BRIEF OF LAW
ON BEHALF OF THE DEFENDANT, THE UNIVERSITY OF SASKATCHEWAN STUDENTS' UNION

I. Introduction

1. Between October 4th and 6th, 2006, undergraduate students at the University of Saskatchewan voted, by a margin of 384 votes, to federate with the Canadian Federation of Students ("the CFS"), a national students' organization representing about 450,000 students and over 80 student associations of colleges and universities across Canada.

2. As in any referendum or election, not everyone was happy with the results. Also, as in any referendum or election, there were various imperfections in the process leading up to the vote. The Plaintiff, Robin Mowat, who is no longer a student at the University of Saskatchewan or a member of the USSU, seeks to have this Honourable Court declare the referendum invalid and overturn the results. Clearly, this is a serious request. It requires this Honourable Court to step into the democratic process and override the will of the majority of students who voted. The majority was significant – this is not a case where the margin of victory was a mere handful of votes. There are no allegations of voting irregularities, stuffing of ballot boxes, or other fraudulent actions having to do with the vote itself. Rather, Mr. Mowat is alleging that imperfections in the campaign *process* render this referendum invalid.

3. The University of Saskatchewan Students' Union ("the USSU") is the body responsible for the governing of undergraduate student affairs at the University of Saskatchewan. It is the USSU's position that the results of the referendum reflect the will of the majority of students and ought to be upheld. As the evidence shows, there was certainly some confusion about campaign rules and procedure leading up to the vote. However, the evidence also makes it clear that the USSU dealt with matters fairly and reasonably and that, despite any procedural hurdles, both the "yes" side and the "no" side ran vigorous and effective campaigns. Students who voted had plenty of information available to them prior to the vote. It is

submitted that if indeed Mr. Mowat has standing to bring an application under the *Non-Profit Corporations Act, 1995,* ch N-4.2, S.S. 1995, as amended ("the Act") he must be able to prove that any irregularities, individually or cumulatively, were sufficiently drastic so as to render the votes of close to 400 students invalid. In other words, it is submitted that this application requires the Court to look at the totality of evidence and determine whether problems in the process are enough to lead to the conclusion that almost 400 people would have voted differently had the various alleged problems and irregularities during the campaign period not occurred. In this case, the evidence simply does not point to that conclusion. It is respectfully submitted that the will of the majority of students who voted should not be interfered with, and Mr. Mowat's application should be dismissed with costs.

II. Facts

4. The relevant facts are as follows. Unless otherwise indicated, the source of the facts cited is the Affidavit of Gavin Gardiner, sworn July 7, 2006.

5. The USSU is a corporation incorporated pursuant to the Act. 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".

6. The USSU is composed of the Executive Committee and the University Students' Council ("USC"), each with specified power and duties.

7. Among other things, the USC has the authority to establish an Elections Board, which may "make recommendations" to the USC (see Article 7, Part 2 of the USSU Constitution and Article 10 of USSU Bylaw No. 1).

8. According to Article 5 of the USSU Constitution, membership in the USSU "shall consist of all undergraduate students of the University of Saskatchewan who have been assessed student union fees and who are registered as students and all individuals who have been

assessed, voluntarily or otherwise, student union fees." There are approximately 17,000 full and part-time students who are members of the USSU.

9. The Elections Board is responsible for overseeing, and has authority over the activities of the USSU "as they relate to referenda". However, because the Elections Board is merely a body created by the USC, the USC has final authority over its recommendations.

10. Article 11 of the USSU Constitution deals with referenda. It provides that a referendum must be held for the purposes of establishing or eliminating a "dedicated student fee", and the results of such a referendum shall be binding upon the Executive Committee and the USC.

11 Part IV of the USSU Elections and Referenda Policy deals more specifically with referenda and the rules around referenda. It sets out rules dealing with notice, campaign registration, spending limits, and so on.

12. On November 4, 2004, the USC passed a resolution that the USSU apply to the CFS for membership. The resolution was worded as follows: "Be it resolved that the USSU seek prospective membership in the CFS, the CFS-Student Services, and the CFS - Saskatchewan."

13. Following this resolution of the USC, the USSU formally applied for prospective membership in the CFS, and the CFS subsequently voted to accept the application by the USSU for prospective membership.

14. By applying for and being granted prospective membership in the CFS, the USSU agreed to accept the rights and responsibilities of prospective membership (as per Bylaw I, Art 2b(ii)). One of the responsibilities of a prospective member is to conduct a binding referendum on the question of full membership in the CFS in accordance with the Referendum regulations

described in Bylaw I, Art 4 of the CFS Bylaws. The USSU was also required to hold a referendum by virtue of its own Constitution, which requires a referendum to be held for the purpose of establishing a "dedicated student fee'; federation with the CFS requires an annual fee of approximately $9 per full-time student.

15. One of the requirements of CFS Bylaw I is the formation of a "Referendum Oversight Committee" ("ROC") composed of two members appointed by the prospective member school (in this case, the USSU) and two members appointed by the CFS. The ROC has the responsibility and duty to develop rules governing the referendum and for overseeing the referendum.

16. As outlined above, the USSU had committed to holding a referendum regarding full membership in the CFS, as per the CFS requirements.

17. On September 15, 2005, the Executive Committee passed a resolution that the Executive "support the Canadian Federation of Students in the upcoming referendum."

18. At a subsequent meeting on September 15, 2005 of the USC, the USC passed a resolution that the USC endorse the CFS in the referendum.

19. On September 29, 2005, the USC passed a resolution to amend the USSU's Elections and Referenda Policy to give authority to the ROC for overseeing and running the referendum, with a provision that the USSU Elections Board would ultimately be responsible to ratify the results.

20. The ROC had established its Protocol setting out rules for the referendum prior to the September 29 USC meeting. This Protocol had been available to students and campaigners beginning on September 18, 2006, just prior to the official launch of the campaign period. The ROC protocol was available at the USSU office throughout the campaign period, except for a short period of time when, as stated in Robin Mowat's affidavit dated May 11, 2006, Mr. Mowat himself removed it from the USSU office.

21. Campaigning began by both the "yes" and the "no" sides on or about September 19, 2005.

22. The USSU informed students that a referendum regarding federation with the CFS would be occurring. In addition, it organized two forums to provide information about the referendum to students. The first forum was on September 26, 2005, at Lower Place Riel, a gathering place for students. The second forum was held on October 3, 2005, at the Neatby-Timlin Theatre on campus. Proponents of both the yes and no sides spoke at the forums.

23. The "no" campaign was a very visible presence on campus during the campaign period leading up to the referendum, with an information booth, posters across campus and an active leafleting and information campaign. "No" campaign team members wore "No CFS!" t-shirts throughout the campaign and placed a full-age advertisement in the University of Saskatchewan student newspaper, the *Sheaf*, on October 6th. The "no CFS" campaign literature dealt extensively with the fact that a fee would be associated with membership in the CFS. In addition, members of the Canadian Alliance of Student Associations (CASA) were visibly present on campus and active in the "no" campaign.

24. Voting occurred on October 4, 5 and 6, 2006, by paper ballot, following a total of 18 days of campaigning. Polling stations were set up in all the major colleges across campus. The question on the ballot read as follows: "Are you in favour of membership in the Canadian Federation of Students?" Voters were required to check one of two boxes indicating a response of "yes" or "no" to the question.

25. The results of the vote were as follows: 1,968 in favour of federating with the CFS, and 1,584 against federating with the CFS. 10 ballots were spoiled. In other words, the difference between those voting "yes" and those voting "no" was 384 votes. The turnout for the vote (about 20%) was higher than the turnout in the USSU general election in 2006, where the turnout was under 15%.

26. At the National General Meeting of the CFS, held on November 25, 2006, the CFS voted to grant full membership to the USSU, based on the results of the referendum.

27. Following the referendum, the ROC met to deal with complaints and released its report on December 3, 2005. Following a thorough analysis, the report concluded that "none of the alleged violations, individually or cumulatively, had a significant impact on the referendum so as to change the outcome," and further that "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." Complaints were made by both sides, and included, *inter alia,* a complaint by an individual who claimed that Mr. Mowat swore at her and threw a button at her. Mr. Mowat apologized for this incident according to the Report.

28. According to the resolution passed by the USC on September 29, 2005, ratification of the referendum results was now up to the Elections Board. Following several meetings, the Elections Board released its report on February 23, 2006, in which it determined not to ratify the results as a result of concerns about the process. The Elections Board wrote that its "decision was not an easy one" as it was "very conscious of the fact that there was a strong student participation in the referendum, and the results were not equivocal." The Elections Board recommended that another referendum be held.

29. At the March 30 2006 meeting of the USC, the USC considered the report and recommendation of the Elections Board and decided not to accept the Election Board's recommendations but instead to uphold the results of the referendum.

30. Mr. Mowat convocated from the University of Saskatchewan in the spring of 2006 and is no longer a student at the University of Saskatchewan or a member of the USSU.

III. Issues:

A. Does Robin Mowat have standing under section 135 of the *Act*?

B. Does the court have jurisdiction to grant the relief sought under section 135 of the *Act*?

C. Should sections of the Affidavits filed on behalf of the Plaintiff be disregarded or struck?

D. Is the Plaintiff entitled to relief under section 135 or 225 of the *Act?*

IV. Argument:

A. Standing of the Plaintiff under section 135 of the *Act*

31. It is submitted Mr. Mowat does not have standing to bring an application under section 135(2) of the Act before this Honourable Court.

32. Section 135 provides as follows:

> 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.
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> (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;
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> (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 is made;
>
> (d) an order determining the voting rights of members and of persons claiming to have membership interests. *(emphasis added)*

33. Mr. Mowat convocated from the University of Saskatchewan in the spring of 2006, with a Bachelor of Arts (Honours) Degree. As such, Mr. Mowat is no longer a "member" of the USSU. Nor is he a director. He has no standing to bring an application, and is not entitled to relief under section 135.

B. Statutory jurisdiction under section 135 of the *Act*

34. Even if Mr. Mowat had standing to make an application under section 135, it is submitted that section 135 does not assist him in obtaining the relief he seeks.

35. Section 135 deals specifically with determining controversies regarding the election or appointment of directors of non-profit corporations. It does not deal with referenda or elections beyond the scope of elections for directors. A look at the section as a whole, and its place in the statute, makes it clear that the terms "election" and "appointment" should not be read disjunctively but that rather they should be read as referring to the "election of directors" or the "appointment of directors", and certainly not referenda in general.

36. In any event, none of the remedies avialable under section 135(2) provide the relief sought by Mr. Mowat. Indeed, a closer look at the types of relief available under this section bolsters the position that the intention of the section is to deal with the election or appointment of directors. For example, the Court may, under s135(2)(a), make an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute. This subsection does not assist Mr. Mowat. Subsection 135(2)(b) permits the Court to make an order "declaring the result" of the disputed election or appointment. This subsection also does not assist as it clearly refers to the election or appointment of a director. Mr. Mowat has certainly not brought any evidence forward to suggest that the Court should declare that the result ought to have been in favour of the "no" campaign. The subsection does not empower the Court to declare an election "invalid". Subsection 135(2)(c) permits the Court to make an order requiring a new election or appointment, and make directions for the management of the activities and affairs of the

corporation until a new election is held or appointment is made. Again, this refers to an order requiring a new election or appointment of a director and does not assist in the matter of referenda on issues unrelated to directors. Finally, subsection 135(2)(d), which permits the court to make an order determining the voting rights of members and of persons claiming to have membership interests, is also inapplicable.

37. Cases dealing with the interpretation of section 135 support the arguments made above as they deal with issues surrounding the appointment or election of directors of non-profit entities. Certainly, in no case has the court used section 135 in the matter of a referendum dispute. See for example: *Ray v. Morin*, [2002] S.J. No. 233 [Tab 1].

C. Application regarding Affidavits

38. It is the USSU's position that many sections of the affidavits submitted on behalf of the Plaintiff violate *The Queen's Bench Rules* respecting affidavit material and ought to be dealt with accordingly.

39. Rule 319 of *The Queen's Bench Rules* provides as follows:

> Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, in 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 cost of such affidavits shall be borne by the solicitor filing the same.

40. It is submitted that the present application is in the nature of a final rather than an interlocutory application as it requires this Court to determine the principal matter in

question. A judgment in this matter would finally dispose of the rights of the parties herein. This Court has held that a motion pursuant to section 234 of *The Business Corporations Act*, ch.B-10, R.S.S., 1978 (as amended) (the oppression remedy), which parallels the relief sought herein under section 225 of the *Act*, was in the nature of a final application: *Hansen v Eberle* (1995), 139 Sask. R. 249 (Q.B.) [Tab 2].

41. Therefore, the restriction on hearsay evidence applies to this application as it is in the nature of a final, rather than an interlocutory, application.

42. Rule 319 also restricts the inclusion of argumentative statements in affidavits. The Court in *Dlouhy v Dlouhy* (1995), 130 Sask. R. 285 (Q.B.) [Tab 3] explained that argumentative material is material that contains, in addition to a statement of fact, reasoning or comment on how those facts bear on the disputed matter. Similarly, in *Mitchell v Intercontinental Packers* (1996), 146 Sask. R. 10 (Q.B.) [Tab 4] the court held that argumentative, polemic and rhetorical statements amounting to advocacy, as well as statements of legal conclusion, have no place in affidavits. In other words, it is not up to the deponent to use his or her affidavit to argue the conclusions he or she would like court to draw. In addition, Rule 319 prohibits the use of statements which are irrelevant, speculative, or an expression of opinion: *Hobin v. Hardy* (1996), 140 Sask. R. 222 (Q.B.) [Tab 5].

43. Where Rule 319 is violated, the Court is required to disregard the offending paragraphs and can award costs against the party filing the affidavit: *Verbeke v Zimmerman* (1990), 86 Sask. R. 4 [Tab 6].

44. Rule 327 of *The Queen's Bench Rules* provides as follows: "The court may order any matter which is scandalous to be struck out from any affidavit."

45. The USSU objects as follows to the Affidavits of Robin Mowat, sworn May 11, 2006, Trent Evanisky, sworn May 10, 2006 and Victora Coffin, sworn May 9, 2006:

Affidavit of Robin Mowat

(1) The USSU objects to paragraph 5 of Mr. Mowat's affidavit. This paragraph contains the following statement: "...it was clear from the start that there was confusion about the process at the USSU itself"....This is a statement of opinion and the conclusion that Mr. Mowat wishes the Court to draw from the evidence. It is not a statement of fact within his knowledge and ought to be disregarded.

(2) The USSU objects to paragraphs 6 of Mr. Mowat's affidavit. This paragraph includes the following statements: "[Mr. Olszynski]...told me that the referendum may not occur at all" and "He informed me that he had just been informed that the USSU legal counsel, Greg Whalen [sic], had concerns about the legality of any referendum held outside of USSU's rules. There had been no proper consideration given to rectifying the problem of procedures and rules until recently and Mr. Olszynski informed me that he would be attending the next session of University Student Council...." The USSU objects to the use of hearsay and double hearsay evidence in this statement. The USSU further objects to the tendering of hearsay evidence regarding a legal opinion, which is prejudicial and in the nature of a conclusion that he would like the court to draw. This entire paragraph should be disregarded by the Court.

(3) The USSU objects to paragraph 8 of Mr. Mowat's affidavit. This paragraph contains the following statements: "During my conversation with Mr. Olszynski it became clear that he was concerned with ROC's authority to administer the Referendum. Mr. Olszynski also indicated to me that it was the chief concern of Mr. Whalen [sic]..." Again, this is hearsay evidence, and a statement of opinion and should be disregarded by the Court.

(4) The USSU objects to paragraph 9 of Mr. Mowat's affidavit, which contains the following sentence: "Mr. Olszynski told me that the ROC had a copy of the proposed referendum rules, but since the ROC had no authority they were only a draft copy." Again, this is hearsay and a statement of legal conclusion and is inadmissible and should be disregarded.

(5) The USSU objects to paragraph 10 of Mr. Mowat's affidavit. This paragraph contains the following statement: "I had been aware of a previous attempt made by the USSU to hold this referendum in March 2005. However, at that time, due to concerns from Mr. Whalen [sic], the USSU postponed the referendum, ostensibly to work out the kinks in the process. But it was apparent to me on 27 September that no such work had been done in the intervening months, and that the USSU was just as unprepared for the referendum in October as it was in March." Again, this is a statement of opinion and conclusion and is argumentative in that it sets out the conclusion that Mr. Mowat would like the court to reach and it should be disregarded.

(6) The USSU objects to paragraph 11 of Mr. Mowat's affidavit. This paragraph contains the following statement: "To me, this latter document [the ROC protocol] clearly lacked substance and legitimacy". This is a statement of opinion and is argumentative and is scandalous and prejudicial to the USSU. It should be struck as offending Rules 327 and Rule 319.

(7) The USSU objects to paragraph 12 of Mr. Mowat's affidavit. Paragraph 12 contains the following statement: "For instance, there should have been an official call to register campaigns..." This is merely Mr. Mowat's opinion as to what should have happened. It has no place in an affidavit and should be disregarded as offending Rule 319.

(8) The USSU objects to paragraph 13 of Mr. Mowat's affidavit. This paragraph contains the following statement: "Throughout the following week, I was told of similar occurrences in classrooms all over the university from many of students [sic] with whom I spoke." This statement is pure hearsay and clearly offends Rule 319 and should be disregarded by the court. The fact that the identity of the students who made these alleged comments is not provided is grounds for solicitor and client costs under Rule 319.

(9) The USSU objects to paragraph 14 of Mr. Mowat's affidavit, which contains the following sentence: "Throughout the referendum period there appeared to be no limit

to the amount of resources spent on the "yes campaign". This is a statement of opinion, not based on any evidence, and is speculative in nature and as such offends Rule 319 and ought to be disregarded.

(10) The USSU objects to paragraph 16 of Mr. Mowat's affidavit. This paragraph includes a series of statements apparently made by Mr. Olszynski. The entire paragraph offends the rule against hearsay and should be disregarded.

(11) The USSU objects to paragraph 18 of Mr. Mowat's affidavit, which contains the following statement: "Indeed, I spoke with many students who had voted and were unaware that there was going to be a fee associated with membership." This attempt to proffer hearsay evidence is a clear violation of Rule 319. Furthermore, Mr. Mowat fails to identify which students may have made such statements to him. As such, this statement is highly prejudicial to the USSU and should be struck by the Court with solicitor and client costs under Rule 319.

(12) The USSU objects to paragraph 19 of Mr. Mowat's affidavit, which contains the following statement: "Perhaps one of the largest violations of the [sic] both standard USSU rules and common sense, is that the USSU declared itself officially in support of joining the CFS." This is an opinion and is argumentative in nature. Mr. Mowat is attempting to declare in his affidavit a conclusion that he would like the Court to draw. As a violation of Rule 319, this paragraph ought to be disregarded by the Court.

(13) The USSU objects to paragraph 22 of Mr. Mowat's affidavit, which contains the following statement: "From what I witnessed at this session of USC, it seemed clear that the Members of Student Council felt pushed into this last-minute decision due to the potential legal conflict with the CFS over failing to hold a referendum." This statement is speculative and a statement of opinion and offends Rule 319. It should be disregarded.

(14) The USSU objects to paragraph 24 of Mr. Mowat's affidavit, which contains the following sentences: "Given that the ROC included only two members who actively campaigned for the CFS and two members appointed by an organization which

officially campaigned for the CFS as well, it is unsurprising that the concerns I have listed here fell on deaf ears at the ROC. Yet I hoped that they would see that the vast violations in basic democratic fairness, such as failing to establish a set of official rules before campaigning started, would have reasonably affected the referendum result..." This series of statements are statements of opinion and are argumentative in nature. They offend Rule 319, are highly inappropriate and prejudicial to the USSU and should be struck as scandalous and as being in violation of Rule 327 and Rule 319.

(15) The USSU objects to paragraph 28 of Mr. Mowat's affidavit, which provides that "Again, USC's decision to go against its own properly constituted board....appears to be made under duress...." This is a statement of opinion, not of fact and as such offends Rule 319. It should be disregarded.

(16) The USSU objects to paragraph 29 of Mr. Mowat's affidavit. This paragraph includes the following statement: "But the final decision of USC to go ahead and ratify the referendum merely added another error to the long list, rather than remedying the situation." This is a statement of opinion and is argumentative. It should be disregarded as it offends Rule 319.

Affidavit of Trent Evanisky

(17) The USSU objects to paragraph 5 of Trent Evanisky's affidavit, filed in support of Mr. Mowat's application. Mr. Evanisky states that "...I question the legitimacy of the referendum and whether some members of the USSU executive deliberately altered the traditional USSU Referendum process to produce an outcome that met with their own political agenda." This statement is highly prejudicial to the USSU and is scandalous in nature. It is not a statement of fact but rather an opinion, with absolutely no factual basis, that essentially attributes fraudulent intentions to certain members of the USSU. This statement should be struck.

(18) The USSU objects to paragraph 8 of Mr. Evanisky's affidavit. This paragraph includes the statement "I find the prospect of the USC being able to hand over

responsibility of running a referendum to a third party very discomforting." This statement, aside from being inaccurate, is a statement of opinion and conclusion and should be disregarded.

(19) The USSU objects to paragraph 10 of Mr. Evanisky's affidavit. This paragraph contains the following statement regarding the Referendum Oversight Committee: "By reading these minutes it appears as though there was a total collapse of the ROC and that a consensus had been broken on the conducting of the Referendum" Besides being inaccurate, this is a statement of opinion and is speculative in nature and as such offends Rule 319. This statement should be disregarded.

(20) The USSU objects to paragraph 13 of Mr. Evanisky's affidavit. This paragraph contains the statement "I do not understand why the two members least familiar with the U of S campus tasked themselves with determining the location of this particular polling station and why precedent was ignored." This statement is argumentative and should be disregarded.

(21) The USSU objects to paragraph 16 of Mr. Evanisky's affidavit. This paragraph contains the following sentence: "I do not believe that it is fair that a person who had a public interest in the outcome of the Referendum should have been involved in the logistics of running it." This statement, referring to the role of Mr. Gardiner, President of the USSU is inaccurate and also offends Rule 319 as it is a statement of opinion. It should be disregarded.

Affidavit of Victoria Coffin

(22) The USSU objects to paragraphs 7, 10 and 11 of Ms. Coffin's affidavit. These paragraphs refer to information learned from a third parties and as such offend Rule 319 and the rule against hearsay. They should be disregarded.

46. It is respectfully submitted that the substantial violations of evidentiary rules, including the inclusion of scandalous material, and the expense this has caused the Defendant USSU warrants an award of costs against Mr. Mowat on a solicitor and client basis, in any event of the cause.

D. Application under sections 135 and 225 of the *Act*

47. Mr. Mowat's argument is premised on the assumption that flaws in the process leading up to the referendum should invalidate the results. It is the USSU's position that despite any flaws in the process, and despite mistakes made by either side of the campaign in this case, the evidence simply does not lead to the conclusion that those students who voted for federation with the CFS, or those who voted against federation with the CFS for that matter, did not know what they were doing. Mr. Mowat has simply not shown that any actions of the USSU changed the results of the referendum.

48. It is submitted that the Act's oppression remedy should not be used to quash the results of a democratic process in which an issue was decided by a clear majority of voters. Jurisdiction and standing issues aside, it is further submitted that the Court should not invoke a remedy under section 135 in this case.

49. Figuratively speaking, Mr. Mowat has lost sight of the forest as his application dwells on several particular trees. If one steps back and looks at the larger picture of what *actually happened* during the referendum process, one can see that nothing that occurred could reasonably be seen to have changed the results of the referendum in terms of the ultimate outcome. Both the "yes" side and the "no" side ran vigorous campaigns. There was information readily available to students on both sides of the issue. Indeed, the high number of votes for the "no" side indicate that the "no" side in fact ran an effective campaign and persuaded many students to vote against federation with the CFS. The vote reflects the democratic will of students, voting on a contentious and highly publicized issue, and should be upheld. Furthermore, the relatively high voter turnout (as compared to typical USSU election turnout), shows that students took an active interest in the subject matter of the referendum.

50. Mr. Mowat alleges that he is entitled to relief under section 225 because the conduct of the USSU was oppressive, unfairly prejudicial, or unfairly disregards his interests. It is submitted that this is not so. Section 225 provides as follows:

> 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 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 members, security holder, creditor 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.

51. A "complainant" is defined in section 222 as including the following:

> a) a member or a registered holder or beneficial owner, and a former registered holder or benficial 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 an application pursuant to this Division.

52. As Mr. Mowat is a past member of the Executive of the USSU, it is conceded that he may have standing to make an application under section 225 as a "former director", although it should be reiterated that, as he no longer a member of the USSU, he has no current interest in the issue.

53. Section 225 of the Act is analogous to section 234 of *The Business Corporations Act, supra.* Madam Justice Dawson held in *Lunn v. B.C.L. Holdings Inc.* [1997] 2 W.W.R. 542 (Q.B.) [Tab 7] that case law interpreting the oppression remedy in *The Business Corporations Act* can be used to assist the court in making determinations under section 225 of the *Act.*

54. It must be made clear from the outset that a shareholder or member who has been outvoted is not "oppressed", unfairly prejudiced, or disregarded within the meaning of the statute: *Bosman v Doric Holdings Ltd.* (1978), 6 B.C.L.R. 189 (B.C.S.C.) [Tab 8]. As an "outvoted" former student, Mr. Mowat is clearly unhappy with the results of the referendum. However, this is simply not enough to justify intervention by the Court. The question, then, is did the USSU do anything that was oppressive or unfairly prejudicial, or did it disregard Mr. Mowat's interests within the meaning of the *Act*?

55. The Saskatchewan Court of Appeal in *Wind Ridge Farms Ltd v. Quadra Group Investments Ltd* (1999), 180 Sask. R. 231 (C.A.) [Tab 9], stated the following principles regarding the oppression remedy:

> "Oppressive conduct is at the lowest a visible departure from the standard of fair dealing and a violation of the conditions of fair play" on which shareholders....are entitled to rely.... Oppressive conduct has also been described as a lack of probity and fair dealings in the affairs of the company to the prejudice of some portion of its members. ...The terms "unfair" and "prejudice" are defined as conduct that is unjust and inequitable and unfairly prejudicial. Each case will be decided on its own facts: what is oppressive or unfairly prejudicial in one case may not necessarily be so in a different set of circumstances."

56. What, then, would render the actions of the USSU "oppressive"or unfairly prejudicial within the context of the CFS referendum? It is submitted that the case law dealing with controverted elections in general is instructive as to the approach taken by courts where the results of a democratic process are challenged. This body of law, it is submitted, provides guidance to the Court in making a determination as to whether the referendum involved conduct that could be considered oppressive or unfairly prejudicial, or whether it unfairly disregarded Mr. Mowat's interests within the meaning of the Act.

57. The overriding theme that emerges from controverted elections case law is that courts approach their jurisdiction over democratic processes with significant caution and are hesitant to interfere with the will of the electorate unless an application shows on its face that

non-compliance with election rules affected the ultimate *result* (as opposed to simply the number of votes) of the election: *Reaburn v. Lorje,* 2000 SKQB 81 [Tab 10].

58. The Court in *Re Bennett* [1972] N.J. No. 38 (Nfld. S.C.) [Tab 11], set out the common law rule respecting controverted elections as follows:

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

59. In other words, courts are slow to overturn election results on the basis of irregularities or problems with procedure. 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, and the Court is satisfied that the "ultimate result" as opposed to the number of votes cast one way or another would have been affected, should the court intervene.

60. Thus, if the actions of the USSU created a situation where there was no true election and the *ultimate election result* was invalid, then the Court may intervene under section 225. In making this determination, it is submitted that the Court ought to look at the totality of the evidence as to whether, despite any specific imperfections in the process, the students in fact did not have a free and unfettered right to make their choice at the ballot box. Again, there is no allegation of stuffing ballot boxes, of students being intimidated to vote in a certain manner, or of students being refused the opportunity to vote or otherwise disenfranchised.

Rather, the allegations made by Mr. Mowat involve relatively minor infractions or confusions and will be dealt with in the following paragraphs.

61. Mr. Mowat argues that the ROC Protocol "did not apply" to the referendum prior to September 29, 2005 (when the USC officially gave authority to the ROC to run the referendum). As such, he claims that the referenda rules of the USSU applied prior to, and also following, September 29, 2005, and that multiple infractions of these rules occurred. The USSU's position is that this is simply not the case. The ROC had authority over the referendum and the rules of the ROC Protocol applied to the referendum process.

62. This argument is supported by case law dealing with other challenges to CFS referenda in Canada. For example, in *Byers v. Cariboo College Student Society,* 2006 CarswellBC 928 (B.C.S.C.) [Tab 12], the British Columbia Supreme Court held in paragraph 8 that the

> Federation's bylaws formed the basis upon which the referendum was to be conducted was a provision agreed to by the society when it applied for and obtained status as a prospective member. The application of the Federation's bylaws is logical in that it is typically the organization in which membership is sought which sets the rules upon which it is prepared to grant membership. However, within the broad parameters of the Federation's by-laws the oversight committee had the capacity to finalize the details of the referendum campaign, as found in its referendum Rules.

63. Interestingly, that case also involved allegations by the applicants that the Student Society's bylaws were not being followed to run the election, as well as complaints about "irregularities in the appointment and conduct of the referendum Oversight Committee, restrictions on campaigning against the referendum, and the manner in which the vote was conducted, all of which the petitioners submit gave an unfair advantage to those in favour of the referendum passing, but a disadvantage to those opposed to the vote." The Court dismissed the application.

64. Similarly, in *Canadian Federation of Students (Ontario) v. Students Federation of the University of Ottawa,* [1995] O.J. No. 4774 (On. Gen. Div.) [Tab 13], the court dealt with a situation where the University conducted a referendum on the issue of defederation from

the CFS. The Court held that the referendum should be held pursuant to the rules of the CFS.

65. In other words, the ROC Protocol was the legitimate governing document setting out the rules of the referendum. However, it is submitted that *even if* the USSU elections and referenda rules applied to some or all of the referendum process, Mr. Mowat would still not be successful in his challenge. Each allegation of violations of USSU rules will be considered in turn.

(1) Notice and campaign period

66. Mr. Mowat argues that the fact that the proper notice periods may not have been complied with respecting a formal notice for campaign team registration, notice of the official start date for campaigning, and notice of the referendum question served on the student body constitutes a violation of section 225. The USSU Elections and Referenda Policy provides as follows:

(1) Notice

1. Notice of the referendum must be received by the Chair or acting Chair of the USC no later than four (4) weeks prior to the expected vote of the referendum issue. This date shall be included in the Elections Schedule.

(b) Campaigning

3. The campaign period shall be as outlined in the Election Schedule. Campaigning may begin upon the registration of a campaign, which may occur at any time after the notice of referendum is given.

2. Campaigning shall begin immediately following the information meeting and shall end at 4:00 on the final day of voting.

67. As stated above, these provisions are not applicable as the ROC was the governing document. However, even if they were, the fact is that the USC was aware that the

referendum would be occurring, and made this information available to the student body in plenty of time and in this case ensured a campaign period of 18 days.

68. In addition, Mr. Mowat alleges that there was a violation of the ROC's own notice provision (which required two weeks notice and a minimum of 10 days' campaigning.

69. Finally, it is submitted that any "reasonable student" would have been well aware of what the referendum was about. Regardless of the specific date that the "no" team registered, it was actively campaigning by September 19.

(2) Examination of referendum question by solicitor

69. Part (a) 2 & 3 of the Elections and Referenda Policy provides that:

(a) To ensure clarity and legal status, prior to the cote, the USSU solicitor must examine the wording of each referendum question. The solicitor has the right to alter the wording of referendum questions to ensure clarify and legal status, but must not alter the spirit and intent;

(b) The CRO shall receive the referendum question, as approved by the USSU solicitor, no less than two weeks prior to the general voting..

70. Mr. Mowat states there were violations of these rules but it is unclear what, if any, impact this issue has on his application. The evidence shows that the approved question was indeed the question on the ballot. The date of receipt of the question by the CRO could not be said to, in any way, impact on the results of the referendum.

(3) Unbiased information to membership

71. Mr. Mowat argues that the USSU violated the provision (part (a)(4)) of the USSU Elections and Referenda Policy which mandates it to provide information about referenda in an "unbiased manner."

72. Again, the USSU takes the position that this section does not apply as the ROC Protocol governed the referendum. However, in any event, the evidence shows that the USSU did in fact provide unbiased information to the student body in the form of an announcement about the referendum, as well as through organizing two forums on the referendum where speakers from both sides were invited to be present. The fact that the Executive Committee and the USC decided to support federating with the CFS does not violate this provision. Political leaders are elected to take positions on issues, and there is a clear precedent at the USSU for the USC and Executive Committee to take a position on the subject matter of referenda. Certainly, the USSU in no way prevented the dissemination of information by the "no" side and in fact encouraged its campaign through, for example, endorsing its posters. If Mr. Mowat is alleging that students were so unable to think for themselves that their vote was dictated by the fact that the Executive or the USC endorsed the CFS, there is absolutely no evidence to support this.

*(4) **Advertizing and spending limits***

73. Mr. Mowat argues that the CFS surpassed spending limits and violated advertising policies set out in the USSU Elections and Referenda Policy, which provides as follows:

> (b) Campaigning
>
> 1. There shall be no advertising by or on behalf of any registered campaign prior to the information meeting, held in according [sic] to the Election Schedule.
>
> 10. Campaign limits will follow the attached schedule of Fair Market Value (FMV) campaign materials. In no case shall the total cost of campaigning for any one registered campaign committee in any one referendum exceed one thousand dollars ($1,000) not including taxes, according to either the FMV schedule or actual costs. If a registered campaign committee's campaign material falls outside of the schedule, the material must be submitted to EB so that a FMV can be assessed.

74. Mr. Mowat alleges that the CFS violated the above spending limits. It is the USSU's position that the ROC Protocol was the governing document. The Protocol did not include

a reference to spending limits. Mr. Mowat makes no reference to the amount of money spent by the no campaign. Furthermore, he tenders no evidence to show on its face that the amount of money spent in any way impacted the outcome of the referendum. Both sides used very similar campaign techniques: posters, leafleting, and so on. Mr. Mowat's campaign placed a full-page ad in the Sheaf, printed thousands of full-colour leaflets, and otherwise got their message out effectively. It cannot be said that the amount spent on the campaign in this particular case changed the result of the referendum. Similarly, whether or not there was advertising prior to September 19th by either party cannot have changed the results.

(5) Classroom campaigning

75. Mr. Mowat alleges there was classroom campaigning contrary to the USSU Elections and Referenda Policy, which provides as follows:

> Under no circumstances shall a registered campaign committee, or its representatives, deliver campaign speeches in regularly scheduled classes or labs.

76. It should be noted that there were allegations regarding classroom campaigning by both sides. Again, the USSU policy was not the governing policy for this referendum. However, even if it was, the evidence in this regard is hearsay. Furthermore, it cannot be accepted that classroom campaigning would have the impact of making the results of the referendum unfair. Indeed, the ROC concluded that if students were in fact upset by classroom campaigning, they would have reflected this in their vote.

(6) ROC Protocol was an "evolving document"

77. Mr. Mowat alleges that the ROC Protocol was an "evolving document" and this somehow impacted the ability of the campaigners to run their campaigns. Evidence makes it clear that the ROC Protocol applied equally to the "yes" and "no" campaign teams and was available to campaigners throughout the campaign period (except for a brief period of time when it was removed by Mr. Mowat himself). It is not clear how the fact that the ROC may have

been amended during the campaign period in any way impacted the actual campaigns. In fact, the evidence shows that rather than being hampered in any way, the no campaign was effective and energetic throughout the campaign period.

(7) Allegation regarding fee on referendum question

78. Mr. Mowat tendered hearsay evidence, with no information as to the identity of the source or sources of the evidence that many students who voted "were not aware" that there was a $9 annual fee associated with membership in the CFS. It is submitted that any reasonably aware student would have known that a fee was involved, as the issue of the fee was widely disseminated by Mr. Mowat's own campaign. However, in any event, there is no requirement in the USSU Constitution, Bylaws or the ROC Protocol to have fee information included in the referendum question. Furthermore, in accordance with section 2(b) of CFS By-law 1, the USSU, as a prospective member, was bound contractually to accept the rights and responsibilities of "prospective membership". In accordance with paragraph 4(f)(iii) of the CFS Bylaw 1, the referendum question is to be stated as "are you in favour of membership in the Canadian Federation of Students?"

(8) Elections board did not ratify results

79. Mr. Mowat is upset the USC decided not to accept the recommendation of the Elections Board, which did not ratify the results of the referendum. A reading of the Elections Board report reveals that the Elections Board focused exclusively on the process and failed to analyze satisfactorily if and how any procedural defects impacted the final result of the referendum. Indeed, it admitted that the results of the referendum were "unequivocal". It is submitted that though well-intentioned, the Elections Board unfortunately did not undertake the right analysis on this issue and the USC was right to refuse to accept its recommendation. In any event, the EB is merely a board of the USC and does not have authority over the USC's decisions. Rather, its role is to make recommendations which the USC is free to accept or reject. In addition, this after-the-fact matter certainly did not impact the referendum process itself, which is the focus of Mr. Mowat's application.

(9) Composition of ROC

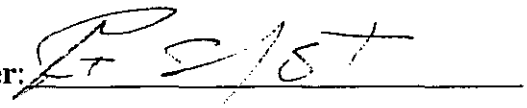
80. Mr. Mowat hints that the composition of the ROC, which was made up of two members of the CFS and the USSU's Chief Returning Officer and Assistant Chief Returning Officer (both impartial) skewed the rules in favour of the CFS. He brings forth absolutely no evidence to support this allegation. Furthermore, the ROC operated on a consensus basis and so the CFS members could not have unduly influenced its decisions. Again, no evidence supports Mr. Mowat's allegations in this regard.

V. Conclusion

81. An analysis of the evidence in this case, and an application of the law to this evidence, leads to the conclusion that Mr. Mowat's application must fail. It is submitted that his application under section 135 of the *Act* must fail on the standing and statutory jurisdiction issues, and that it must also fail on a substantive application of either sections 135 or 225. The USSU's actions during the referendum can in no way be interpreted as having the effect of changing the ultimate result of the referendum. A majority of students of the University of Saskatchewan made their free and democratic choice to federate with the CFS. It is respectfully submitted that their will should not be overridden bu this Honourable Court.

DATED at the City of Saskatoon, Saskatchewan, this 7th day of July, 2006.

Scharfstein Gibbings Walen & Fisher LLP

Per: 

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