, the CRO and ACRO were unanimous in their opinion that the Referendum could not be held.

Affidavit of Trent Evaninsky, paragraph 10.

13. At a USC meeting held on September 29, 2005, [just two school days prior to the Referendum voting period began], Mr. Olszynski admitted that certain violations of both USSU and CFS policy had been made. In particular he noted that:
 - (a) The CRO had not been given the Referendum question as it would appear on the ballot within the two-week limit, as required by both CFS Bylaws and the USSU Elections Policy; and
 - (b) In the case of the Elections Policy, the Referendum question needed to be approved by the USSU solicitor prior to being passed to the CRO. Mr. Olszynski stated that this had not been done.

Affidavit of Robin Mowat, paragraphs 15 and 16.

14. At this USC meeting, the Elections Policy was amended, inserting a clause stating that in the case of a Referendum to federate with the CFS (gain full membership), a Referendum Oversight Committee would be formed and the results of such a Referendum subject to ratification by the USSU Elections Board ("EB")

Affidavit of Robin Mowat, paragraph 15, Exhibit H.

15. There was a further amendment to the Elections Policy made on September 29, 2005 that required the Elections Board ratify the result of the Referendum.

Affidavit of Robin Mowat, paragraph 15, Exhibit H.

16. It is unclear when the official campaign period for the Referendum began. Over the course of September and early October of 2005, it was visually apparent on campus that the CFS was involved in a campaign at the University of Saskatchewan. There

were posters supporting the CFS put up all over campus. Jeremy Ring noticed these posters before he was aware that there was a Referendum.

Affidavit of Jeremy Ring, paragraph 3.

17. Prior to the Referendum, the process that the USSU followed with respect to elections was that:
 - (a) The USSU made an official call to register campaigns;
 - (b) The USSU held a mandatory information meeting to brief all campaigners on the rules; and
 - (c) Only then could campaigning commence.

Affidavit of Robin Mowat, paragraph 12.

18. However this process was not followed. Referendum rules were not available to students until at least September 27, 2005, seven days prior to the first day of voting. Mr. Mowat received a copy of the Referendum rules directly from ACRO Mr. Olszynski on September 27, 2005. At this time, Mr. Mowat had received the USSU's only copy of the Referendum rules since he was contacted by the USSU's secretary to return his copy.

Affidavit of Robin Mowat, paragraphs 7 and 9.

19. The copy of the Referendum rules that Mr. Mowat received from Mr. Olszynski were not signed by any member the Referendum Oversight Committee ("ROC").

Affidavit of Robin Mowat, paragraph 9, Exhibit B.

20. Mr. Mowat was confused with respect to which rules would govern the Referendum. USSU election and Referendum rules and procedures are clearly outlined in the Elections Policy; however Mr. Mowat had received a draft, unauthorized set of rules established by the ROC. There was no official registry for campaigns, nor was there a meeting with students to review the Referendum rules.
21. On January 17, 2006 the Elections Board, under the new chairmanship of Victoria Coffin, began to consider how it would evaluate whether or not to ratify the

Referendum. It attempted to clarify key dates of the Referendum process and created a list of factors that it felt might have influenced student decisions.

Affidavit of Victoria Coffin, paragraph 12.

22. As a result of its investigation the EB chose not to ratify the results of the Referendum on January 28, 2006. The EB issued a report that was submitted to USC on February 9, 2006. The key concerns outlined by the EB were:
- (a) Although there was close to one year between taking out perspective membership and the Referendum, the ROC still had to deal with fundamental issues on a compressed timeline;
 - (b) No formal notice requesting campaign team registration;
 - (c) No formal declaration of the date that campaigning was to begin;
 - (d) No notice of questions was served to the student body;
 - (e) ROC protocol was an involving document;
 - (f) There was no agreement on specific key issues: spending limits, classroom campaigning, and campus participation;
 - (g) There is no clear resolution on the inconsistency's of USSU and CFS bylaws prior to the campaign.
 - (h) Only those complaints that were issues within protocol were considered;
 - (i) CSS members of ROC were involved in Referendum campaigning;
 - (j) No separate appeal's board was struck in accordance with CFS Bylaw No. 4(g).

Affidavit of Victoria Coffin.

23. At the March 30, 2006 meeting of USC, Council heard from both USSU President Gardiner and USSU General Manager Caroline Cottrell that the USSU would face a lawsuit from the CFS if they did not ratify the Referendum. Council also heard about Robin Mowat's intention to have the Referendum results looked at by a judge.

Supplemental Affidavit of Trent Evanisky, paragraph 15.

24. The comments made by President Gardiner and Ms. Cottrell were made as a result of an opinion sent to USSU legal counsel Greg Whelan by Todd Burke, legal counsel representing the CFS. USC made the decision to override the EB and to ratify the results of the Referendum. Even the Members of USC who sat on the EB voted to over-turn their own findings. The motion to ratify the results of the election passed with a margin of 13-6.

Supplemental Affidavit of Trent Evanisky, paragraph 16, Exhibit E.

25. At its meeting of May 5, 2006, the Board of Governors of the University of Saskatchewan approved the following resolution:

That the request to collect a Canadian Federation of Students (CFS) undergraduate fee be denied.

Affidavit of Dr. Lea Pennock, paragraph 3.

26. At a USC meeting on May 14, 2006 USSU President, Evan Cole indicated that the USSU owes CFS \$160,000.00 in dues and that this money was to come from students.

Supplemental Affidavit of Trent Evanisky, paragraph 17, Exhibit O.

III. ISSUES

- (a) Robin Mowat has standing to bring this motion.
- (b) Section 135 of the Non-Profit Corporations Act contemplates Referendums.
- (c) The USSU's actions are oppressive and unfairly prejudicial in accordance with s. 225 of the Non-Profit Corporations Act.
- (d) The Referendum should be held as void and a new Referendum ordered.
- (e) CFS should not be added as a party to this motion.
- (f) Should CFS be successful in being added as a party, it is not entitled to cross-examine Mr. Mowat.
- (g) Portions of Mr. Gardiner's Affidavit should be struck.
- (h) If added as a party, portions of Ms. Watson's Affidavit in support of the CFS should be struck.

IV. ANALYSIS

A. Robin Mowat has standing to bring this motion

1. Mr. Mowat graduated from the University of Saskatchewan in May of 2006, however it is submitted that he continues to be a member of the USSU until August 31, 2006.
2. Membership for USSU members who have paid their dues for Term 1 and Term 2 are, by convention, still members until August 31. Many of the benefits associated with USSU membership continue in force until August 31. For example, coverage under the USSU's Health and Dental plan are effective until August 31, regardless of whether the member is registered in classes during the Spring-Summer Sessions. Under the heading "When" of the USSU's Health and Benefit Plan it states:

When : All enrolments must be completed between Sept. 2 - 20, 2005 (for full-year coverage). Only new Term 2 students can enrol themselves and their spouse/ dependants between Jan. 4 - 17, 2006 for coverage from Jan. 1 - Aug. 31, 2006.

Rebuttal Affidavit of Robin Mowat, paragraph 9.

3. Indeed, most USSU Executive members, who must remain ordinary USSU members (i.e. registered students) during their one-year term, do not take classes during the summer period, but are considered to still be members. In general, a very many number of undergraduates only take classes (and pay USSU dues) during Term 1/Term 2 and take the summer off in order to work. These students are still considered USSU members.

Rebuttal Affidavit of Robin Mowat, paragraph 10.

4. Should the court find that Mr. Mowat's membership in the USSU has ceased, Mr. Mowat continues to have standing as this application was brought while he was a member of the USSU.
5. This application was commenced on May 19, 2006. The Elections Board Report validated Mr. Mowat's concerns on January 28, 2006. It appeared the USSU might hold another Referendum to clear up the matter. However on March 30, 2006 USC

decided to ignore the Elections Board Report and to ratify the results of the Referendum.

6. As early as April 3, 2006 Mr. Mowat notified the concerned parties through a letter that indicated that he would be initiating this application. At this point Mr. Mowat was clearly a member of the USSU, acting as quickly as possible to pursue this application. Faced with the task of gathering evidence from fellow students, in the midst of final examinations, proved difficult.

Rebuttal Affidavit of Robin Mowat, paragraph 12.

7. However the expedited nature of Mr. Mowat's notice to the USSU of his intention to apply for judicial review of the Referendum is sufficient to grant him standing.

B. Portions of Mr. Gardiner's Affidavit should be struck.

8. Rule 319 of *The Queen's Bench Rules of Saskatchewan* states as follows:

319. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may under special circumstances be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same; and where affidavits upon information and belief are filed which do not adequately disclose the grounds of such information and belief the court may direct that the costs of such affidavits shall be borne by the solicitor filing the same.

9. On an interlocutory application, affidavits based on information and belief are admissible, provided the grounds for the hearsay are provided and special circumstances exist. Both of these criteria must be satisfied, otherwise the hearsay is inadmissible.

Smith v. Smith, 2000 SKQB 108 at para.22 (Sask.Q.B.) [TAB J].

10. If at all possible, the court prefers to receive information first hand. The words 'special circumstances' "were probably intended to avoid to avoid the use by parties to an extravagant degree of affidavits on information and belief when in many circumstances...the party with first hand information being readily available could himself have taken the necessary affidavit rather than it being taken on

information and belief, the information having been supplied by the principal party himself.”

R. v. Ferrieh (1985), 42 Sask.R. 117 at para. 19 (Sask.Q.B.) [TAB K].

11. Rule 319 will also be offended by the inclusion of argumentative statements. A statement is considered argumentative “when it contains, in addition to a statement of fact, reasoning or comment on how those facts bear on the disputed matter(.)”

Smith v. Smith, 2000 SKQB 108 at para.28 (Sask.Q.B.) [TAB J].

12. Rule 327 of *The Queen’s Bench Rules of Saskatchewan* states as follows:

327. The court may order any matter which is scandalous to be struck out from any affidavit.

13. Scandalous matter has been interpreted as “any matter which is indecent, offensive and made for the purpose of prejudicing the opposite party. It is material which is unbecoming and contrary to good manners and accepted pleading and practice.”

R. v. Bank of Nova Scotia, [1983] S.J. No.346 at para.11 (Sask.Q.B.) [TAB L]

14. If material in an affidavit is relevant, even though it is also scandalous, it is admissible. In order to be struck out under Rule 327, the material must be both scandalous and irrelevant.

Smith v. Smith, 2000 SKQB 108 at para.33 (Sask.Q.B.) [TAB J].

15. The following paragraphs, or part paragraphs, of Gavin Gardiner’s Affidavit contain hearsay without stating any grounds for belief or special circumstances, therefore offending Rule 319:

(a) Paragraphs 18, 26, 29, 30 and 32.

16. The following paragraphs, or part paragraphs, of Gavin Gardiner’s Affidavit are argumentative in nature, therefore offending Rule 319:

(a) Paragraphs 18, 21, 26, 29, and 30.

17. The following paragraphs, or part paragraphs, of Gavin Gardiner’s Affidavit are scandalous and irrelevant to the proceedings, therefore offending Rule 327:

- (a) Paragraphs 26 and 27.

C. If added as a party, portions of Ms. Watson's Affidavit in support of the CFS should be struck.

- 18. The following paragraphs, or part paragraphs, of Lucy Watson's Affidavit contain hearsay without stating any grounds for belief or special circumstances, therefore offending Rule 319:

- (a) Paragraphs 19, 28, 31, 35, 39, 48, 49 and 56.

- 19. The following paragraphs, or part paragraphs, of Lucy Watson's Affidavit are argumentative in nature, therefore offending Rule 319:

- (a) Paragraphs 19, 39, 48 and 76.

- 20. The following paragraphs, or part paragraphs, of Lucy Watson's Affidavit are scandalous and irrelevant to the proceedings, therefore offending Rule 327:

- (a) Paragraphs 39 and 49.

D. Section 135 of the Non-Profit Corporations Act contemplates Referendums

- 21. The Non-Profit Corporation Act states at s. 135:

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.

- 22. The ability of Mr. Mowat to apply to the court for review of the Referendum results depends upon the definition given to the term "election" in the first part.

Unfortunately the term is not defined in the Act. Furthermore, judicial consideration of this provision in Saskatchewan is lacking. Section 85 of the *British Columbia Society Act*, s. 139 of the *Manitoba Corporations Act*, and s. 243 of the *Newfoundland Corporations Act* are all very similar in wording, but have not been considered in this context either.

- 23. Counsel for the USSU suggests that the Referendum does not fall into the definition of election because it only applies to the election of officials. A review of the

wording of the section illustrates that it applies to elections or appointments of directors or auditors. The inclusion of the appointment of directors/auditors does not confine the first part of the definition to the election of directors/auditors. It clearly encompasses the election of officers. A review of the definition of “Election” in other pieces of Saskatchewan legislation, illustrate that it also encompasses Referendums.

24. In the *Local Government Elections Act*, L. 30.1 S.S. 1982-1983 “Election” is defined at s. 2(1)(k) as:

“**election**” includes a by-election, and means:

- (i) an election of members of council;
- (ii) an election of board members; or
- (iii) a vote of electors or voters, as the case may be, for approval of a bylaw or resolution, or to obtain their opinion on any question or resolution submitted to them, pursuant to *The Cities Act*, *The Municipalities Act*, *The Northern Municipalities Act* or *The Education Act*, 1995, as the case may be;

[Tab A]

25. It is counter-intuitive to exclude a Referendum from the definition of Election. “Election” is defined by Merriam-Webster’s Dictionary of Law (1996, Merriam-Webster Inc., retrieved on-line from www.dictionary.com) as:

the act or process of electing

[Tab B]

26. “Elect” is defined as:

to select by vote for an office, position, or membership

[Tab B]

27. Clearly the Referendum held at the U of S in the fall of 2005 falls within this meaning. If s. 135 of the Act were confined to the election of officials, members of non-profit organizations would have no recourse where a vote to join another organization is improperly held.

28. Mr. Mowat has no other means to contest the results of the Referendum. The only bodies available to hear Mr. Mowat’s appeal was the ROC and the EB. Not

surprisingly the ROC dismissed Mr. Mowat's complaints. However, the EB investigated the administration of the Referendum and declared it invalid. Despite this finding the USSU continues to be a member of the CFS.

E. The USSU's actions are oppressive and unfairly prejudicial in accordance with s. 225 of the Non-Profit Corporations Act

29. Section 225 (1) of the *Non-Profit Corporations Act* states:

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.

30. In *Walton (Litigation Guardian of) v. Saskatchewan Hockey Association* (1998), [1999] 1 W.W.R. 135 (Sask. 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. . .

[Tab C]

31. Thus the benchmarks for the Court to consider when considering whether a non-profit corporation's actions are oppressive, are as follows:

- (a) The non-profit organization must act in good faith;
- (b) The non-profit organization must not act illegally; and

- (c) The non-profit organization must act in accordance with the rules of natural justice.
32. It is submitted that the USSU's actions in connection to the Referendum are oppressive since it has ignored the rules of natural justice. Further, events leading up to the actual Referendum, and the USSU's failure to remain impartial throughout the process, indicate a lack of good faith.
33. A key requirement of natural justice is the duty of fairness. It is submitted that the USSU in carrying out its executive or administrative function owed its members a general duty of fairness.
34. The common law duty of procedural fairness was reviewed by Laskin C.J.C. in the case of *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311 (S.C.C.). At pp. 324 and 325 the Chief Justice said:

...I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373], at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."

[Tab D]

35. The emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice has been reviewed by the Supreme Court of Canada. In the case of *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 S.C.R. 602 (S.C.C.). At pp. 629-631, Dickson J. states:

...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....

[Tab E]

36. In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at paragraphs. 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 S.C.R. headnote, at 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 the 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.

[Tab F]

37. In the present context, determining the content of the duty of fairness would include:
- (a) consideration of the nature of the statutory scheme for making decisions for its member;
 - (b) the process that must be followed in making such decisions;
 - (c) the function that a participatory process serves in the ultimate decision being made by the USSU; and
 - (d) the importance and consequences of the decision to those who might be affected by it.
38. The USSU is a corporation incorporated pursuant to the *Non-Profit Corporations Act*.

Affidavit of Gavin Gardiner, paragraph 3.

39. According to Article 1 of the USSU Constitution, the USSU is the “organization responsible for the governing of undergraduate student affairs at the University of Saskatchewan.”

Affidavit of Gavin Gardiner, paragraph 3.

40. The Executive Committee of the USSU is entitled to administer the affairs, manage the activities and formulate policies for the USSU and to be accountable to the USC with respect to the same according to Article 7, Part 2 of the USSU Constitution.

Affidavit of Gavin Gardiner, paragraph 6.

41. Article 7, Part 2 B of the USSU Constitution entitles USC to establish standing committees, boards, other committees and commissions from time to time that it considers advisable.

Affidavit of Gavin Gardiner, paragraph 6.

42. Thus the USSU Executive acted within its authority when it took out a prospective membership in the CFS and agreed to hold a Referendum to determine whether or not the USSU should join CFS.

43. By applying for and being granted prospective membership in the CFS, the USSU agreed to accept the rights and responsibilities for this membership.

Affidavit of Gavin Gardiner, paragraph 15.

44. The responsibilities of prospective membership included:

- (a) Holding a binding Referendum in accordance with CFS bylaw I, Article 4; and
- (b) The formation of a Referendum Oversight Committee composed of two members of the CFS and two members of the USSU;

Affidavit of Gavin Gardiner, paragraphs 15 and 16.

45. The ROC was responsible for (amongst other things):

- (a) Establishing the notice requirement for the Referendum and ensuring that notice is posted;
- (b) Establishing the campaign period; and
- (c) Establishing all other rules and regulations for the vote.

Affidavit of Gavin Gardiner, paragraph 16.

46. Mr. Gardiner asserts that the notice of the Referendum was advertised between September 15-19. However, he does not substantiate this assertion with copies of

any of the e-mails sent to “colleges” or by appending copies of the posters notifying students of the upcoming Referendum.

Affidavit of Gavin Gardiner, paragraph 17.

47. More telling is the lack of evidence of a specific date that the campaign period commenced.
48. Mr. Mowat was not aware of the Referendum until at least September 26, 2005. Even though he had been on campus as early as September 13, 2005.

Affidavit of Robin Mowat, paragraph 3.

49. Mr. Ring noticed an active campaign by the CFS through posters located on campus, even before he was aware that the Referendum campaign period had begun.

Affidavit of Jeremy Ring, paragraph 3.

50. Mr. Mowat attempted to retrieve a copy of the Referendum rules on September 26, 2006 without success. He obtained a copy of the Referendum Protocol on September 27, 2006, just seven days prior to the first voting day for the Referendum.

Affidavit of Robin Mowat, paragraphs 7 to 9.

51. This application has illustrated that the Referendum Protocol was an evolving document. In fact three different versions of the Protocol have been appended to Affidavits in this matter.
 - (a) Version 1 is dated “Sunday, September 11, 2005.” It is attached to Ms. Watson’s Affidavit as Exhibit “N”.
 - (b) Version 2 is dated “Tuesday, September 20, 2005.” It is attached to Mr. Gardiner’s Affidavit as Exhibit “N”. However, Mr. Gardiner’s version lacks the cover page showing the date. It is the same document submitted by Mr. Mowat as Exhibit “A” of his Affidavit.

- (c) Version 3 was included in the final ROC report and is the only copy of the Protocol which bears the signatures of the ROC. Its cover page shows a date of “Friday, September 30, 2005” but its signatures are dated “Dec. 3, 2005”. This was attached as Exhibit “T” of Mr. Gardiner’s affidavit.
52. Version 1 is 8 pages in length. Version 2 is 12 pages in length. Version 3 is 13 pages in length.
53. Page 2 of the Protocol is taken from the CFS Bylaws (Bylaw I, 4 b.), but Version 1 contains a spelling error at the end of subsection ii. It is correct in Versions 2 and 3.
54. Page 4 of the Protocol is entitled “Section 2: Polling Station Locations and Hours.”
- (a) Version 1 states: “October 4-6: Locations to be determined 8:30-20:30”
 - (b) Version 2 is similar but states that the end time of voting to be 19:30 rather than 20:30. Version 3 is the only version that contains the locations of the polls.
55. Version 1 does not contain the section containing the ballot question, listed as “Section 3: Ballot Question” in versions 2 and 3.
56. Version 1’s section dealing with “Campaigning” (listed as Section 5 in Versions 2 and 3) differs greatly from subsequent versions.
- (a) In subparagraph A, Version 1 continues to list the time of end of voting as 20:30, while the subsequent versions list it as 19:30.
 - (b) In subparagraph B, Version 1 restricts who is entitled to participate in the voting:

“As per Bylaw I, 4 d ii. Campaigning [CFS Bylaws], only individual members and representatives of the member local association, representatives of the Federation and representatives of other Federation member local associations shall be permitted to participate in the campaign.”

Versions 2 and 3 remove this restriction entirely replacing it with:

“In order to participate in the Referendum campaign, individuals must familiarise themselves with the Referendum protocol as outlined in this document. Any University of Saskatchewan student who wishes to

campaign in the Referendum may request and shall received an orientation to the Referendum protocol by the members of the Referendum Oversight Committee.”

- (c) Version 1 prohibits campaigning in subparagraph C in “the library or in areas where alcohol is served.” Versions 2 and 3 limit campaigning even further to include more explicitly all “University of Saskatchewan libraries”, “the Games Room”, and “communications labs”.
 - (d) Version 1 indicates that “posting [of campaign materials] shall only be permitted in accordance with the University of Saskatchewan Students’ Union’s rules”; while Version 2 and 3 states that “posting of materials shall only be permitted in those areas as per the University of Saskatchewan Students’ Union’s rules. All posters must be stamped with the University of Saskatchewan Students’ Union stamp prior to posting.”
 - (e) Version 1 does not contain the sections labelled in Version 2 and 3 as “Poll Clerks” and “Security of Ballot Boxes.”
57. The last section in Version 1 is a section addressing “Electorate”. It differs from subsequent versions in that it lists in subparagraph A the eligible number of voters as “xxxxx”. Subsequent versions list it as “16,915 (2004-2005 figures).”
58. Neither Version 1 nor Version 2 of the Protocol includes a section entitled “Complaints”. “Section 11: Complaints” only appears in Version 3 of the Protocol.
59. Prior to the election there were at least two different documents setting out the rules of the Referendum. Not only did interested participants in the Referendum struggle to obtain a copy of these rules, but it appears that the ROC struggled to complete and finalize the rules prior to the Referendum’s commencement.
60. At paragraph 22 of his Affidavit, Mr. Gardiner asserts that the Referendum Protocol was available to students and campaigners beginning on September 18, 2005. However, the copy of the Protocol attached to his Affidavit as Exhibit “N” is

clearly a copy of the Protocol attached to Mr. Mowat's Affidavit as Exhibit "A", without the cover page. This is dated September 20, 2005 document.

61. It is clear that Version 2 of the Protocol was not in effect as of September 20, 2006.

- (a) Section 4(c) of Version 2 of the CFS Bylaws required that members receive two weeks notice of the Referendum question. However, at a USC meeting held on September 29, 2005 the ACRO informed USC that the CRO had not been given the Referendum question as it would appear on the ballot within the two week limit.
- (b) Two weeks, prior to the first voting day in the Referendum would in fact be September 20, 2005. Therefore, Version 2 of the Protocol could not have been in effect as of September 18, 2005 or at least September 20, 2005 because of the ACRO's September 29th report of the breach of Section 4(c) of the CFS Bylaws.

Exhibit F, Affidavit of Gavin Gardiner.

62. Further, the ROC violated CFS Bylaws as follows:

- (a) Section 4(c) required that members receive two weeks notice of the Referendum question.
Exhibit F, Affidavit of Gavin Gardiner.
 - (i) The Referendum question is not included in version 1 of the Protocol document but only appears in version 2, dated September 20, 2005. This document was not available to students until September 27, 2005, just 5 school days before the day of voting.
- (b) Section 4(d) required a minimum of 10 days of campaigning.
 - (i) Again, the Referendum Protocol was not available until September 27, 2005.
- (c) Section 4(g) required the establishment of an Appeals Committee comprised of one member appointed by the USSU that were not on the ROC.
 - (i) An Appeals Committee was not struck. Rather the ROC heard appeals.

Exhibit "T", Affidavit of Gavin Gardiner.

63. The final administrative flaw in the process was that the ROC was not given authority to administer the Referendum until September 29, 2005. The Referendum Protocol was not approved by USC until this date. This the governing body of the Referendum and the rules that would apply were empowered retroactively.

Affidavit of Robin Mowat, paragraph 15, Exhibit H.

64. Further, it appears as though the final Referendum Protocol was not signed until December 3, 2005, several months after the Referendum was completed.

Affidavit of Gavin Gardiner, Exhibit "T"

65. Clearly principles of fairness require that electoral rules are provided to members in advance of any campaign period. The attempt by the USSU to grant the ROC authority to administer the Referendum retroactively violates the principle that campaign rules must be made available to all participants prior to the start of an election in order to ensure there is a level playing field between all participants.
66. In *Pitt Polder Preservation Society v. Pitt Meadows (District)* (2000), 77 B.C.L.R. (3d) 54 (B.C. C.A.) the Respondent adopted by-laws rezoning certain land. The applicant sought an order quashing the by laws on the grounds that the Respondent failed to disclose all relevant documents in advance of a public hearing. While this decision does not deal with elections *per se*, it is significant in detailing rules of natural justice. Justice Rowles writing for the majority of the British Columbia Court of Appeal held at paragraph 68:

Failure to disclose impact reports and other relevant documents to public prior to public hearing amounted to breach of duty of procedural fairness.

[Tab G]

67. Ultimately the Court of Appeal held that the finding that there was no evidence of bad faith was not determinative of whether requirements of procedural fairness were met.
68. The most obvious reason that voting systems are important to USSU members is that they determine who is elected, which voters are represented, and in the case at

hand, who ultimately represents the USSU nationally. Who is elected directly affects what kinds of policies are passed and who benefits or suffers from those policies. Since it matters greatly who wins elections, voting systems matter as well, because different methods of voting can produce different winners

69. The electoral system that the USSU chose also had the affect of confusing students since the Referendum Protocol chosen by the ROC differed greatly from the USSU Election and Referenda Policy, a policy followed during past Referendums and applied to every election for representatives to the USSU executive.

Affidavit of Robin Mowat, paragraphs 11 to 12.

70. Voting systems, then, can have a variety of important political impacts. It quickly becomes clear that these rules can have some very significant and wide-ranging implications. While the individual complaints by the Yes and No side of the Referendum campaign may not have impacted the outcome of the Referendum, surely the procedures or lack thereof, affected the final results.
71. The body administering the Referendum (the ROC) was made up by two impartial members of the USSU and two politically motivated members of the CFS. The Applicant does not dispute that the USSU was entitled to empower the ROC with the authority to administer the Referendum. However, it submits that the USSU had a duty to ensure that the Referendum rules were well-defined. This is especially important where there was an appearance of bias.
72. However in the present case the Referendum Protocol was not ratified until the campaign had begun. Further, the Referendum Protocol was not made available to students until September 27, 2005, just 5 school days prior to the first voting day. Clearly there was not a level playing field between the campaigns. The “yes” side was aware of the Referendum rules because they were part of the body setting those rules. The “no” side was left to campaign in a vacuum, at times following the USSU’s Election and Referenda policy that did not apply. Surely procedural fairness requires that each side of an election be made aware of the rules that would govern it.

73. The most obvious reason that the Referendum was important was that it determined whether the USSU joined a national body that levied a membership fee that, in turn, would be passed on to USSU members

74. By joining the CFS the USSU already owes it \$160,000.00.

Supplemental Affidavit of Trent Evaninsky, paragraph 17.

75. It is unclear what additional fees would be levied against the USSU by CFS.

76. The USSU in turn would collect this amount from USSU members by way of a student fee in the amount of \$9.00.

Affidavit of Gavin Gardiner, paragraph 38.

77. This fee would be levied against USSU members in perpetuity, or until the USSU held another Referendum, voting to cease membership in the CFS.

Affidavit of Lucy Watson, paragraph 12.

78. Levying a fee against USSU students without first following its own procedures with respect to levying such an amount is oppressive. Electoral guidelines are in place so that each member may have a voice in the outcome of a Referendum. By failing to follow its own election policies [i.e. the Referendum Protocol] the USSU has diminished its members' opportunity to have its voice heard.

79. Further, CFS ratified the USSU as a member at its General Meeting on November 23-26, 2005.

Affidavit of Lucy Watson, paragraph 59.

80. At this time, the ROC had not yet completed its investigation report. Nor had the Elections Board ratified the results of the Election.

81. The ROC completed its investigation report on December 3, 2005.

Affidavit of Gavin Gardiner, paragraph 34, Exhibit "T".

82. The Elections Board refused to ratify the results of the Referendum on January 28, 2006.

Affidavit of Victoria Coffin, paragraph 18.

83. On September 29, 2005 the USC approved a motion amend the USSU Elections Policy to insert a clause stating that in the case of a Referendum to federate with the CFS (gain full membership), the ROC would be formed and the results of such a Referendum subject to ratification by the EB.

Affidavit of Robin Mowat, paragraph 20.

84. This amendment to the USSU Elections Policy empowered the ROC to administer the Referendum. By granting the USSU membership prior to ratification by the EB, the CFS ignored the USSU's autonomy to control its own process.
85. The Applicant takes exception to CFS' disregard for the USSU's policies. If it disregarded the USSU's procedures on membership, what is stopping the CFS from ignoring the USSU's policies in the future? By failing to enforce its own Election and Referendum policy [as amended on September 29, 2005], the Applicant asserts that the USSU is unfairly disregarding the interests of its members. These procedures were put in place by elected representatives on behalf of USSU members. By failing to enforce these procedures the USSU is acting unilaterally disregarding its members right to voice its opinion with respect to membership in third party organizations.

F. The Referendum should be void and a new Referendum ordered

86. The relevant sections of s. 135 (2) of The Non-Profit Corporations Act states:

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

...

(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;

...

87. Further, s. 225 of the Act states:

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;

88. The applicant seeks a declaration that the Referendum held on October 4-6, 2006 is void pursuant to s. 135(2)(b) of the Act. The effect of such a declaration would effectively put the USSU in the same position that it was prior to the Referendum – a prospective member in the CFS. The USSU would then be faced with its own choice to hold an additional Referendum or to negotiate with the CFS with regards to any outstanding obligations it has as a prospective member.
89. In the alternative, the Court may hold that the Referendum was void and order a new Referendum, in compliance with the Referendum Protocol pursuant to s. 135(2)(c) of the Act.
90. If the Court decides that s. 135 of the Act does not contemplate Referendums, the Applicant submits that the Court may order that the USSU cease its membership in the CFS pursuant to s. 225(a) of the Act. The implications of such an order allow the USSU to negotiate with the CFS with regards to any outstanding obligations it had as a prospective member.

G. CFS should not be added as a party to this motion.

91. CFS relies on Queen's Bench Rule 39 to be added as a party to Mr. Mowat's application. *Brand v. College of Physician's and Surgeons Saskatchewan*, 86 Sask. R. 18 (Sask C.A.) [Tab H] is the leading authority on the use of Rule 39.
92. At paragraph 80 the Court holds that merely having an interest in the result of an appeal does not itself create a basis for granting an application to intervene:

Rather, there must be some prospect that the process will be advanced or improved in some way by virtue of the intervention. It is not apparent that this appears in this case. Indeed, counsel for the intervener acknowledged it was not his desire to provide an echo for the arguments presented by the appellant, and if that was his only role he could understand that intervention was not an advantage to anyone.

In this case the Court did not allow a party to be added as they felt:

(t)he question which the intervener wishes to have addressed will be adequately dealt with by the parties to this appeal.

93. The *Brand* case was also relied on in *Young, Litigation Guardian of v. Young* 108 Sask R. 161. In this case, at paragraph 10, the Court held that Rule 39 is applicable to interveners who are strangers to actions:

(i)f their pocketbooks are likely to be affected.

94. Similarly at paragraph 5 the Court also relies on *Canada (A.G.) v. Saskatchewan Water Corp.* where the Court held:

That an intervener cannot seek to increase the number of issues the parties themselves have included in the action.

95. Lastly, in *Robo Management Company v. Saskatchewan* 122 Sask R. 236 (Sask Q.B.) [Tab I] the Court (relying on *Restar* and *Township of Puslinch et al*) held, at paragraph 13, that a Rule 39 application can be denied where the Court feels the interest of the applicant is already adequately represented.

96. Thus, in determining whether an intervener will be added as a party under Rule 39, the Court will consider the following:

- (a) Whether the process will be advanced or improved in some way by the intervention;
- (b) Whether the intervener will be adversely affected or whether their “pocketbooks are likely to be affected”;
- (c) Whether or not the intervener is seeking to increase the number of issues; and
- (d) Whether the interests of the intervener are already being represented.

Process Advanced or Improved

97. The cornerstone of Mr. Mowat’s application is that the USSU and the ROC did not follow its own rules when conducting the Referendum. The inclusion of the CFS in this application is not improved or advanced because the USSU can readily respond to Mr. Mowat’s assertions in that:

- (a) The USSU appointed two, impartial individuals, to the ROC to administer the Referendum;
- (b) CFS did not participate in any of the administration of the Referendum beyond the ROC; and
- (c) All meetings held to administer the Referendum [i.e. ROC, USC, USSU Executive, EB] were reported in minutes. None of the parties have disputed the accuracy of the minutes.

Pocketbook Adversely Affected

98. No matter what the outcome of Mr. Mowat's application, the CFS will not be prejudiced.

- (a) According to the CFS Constitution, the USSU was required to hold a Referendum within five months of taking out a prospective membership in the CFS;
- (b) The CFS did not enforce this constitutional provision with the USSU and at an Annual General Meeting of the CFS in March 2005, granted the USSU an extension of the deadline to hold a Referendum;

Affidavit of Victoria Coffin, paragraph 14.
- (c) The USSU has acknowledged that it owes CFS approximately \$160,000.00.
Supplemental Affidavit of Trent Evanisky, paragraph 17;
- (d) The USSU did not collect this amount from students for the 2005/2006 school year;
- (e) The USSU is not able to collect this amount from students for the 2006/2007 school year because it missed the deadline to apply to the Board of Governors to levy a student fee to collect this amount;

[USC Minutes dated May 14, 2006, attached as Exhibit "O" of the Supplemental Affidavit of Trent Evanisky].

- (f) CFS has not taken any steps to collect dues from the USSU to date.
99. The CFS has had many opportunities to enforce the USSU's obligations to it. To date, it has chosen to extend deadlines so that the USSU may organize itself. It has further chosen to extend deadlines to the USSU despite unexplained delays such as the USSU's failure to apply to the Board of Governors to levy a student fee. To argue that its pocketbook would be affected by a further delay is disingenuous on the part of CFS who has granted the USSU nothing but indulgence to this point.
100. CFS argues that it will be adversely affected because it has anticipated receiving fees from the USSU. However, the representative from the CFS did not append a budget for the organization to show that it has relied on fees from the USSU in its annual financial planning.
101. Further, at paragraph 12 of her Affidavit, Ms. Watson states that the USSU was a founding member of the CFS but withdrew by Referendum in 1993. She does not cite any financial penalty incurred by the USSU from withdrawing at that time.
102. CFS argues that it would also be adversely affected by an additional Referendum because it would have to bear the expense of having two representatives on the ROC [Affidavit of Lucy Watson, paragraph 74].
103. An additional Referendum could be held, using the Referendum Protocol documents already produced by the ROC date-specific with adjustments. There is no need for the ROC to reconvene in person since the substantive work of the ROC has been already completed.

Intervener Increasing the Number of Issues

104. The CFS argues that its participation in Mr. Mowat's application is necessary to explain the rules of the applicable by-laws of CFS and CFS-S. [Affidavit of Lucy Watson, paragraph 76]. However, such intervention is unnecessary.
105. There is no dispute between Mr. Mowat and the USSU regarding the applicable bylaws of the CFS. Mr. Gardiner, as a former executive member of the CFS,

accurately sets out the relevant CFS provisions. In fact, Ms. Watson's affidavit and Mr. Gardiner's affidavit are largely the same.

106. The key issue in Mr. Mowat's application is whether USSU members were given sufficient notice of the applicable election rules prior to the Referendum being held.
107. The addition of the CFS as a party to this motion will complicate Mr. Mowat's application by reintroducing evidence that is not disputed by either of the parties. Further, CFS' attempt to cross-examine Mr. Mowat and those who have provided supporting affidavits will cause further delay and expense. Even the USSU, who has much at stake, has not made such an application.
108. The CFS has significant resources at its disposal. It has the means to draw this matter out for a momentous amount of time and cost. Adding the CFS as a party to this motion will prevent the USSU from making future plans with respect to either:
 - (a) Holding an additional Referendum; or
 - (b) Levying a fee against its members to satisfy its debt to the CFS.
109. It is in the interest of both Mr. Mowat and the USSU to have this matter resolved expeditiously.

Interests of the Intervener are Already Being Represented

110. In support of its position, the USSU has submitted the Affidavit of former USSU President, Gavin Gardiner. At all material times leading up to this application, Mr. Gardiner was also the Saskatchewan Representative to the CFS National Executive. Rebuttal Affidavit of Robin Mowat, paragraph 31.
111. The CFS has asserted that the failure of the USSU to continue to carry out its obligations to the CFS would result in the CFS and CFS-S to consider legal remedies available to it to enforce those obligations. [Affidavit of Lucy Watson, paragraph 71]. Nowhere in the USSU's supporting documents does it dispute those obligations.

112. The addition of CFS as a party to this motion would simply echo the assertions made by the USSU. Indeed, a comparison of Mr. Gardiner's affidavit to that of Ms. Watson's indicates that there is little difference in their approach to Mr. Mowat's application. For the most part, the same USSU minutes, ROC minutes and protocols are relied on. The applicable CFS bylaws are also related in both sets of Affidavits. The evidence and argument of the CFS is unnecessary to resolve the issue between Mr. Mowat and the USSU.

H. Should CFS be successful in being added as a party, it is not entitled to cross-examine Mr. Mowat

113. There is very little controverted evidence with respect to the substantive issues in this motion. Where the party's affidavits contradict one another, it is submitted that the documents appended to each party's affidavits speak for themselves.

114. For example, none of the parties dispute the process leading up to the establishment of the ROC. Further, none of the parties dispute the CFS' bylaws or the USSU's decisions, motions or constitutional provisions.

115. The dispute lies in whether the rules of the Referendum were readily made available to USSU members prior to the Referendum campaign period. Clearly they were not.

- (a) The ROC was not granted authority to govern the Referendum until September 29, 2005;

USC Minutes dated September 29, 2005 appended as Exhibit I to Supplemental Affidavit of Trent Evanisky.

- (b) The Referendum Protocol was not ratified by USC until September 29, 2005;

USC Minutes dated September 29, 2005 appended as Exhibit "I" to Supplemental Affidavit of Trent Exanisky.

- (c) Although dated September 20, 2005, Version 2 of the Referendum Protocol was backdated. At the September 29, 2005 USC meeting the ACRO reported

that the CRO had not been given the Referendum question as it would appear on the ballot within the two-week limit, as required by the CFS Bylaws.

USC Minutes dated September 29, 2005 appended as Exhibit I to Supplemental Affidavit of Trent Evanisky.

116. Given the three different versions of the Referendum Protocol that have been appended as Exhibits in this matter, it is clear that the parties themselves are unsure of what rules applied to the Referendum.
117. To cross-examine all of the students who have provided supporting Affidavits to Mr. Mowat's motion would simply cause unnecessary delay and expense to all of the parties. The heart of the issue is procedural fairness. Thus the court may rely on the documents appended to the parties' affidavits, which were created in the ordinary course of the USSU's business, in arriving at a decision.

All of which is respectfully submitted this 18th day of August, 2006.

ROBERTSON STROMBERG PEDERSEN LLP

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SUPPORTING DOCUMENTS

	Tab
<i>Local Government Elections Act</i> , L.30.1 S.S. 1982-1983	A
Merriam-Webster's Dictionary of Law (1996, Merriam-Webster Inc., retrieved on-line from www.dictionary.com)	B
<i>Waltson (Litigation Guardian of) v. Saskatchewan Hockey Association</i> (1998), [1999] 1 W.W.R. 135 (Sask. Q.B.)	C
<i>Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police</i> , [1979] 1 S.C.R. 311 (S.C.C.)	D
<i>Martineau v. Matsqui Institution (No. 2)</i> , [1980] 1 S.C.R. 602 (S.C.C.)	E
<i>Baker v. Canada (Minister of Citizenship & Immigration)</i> , [1999] 2 S.C.R. 817 (S.C.C.)	F
<i>Pitt Polder Preservation Society v. Pitt Meadows (District)</i> (2000), 77 B.C.L.R. (3d) 54 (B.C. C.A.)	G
<i>Brand v. College of Physician's and Surgeons Saskatchewan</i> (1990), 86 Sask. R. 18 (Sask C.A.)	H
<i>Robo Management Company v. Saskatchewan</i> (1994), 122 Sask R. 236 (Sask Q.B.)	I
<i>Smith v. Smith</i> (2000), 2000 SKQB 108 (Sask. Q.B.)	J
<i>R.v. Fenrich</i> (1985), 42 Sask.R. 117 (Sask. Q.B.)	K
<i>R. v. Bank of Nova Scotia</i> , [1983] S.J. No. 346 (Sask. Q.B.)	L

APPENDIXES

1. Complete chronology of events	M
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