

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

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

Appellant
(Added Respondent)

- and -

ROBIN MOWAT

Respondent
(Applicant)

- and -

UNIVERSITY OF SASKATCHEWAN STUDENTS' UNION

Respondent
(Respondent)

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**FACTUM OF THE APPELLANTS
THE CANADIAN FEDERATION OF STUDENTS and THE CANADIAN
FEDERATION OF STUDENTS-SERVICES**

PART I – INTRODUCTION

1. The Canadian Federation of Students (“CFS”) and the Canadian Federation of Students-Services (“CFS-S”) (collectively referred to as the “Appellants”) appeal from the Order of the Honourable Mr. Justice Smith dated October 13, 2006, declaring that the referendum held by the University of Saskatchewan Students’ Union (“USSU”) between October 4-6, 2005 as to whether the USSU should join the Canadian Federation of Students was of no force or effect.

2. The Appellants do not appeal the decision of the Honourable Mr. Justice Smith dismissing the motion seeking an order to cross-examine the Applicant Robin Mowat on his Affidavit sworn in support of his Application.

PART II- JURISDICTION AND STANDARD OF REVIEW

Jurisdiction

3. Section 233 of the *Non-Profit Corporations Act, 1995*, S.S. 1995, c. N-4.2. (the “Act”) provides that an appeal lies to the Court of Appeal from any order made by the Court pursuant to the Act. Section 7(2) of the *Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1., provides that an appeal lies to the Court of Appeal from a decision of the Court of the Queen’s Bench.

Standard of Review

4. The Appellants allege that the Honourable Justice Smith made errors of law, fact and mixed law and fact in his decision of October 13, 2006.
5. The standard of review on a question of law is that of correctness.
Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at 247, Book of Authorities (BA) Tab 1
6. The standard of review on a question of fact is that of palpable and overriding error.
Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at 248, BA Tab 1
7. A question of mixed fact and law is subject to a standard of palpable and overriding error *unless* it is clear that the trial judge made some extricable error in principle with respect

to the characterization of the legal standard or its application, in which case the error may amount to an error of law (i.e. subject to a standard of review of correctness).

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at 263, BA Tab 1

PART III- SUMMARY OF FACTS

The Parties

8. The Applicant Robin Mowat was the president of the University of Saskatchewan Students' Union ("USSU") during the 2003-2004 academic year. Between September 2005 and April, 2006, Mr. Mowat was a student enrolled at the University of Saskatchewan. Mr. Mowat convocated from the University of Saskatchewan ("UOS") with a Bachelor of Arts (Honours) in May of 2006.

Affidavit of Robin Mowat, Tab 14, Appeal Book (AB) Volume 4, p. 620 (para. 2)

Affidavit of Gavin Gardner, Tab 9, AB Volume 2, p. 371 (para. 39)

Decision of Justice Smith, Tab 7, AB Volume 1, p. 36 (para. 26)

9. The CFS is a federal non-share capital non-profit corporation, which among other things, advocates on behalf of university students across Canada. The CFS-S is a federal non-share capital non-profit corporation and enables students to collectively pool their resources to provide student owned and operated services.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 50-51 (paras. 2 & 3)

Decision of Justice Smith, Tab 7, AB Volume 1, p. 29 (para. 3)

10. Membership in the CFS and the CFS-S is governed by By-Law One (1) of the By-Laws of the CFS and CFS-S, respectively (collectively referred to as the "CFS By-Laws"). There are two types of members in the CFS and CFS-S: individual members and voting members. Students, or individual members, are represented through local student

associations to which they belong. Local student associations representing individual members are voting members.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 52 (para. 6)

11. Local student associations first join the CFS and CFS-S as prospective members. The local student association is then obligated to conduct a referendum of its members to determine whether the local student association wishes to become a full member of the CFS and the CFS-S.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 52 (para. 8)

12. The USSU is the organization responsible for the governing of undergraduate student affairs at the University of Saskatchewan.

Affidavit of Gavin Gardner, Tab 9, AB Volume 2, pp. 358-359 (para. 3)

13. On or about November 4, 2004, the USSU passed a motion whereby the USSU would seek prospective membership in the CFS, the CFS-S and CFS- Saskatchewan. The CFS and CFS-S accepted USSU as a prospective member at its convention between November 24 and 27, 2004.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 53-54 (paras. 11 & 13)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 29 (para. 4)

14. Article 2(a)(i) of By-Law 1 of the CFS By-Laws provides that a local student association is eligible to apply for full membership if its members have approved, by referendum, membership in the CFS. Article 2(b)(viii) of By-Law 1 of those same by-laws provides that a prospective member association must hold a referendum on full membership in the

CFS within five (5) months following being accepted as a prospective member unless an extension is granted by the CFS. The referendum is to be held in accordance with the rules and procedures for a referendum as set out in Article four (4) of By-Law 1.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 54-55 (para. 17)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 29 (paras. 4&5)

15. By-Law One (1), Article Four (4)(b) of the CFS By-Laws provides that a Referendum Oversight Committee ("ROC"), consisting of two members appointed by the local student association and two members appointed by the CFS, be established to develop the rules that would govern the referendum.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 55 (para. 18)
Decision of Justice Smith, Tab 7, AB Volume 1, pp. 29-30 (para. 6)

16. In the early months of 2005, representatives of the CFS, the CFS-S and the Council of the USSU discussed potential dates for the scheduling of the referendum. The USSU had concerns regarding the referendum and the interaction between the CFS By-Laws with respect to the referendum and its own Election and Referendum Policy. In order to address these concerns, the USSU sought a legal opinion from its solicitor, Greg Walen.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 55 (paras. 19-20)

17. At its meeting on February 10, 2005, the USSU was presented with the legal opinion of Mr. Walen dated February 8, 2005. Mr. Walen suggested that unless the referendum was conducted in accordance with the USSU's Elections Policy, there would be some question as to the validity of the referendum.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 56 (para. 21)

18. In order to resolve this conflict, Mr. Walen suggested that the USSU's Elections Board and the ROC work together to govern the referendum. Based on the issues raised by Mr. Walen, and the fact that the USSU had not appointed any representatives to the ROC, the University Student's Council ("USC"), agreed that the referendum could not proceed in March and would instead proceed in the fall.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 56 (para. 22)

19. The composition of the Elections Board is provided for in Article 10.01 of By-Law One (1) of the By-Laws of the USSU. The Elections Board was to be comprised of the Chief Returning Officer, Assistant Chief Returning Officer, two members of the USSU, two councillors from the USC and the general manager of the USSU.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 56-57 (para. 23)
Affidavit of Lucy Watson, Tab 8G, AB Volume 1, p. 155

20. While Article 10.01 provides for the composition of the Elections Board, it does not afford the Elections Board any jurisdiction over the conduct of a referendum. The Elections and Referenda Policy of the USSU ("ERP"), governs elections and referenda held by the USSU and permits an Elections Board to oversee elections and referenda. It is from this policy that the Elections Board derived authority over referenda.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 56-57 (paras. 23-24)
Elections and Referenda Policy, Affidavit of Lucy Watson, Tab 8H, AB Volume 1, p. 160
Decision of Justice Smith, Tab 7, AB Volume 1, pp. 31-33 (para. 13)

21. The Appointments Board of the USSU met in late August to select members of the Elections Board, who in turn would select the USSU members of the ROC. The Elections Board subsequently appointed two USSU members as the USSU

representatives on the ROC. The CFS and CFS-S had selected its two members for the ROC at the beginning of 2005.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 55, 58 (paras. 18, 30)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 30 (para. 9)

22. The ROC first met on September 11, 2005. The ROC was charged with developing the rules that would govern the referendum. The agenda for the first meeting included the ROC format and rules, referendum details, polling hours, managing logistics of approval of materials and verification of students' status. The ROC agreed that the referendum should be held between October 4-6, 2005 with campaigning to begin on September 19, 2005.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 59 (paras. 32-33)

23. As part of its mandate, the ROC developed a Referendum Protocol ("Protocol") which was intended to govern the referendum. The Protocol was made available to all USSU students on or about September 13, 2005

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 60 (para. 34)

24. On September 15, 2006, the USC passed a motion endorsing CFS in the referendum.

Affidavit of Gavin Gardner, Tab 9, AB Volume 1, p. 364 (para. 19)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 30 (para. 9)

25. Notice of the referendum was posted on the University of Saskatchewan Student's Union "Buzz Boards" throughout the campus of the university on September 19, 2005. The referendum dates were also published in the student newspaper and on the USSU website.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 60 (para. 35)

26. The ROC met again on September 18, 2005 to discuss the logistics for the review of materials, a review of the rules to date, the ballot question, poll clerks, security of ballot boxes and ballot counting.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 60 (para. 37)

27. Campaigning started on September 19, 2005.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 60 (para. 36)

28. On or about September 20, 2005, the two USSU members of the ROC were provided with a copy Mr. Walen's February 8, 2005 letter. Both of these members expressed concern that the ROC had been acting outside the scope of the USSU and sought direction from the president of the USSU and Mr. Walen. To address these concerns, an amendment to the ERP was presented at the September 22, 2005 meeting of the USSU council. The amendment to the ERP provided:

Move to amend the Elections and Referendum Policy to include under Section 4 Referenda Authority adding a point 2 in Referendum regarding Membership in the CFS an Oversight Committee shall have authority over the Referendum. The CRO and ACRO shall act as the USSU representatives on the Oversight Committee.

The motion to adopt this amendment was postponed until September 29, 2005.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 61 (paras. 40-41)
Decision of Justice Smith, Tab 7, AB Volume 1, pp. 30-31 (paras. 10-11)

29. At the USC meeting on September 29, 2005, the amendment to the ERP was discussed. The Respondent, Robin Mowat was in attendance at the meeting. After considerable debate, the USC adopted the following amendment to the ERP:

Move to amend the Elections & Referenda Policy to include under Section 4 Referenda Authority to add point 2 "In Referenda to federate in the CFS the Oversight Committee shall have authority over the Referendum. The

CRO and ACRO shall act as the USSU Representatives on the Oversight Committee and that the Elections Board must ratify the results of this referendum.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 62 (para. 44)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 31 (para. 12)

30. In compliance with Article four (4)(f)(iii) of By-Law One (1) of the CFS By-Laws, the referendum question read “Are you in favour of membership in the Canadian Federation of Students?”

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 64 (para. 51)

31. Within the student body, the debate was lively and active, at least from September 19, 2005, forward. Any student who was interested had available to him or her a significant exposure to both sides of the issue.

Decision of Justice Smith, Tab 7, AB Volume 1, p. 33 (para. 16)

32. The referendum took place between October 4 and 6, 2005. One thousand, nine hundred and sixty-eight students voted in favour of membership, one thousand, five hundred and eight-four voted against membership and there were ten spoiled ballots.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 64 (para. 52)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 33 (para. 19)

33. Voter turnout was approximately 20%, which was higher than the norm for USSU general elections.

Decision of Justice Smith, Tab 7, AB Volume 1, p. 34 (para. 20)

34. Section 11(b) of the Protocol provided that any complaints concerning alleged violations of the Protocol must be submitted in writing to the ROC by October 11, 2005. The ROC

received a total of seventeen complaints concerning alleged violations of the Protocol by October 11, 2005, including several complaints made by Mr. Mowat and several complaints made against Mr. Mowat.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 64 (para. 55)

35. As a result of the complaints received, the ROC conducted a thorough investigation into each and every complaint related to alleged violations of the Protocol. The ROC also sought an opinion from Mr. Walen as to the validity of the complaints made by Mr. Mowat. Mr. Walen provided his opinion by way of letter dated November 15, 2005. While Mr. Walen did agree that some of Mr. Mowat's concerns were valid, he concluded that none of the alleged violations would have changed the results of the referendum.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 66 (para. 58)

36. On December 3, 2005, the ROC issued its report with respect to the referendum held October 4-6, 2005. Included in its report was a summary of the complaints received by the ROC, the process of dealing with those complaints and the conclusions reached by the ROC regarding those complaints. The ROC also included the legal opinion received from Mr. Walen. The ROC determined that six of the seventeen complaints involved allegations based on the Protocol. The remaining eleven complaints involved allegations not based on the referendum protocol. The ROC concluded that none of the alleged violations, individually or cumulatively, had a significant impact on the referendum so as to change its outcome.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 66 (para. 60)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 34 (para. 21)

37. Once the ROC report had been released, the Elections Board met to discuss the referendum.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 67 (para. 61)

38. On January 28, 2006, the Elections Board passed a motion where it refused to ratify the results of the referendum. The Elections Board presented its report and summary to a meeting of the USC on February 9, 2006. In its report, the Elections Board stated that its underlying concern was whether any issues in relation to the process would have significantly affected the will of the voters. The Elections Board recommended that another referendum take place.

Affidavit of Victoria Coffin, Tab 10, AB Volume 3, p. 552 (para. 18)
Summary of Concerns, Affidavit of Victoria Coffin, Tab 10G, AB Volume 1, pp. 590-593
Decision of Justice Smith, Tab 7, AB Volume 1, p. 34 (para. 22)

39. On or about March 30, 2006, the USC met to consider the report and recommendation of the Elections Board. The members of the USC engaged in considerable debate as to whether the USC should proceed with ratifying the results of the referendum. After this debate, the USC decided not to accept the Election Board's recommendation and ratified the results of the referendum.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, p. 68 (para. 68)
Minutes of USC Meeting, Affidavit of Lucy Watson, Tab 8EE, AB Volume 2, pp. 342-355
Affidavit of Gavin Gardner, Tab 9, AB Volume 2, p. 370 (para. 36)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 36 (para. 25)

40. The Applicant Robin Mowat was in attendance at the March 30, 2006 USC meeting and made submissions that the USC should not ratify the results of the referendum.

Minutes of USC Meeting, Affidavit of Lucy Watson, Tab 8EE, AB Volume 2, pp. 342-355

41. By letter dated April 3, 2006, the CFS and the CFS-S were advised that a legal proceeding to declare the results of the referendum invalid had been brought by Robin Mowat, a former student at the University of Saskatchewan. Neither the CFS or the CFS-S were named as a party to this application.

Affidavit of Lucy Watson, Tab 8, AB Volume 1, pp. 68 (para. 69)

42. The CFS and CFS-S were added as parties by Order of Justice Smith at the August 23, 2006 hearing of the Respondent's Application.

Decision of Justice Smith, Tab 7, AB Volume 1, pp. 37-38 (paras. 29-30)

PART IV- POINTS IN ISSUE

43. The Appellants' position on the issues in this appeal is as follows:

(a) The Honourable Justice Smith erred in granting a remedy under section 225 of the *Act* on the basis that the Respondent was a "former director" of the USSU. In order to seek relief under section 225 as a "former director", the Respondent must establish that he has a sufficient interest in the matter to mandate the remedy granted. A "sufficient interest" will only be established if the Respondent's status as director is contemporaneous with the events about which he complains and that the alleged oppression is current at the time of the application.

(b) The Honourable Justice Smith erred by applying the principles of good faith and natural justice in evaluating the validity of the referendum. The validity of the referendum should have been determined by the application of the test used in cases of controverted elections.

(c) The Honourable Justice Smith erred in law and in fact by failing to make a finding as to whether the complaints surrounding the conduct of the election, if proven by the applicant, would have substantially affected the result of the referendum.

(d) The Honourable Justice Smith made an error in fact by concluding that the USSU had ignored its own rules and imposed its own preordained outcome when it ratified the results of the referendum, despite the position adopted by the Elections Board. The decision of the USC to ratify the results of the referendum was within its authority and accurately reflected the desired outcome as voted by students.

PART V- ARGUMENT**Standing under section 225 of the *Non-Profit Corporations Act, 1995***

44. The Honourable Justice Smith erred in granting a remedy under section 225 of the *Act* on the basis that the Respondent was a “former director” of the USSU. In order to obtain relief under section 225 as a “former director”, the Respondent must establish that he has a sufficient interest in the acts complained of to be granted. A “sufficient interest” can only be established if the Respondent’s status as a director is contemporaneous with the events about which he complains and if the alleged oppression complained of is current at the time of the application.
45. In this case, the Respondent’s status as a director was not contemporaneous to the events that he alleges amount to oppressive conduct. The Respondent was a director of the USSU during the 2003-2004 academic year. The events giving rise to the Respondent’s complaints occurred between September, 2005 and March, 2006, when Mr. Mowat was no longer a director. In addition, at the time the application was heard, the Respondent had convocated from the UOS and, therefore, was no longer a party that could be affected by the alleged oppressive conduct by the USSU. Accordingly, the Respondent did not have standing as a “former director” under section 225 of the *Act*.
46. Although the *Act* uses the term “former director”, it could not have been the intention of the legislature to clothe every former director of a non-profit corporation, no matter what the circumstances, with the status of complainant under section 225. While a “former director” has a *prima facie* right to bring an application pursuant to section 225, that *prima facie* right does not automatically give the “former director” standing. The

“former director” must have a sufficient interest in the complained of events to advance a claim.

Michalak v. Biotech Electronics Ltd., [1986] Q.J. No. 1882 at paras. 16,19 & 22 (Que.Sup.Ct.), BA, Tab 2

47. The “sufficient interest” test has been recognized in Saskatchewan as being applicable in cases where an applicant seeks status as a complainant in order to obtain relief under the oppression remedy, although not in the context of section 222 of the *Act*.

Schafer v. International Capital Corp., [1997] 5 W.W.R. 98 at 104 (Sask. Q.B.), BA, Tab 3; varied on other grounds, [1997] S.J. No. 374 (Sask. C.A), BA, Tab 4

48. In order to establish a sufficient interest, there has to be some connection between the timing of the events which are the subject matter of the complaint and the role of the applicant as director.

Jacob Farms Ltd. v. Jacobs, [1992] O.J. No 813 at p. 5 (Ont. Gen. Div.), BA, Tab 5

49. The oppression remedy was intended to provide former security holders, directors or officers a remedy to seek redress after having been forced out of the company by some wrongdoing in their capacity as a security holder, director or officer.

Litz v. Litz, [1995] 4 W.W.R. 425 at 429 (Man. Q.B.), BA, Tab 6

50. While an inquiry into alleged oppressive conduct may touch upon circumstances which have occurred in the past or may reach into the past, there must exist an interest which is currently being oppressed.

Michalak v. Biotech Electronics Ltd., [1986] Q.J. No. 1882 at paras. 16,19 & 22 (Q.Sup.Ct.), BA, Tab 2

51. While it is clear that the sufficient interest test is applicable in this case, Justice Smith failed to consider it in his analysis. At paragraph forty-one (41) of the decision, Justice Smith states:

Section 225 addresses an application by a complainant. A complainant is defined in s.222 and can be a former director. It is common ground, by all, that the applicant is a former director.

It was on this basis that Justice Smith granted standing to the Respondent. Had the sufficient interest test been applied, the Respondent would not have been granted standing to initiate a complaint as a former director.

52. The following facts, as found in the evidence before the Court and by Justice Smith, support that a sufficient connection does not exist:

- (1) The Respondent was a director of the USSU for the academic year 2003-2004;

**Affidavit of Robin Mowat, Tab 14, Appeal Book (AB) Volume 4, p. 620 (para. 2)
Decision of Justice Smith, Tab 7, AB Volume 1, p. 41 (para. 41)**

- (2) The USSU sought prospective membership in the CFS and CFS-S in November, 2004;

Decision of Justice Smith, Tab 7, AB Volume 1, p. 29 (para. 4)

- (3) The events that led to the Respondent's complaint occurred between September, 2005 and March, 2006,

Decision of Justice Smith, Tab 7, AB Volume 1, p. 36 (para. 26)

- (4) At the time of the hearing of the application, Mr. Mowat had convocated from the UOS.

Affidavit of Gavin Gardner, Tab 9, AB Volume 2, p. 371 (para. 39)

53. If Justice Smith had taken the above facts into account in determining whether the Respondent was former director with sufficient interest under section 225, he would have concluded that the Respondent did not have standing. The events giving rise to the Respondent's complaint were in no way related to or connected with his status as a director of the USSU in 2003-2004.
54. Accordingly, the Honourable Justice Smith erred in allowing a remedy under section 225 of the *Act* on the basis that the Respondent was a "former director" of the USSU.

Did Justice Smith err in law by applying the principles of good faith and natural justice to the decision of the USC on March 30, 2006?

55. The Honourable Justice Smith erred by applying the principles of good faith and natural justice in adjudicating upon the validity of the referendum. Instead, Justice Smith should have applied the legal test emanating from the cases where elections are controverted.
56. The fundamental issue before the Court was whether the alleged referendum irregularities substantially affected the result. By ratifying the results of the referendum on March 30, 2006, the USC concluded that the alleged irregularities, if proven, would not have substantially affected the result. In order to determine whether the conduct of the USC was oppressive, it was necessary for Justice Smith to apply the test emanating from the cases where elections are controverted.
57. In reaching the conclusion that the test to be applied was whether the USSU acted in good faith and in accordance with principles of natural justice, Justice Smith placed

reliance on *Walton (Litigation Guardian) v. Saskatchewan Hockey Association* as well other related cases dealing with non-profit corporations.

58. The cases cited by Justice Smith can be distinguished from the facts of the case under appeal. In each case, the alleged impugned conduct related to an exercise of discretion by the particular organization:

- Application to quash decision of Saskatchewan Hockey Association to suspend player.

Walton (Litigation Guardian of) v. Saskatchewan Hockey Association, [1997] 1 W.W.R. 135 (Sask. Q.B.), BA, Tab 7

- Application to compel a minor hockey association to permit a member to try out for a team in a higher age division

Kanigan (Guardian ad Litem of) v. Castlegar Minor Hockey Association (1996), 141 D.L.R. 4th 563 (B.C. S.C.), BA, Tab 8

- Application to overturn the decision of a minor hockey association to prevent two players from playing for teams in another district.

Beauchamp v. North Central Predators AAA Hockey Association et al. (2004), 247 D.L.R. 4th 745 (ON S.C.), BA, Tab 9

- Application by a hockey team for judicial review of a decision of the association to make changes to the regional boundaries of the league without complying with the proper procedure for doing so.

Miramichi Minor Hockey Club v. New Brunswick Amateur Hockey Association Inc. [1997] N.B.R. (2d) Supp. No. 26 (N.B. Q.B.), BA, Tab 10

59. These cases are of no assistance to the Court in its determination as to whether the alleged irregularities associated with the referendum substantially affected the result since none of the cases cited relate to controverted elections or the application of the oppression remedy under section 225 of the *Act*.

60. The Elections Board concluded that the alleged irregularities “substantially affected the will of the voters.” In determining whether to ratify the results of the referendum, the USC declined to accept the Election Board’s findings, upholding the validity of the electoral process.
61. The Respondent takes issue with the decision of the USC: The Respondent, in seeking to invalidate the referendum, states that the failure by the USC to follow the Referendum Policy was oppressive. The validity of the referendum and the determination of oppression, however, is to be assessed on a test which assesses whether or not the alleged irregularities substantially affected the result and not whether the process of consideration after the vote was taken met the principles of good faith and natural justice.
62. The test applied in cases where elections are controverted require the Court to determine whether the alleged irregularities:
- (a) were substantial and not merely informalities; and
 - (b) were of such a nature that that they may reasonably be said to have substantially affected the result of the referendum.

Anderson v. Stewart and Diotte (1921), 62 D.L.R. 98 at 115 (N.B.S.C.), BA, Tab 11

63. It is not enough to show that there were irregularities in order to vitiate an election. It must also be shown that the irregularities were such that they might have affected the result.

Flookes v. Shrake, [1989] A.J. No. 1011 at p. 13 (Alta. Q.B.) BA Tab 12

64. When a court is charged with determining whether conduct has been oppressive, it must of necessity take its *own* view of the facts and come to its *own* decision on those facts.

Only then will the Court be in a position to pronounce whether the tribunal's decision was "oppressive or prejudicial."

Banda v. Romanian Canadian Cultural Club, [1986] S.J. No. 758 at p. 3 (Sask. C.A.), BA, Tab 13.

65. In reaching his decision, Justice Smith relied on and adopted the conclusion of the Elections Board, a lay body of students, in determining that the alleged irregularities surrounding the conduct of the referendum were true and "had significantly affected the will of the voters." At paragraph 58 of the decision, Justice Smith states:

It is telling that the Elections Board, which was much closer to the ground than any Court could possibly be, concluded that it could not, in good faith, ratify the referendum result. It stated that its underlying concern was whether any of the problems "**would have significantly affected the will of the voters**" From its decision, I must conclude it did. [emphasis in original]

Decision of Justice Smith, Tab 7, AB Volume 1, p. 47.

66. Justice Smith committed an error of law when he accepted the determination made by the Elections Board that the alleged irregularities were proven, and that they had "significantly affected the will of the voters". Justice Smith failed to make his own findings of fact on the record before him, and failed to apply the legal test to those facts.

Courts Should Not Defer to Lay Persons on Questions of Law

67. In the 1990 Prince Edward Island Supreme Court decision of *Eric D. McLaine Construction Ltd. v. Southport (Community)*, the Court considered an application by the plaintiff for certiorari and mandamus respecting the denial of a building permit. The

Court made the following comments regarding the role of Courts in determining questions of law:

The Land Use Commission is not made up of persons who are lawyers. They have no expertise to determine questions of law.

...

Where an administrative body has been created for the purpose of deciding issues that is within its expertise, there can be no question that it should deal with those issues. Where an issue is within the competence and expertise of the Courts, then issues in which it has competence and expertise should be decided by the Court.

Eric D. McLaine Construction Ltd. v. Southport (Community), [1990] P.E.I.J. No. 45 at p. 5 (P.E.I.Sup.Ct.), BA, Tab 14.

68. Justice Smith failed to properly consider the fact that the Elections Board was not in a position to make determinations on questions of law. The Elections Board was comprised of lay persons; specifically, university students.
69. The deliberations of the Elections Board (including minutes of the meetings and its written report) clearly demonstrate that there was significant confusion among the members of the Election Board as to what was the proper legal test to be applied to determine whether it should ratify the results of the referendum. The various tests considered by the Elections Board include:
- (1) The EB needs to decide if the key concerns affected the process and if it affected the results;

Minutes of Elections Board, January 28, 2006, Affidavit of Victoria Coffin, Tab 10F, AB Volume 3, p. 579
 - (2) The question could be when going through the key factors could be **Was this an issue of significant bias as to change the result?**;

Minutes of Elections Board, January 28, 2006, Affidavit of Victoria Coffin, Tab 10F, AB Volume 3, p. 580

- (3) The EB chooses not to ratify due to the lack of confidence in the process and the EB has specific concerns that neither of the organizations bylaws were met. Specifically, the EB has concerns about the compressed time line of the referendum;

Minutes of Elections Board, January 28, 2006, Affidavit of Victoria Coffin, Tab 10F, AB Volume 3, p. 582

- (4) The EB, in its process of discussing the key concerns, took into consideration the principle of Natural Justice. Natural justice is concerned with the fairness of the process. Traditional issues surrounding an activity such as an election or referendum include ensuring clarity, transparency, equality and accessibility; the EB applied these four pillars to guide its analysis of the identified concerns; and

Summary of Concerns, Affidavit of Victoria Coffin, Tab 10G, AB Volume 3, p. 586

- (5) In its assessment, the EB's underlying concern has been whether any issues in relation to the process would have significantly affected the will of the voters.

Summary of Concerns, Affidavit of Victoria Coffin, Tab 10G, AB Volume 3, p. 590

70. It is clear from the record that the lay members of the Elections Board failed to appreciate the legal test to be applied in the circumstances of this case.

71. Justice Smith should have conducted his own analysis of the alleged irregularities related to the conduct of the referendum and determined (if proven to be true) whether they would have substantially affected the result of the referendum. His failure to do so constitutes an error in law.

72. Had Justice Smith engaged the legal analysis, he would have concluded that the alleged irregularities did not substantially affect the result of the referendum.

Report of the Referendum Oversight Committee (ROC)

73. In contrast to the report of the Elections Board, is the report of the Referendum Oversight Committee. After the results of the referendum had been announced, the ROC investigated the alleged violations of the Referendum Protocol.
74. Unlike the Elections Board, the ROC sought out a legal opinion regarding the impact of the alleged violations on the outcome of the referendum. In his November 15, 2005 correspondence, Mr. Walen was in agreement that the results of the referendum would not have been any different absent the occurrence of any of the alleged violations:
- Ideally, it would have been preferential for the referendum to be held in complete compliance with the CFS By-Laws or alternatively, at a minimum, with the USSU Election and Referenda Policy. This clearly did not happen as time frames may not have been complied with. Having said that, however, I cannot state unequivocally that the results would have been any different.
- ROC Committee Report, Affidavit of Lucy Watson, Tab 8Z, AB Volume 2, pp. 309-314**
75. The process adopted by the ROC in addressing the alleged violations was in accordance with the test as set out in the cases where elections are controverted.
76. The ROC assessed the merits of each allegation and the potential impact of the alleged violation on the outcome of the referendum. After thoroughly considering the allegations, the ROC concluded that none of the alleged violations, individually or cumulatively, substantially affected the result of the referendum.

Pre-ordained Outcome

77. The Honourable Justice Smith made an error in fact by concluding that the USSU had ignored its own rules and imposed its own preordained outcome when it ratified the results of the referendum, despite the position adopted by the Elections Board. The decision of the USC to ratify the results of the referendum was within its authority and accurately reflected the outcome as voted by students.
78. The evidence before the Court on the hearing of the Application reveals that while there were several members of the USC that were in favour of joining the CFS and CFS-S, there were also several members who were opposed to joining the CFS and CFS-S. At the September 15, 2005 USC meeting, there was a lively debate as to whether the USC should pass a motion endorsing the CFS in the referendum. After debating the issue, the USC voted to carry the motion.
- Minutes of USC Meeting September 15, 2006, Affidavit of Gavin Gardner, Tab 9,
AB Volume 3, pp. 423-431**
79. Although the USC endorsed the CFS in the referendum at the September 15, 2006 meeting, ultimately the USC was bound by the will of the students at the UOS. The USC did not have the discretion to seek full membership in the CFS and CFS-S unless a referendum of its members was held and the members voted in favour of joining the CFS and CFS-S.
80. A review of the minutes of the March 30, 2006 meeting of the USC reveals that there was a lively debate among the council members as to whether they should ratify the results of

the referendum in light of the Elections Board report. Many council members were vocal in their support for or against ratifying the results of the referendum. The general manager of the USSU, Caroline Cottrell, articulated the factors that each councillor had to take into account when determining whether to ratify the results:

She stated she has read over all documents regarding the referendum several times in the last couple days. She stated that no matter what decision is made at council tonight regarding the referendum, someone is going to sue. She stated that council has the choice between democracy and bureaucracy. On the one hand the USC has a result from the Election and as far as she can tell the results were not significantly compromised by the procedural difficulties. On the other hand, USC has a bureaucratic process that has not been followed and should have been followed throughout the process. She stated that council members have to make a decision based exclusively on principle. She encouraged council members to put aside the issues of whether or not the USSU is going to get sued because it is and deal exclusively and strictly with what your conscience tells you is the right decision to make.

Minutes of USC Meeting March 30, 2006, Affidavit of Lucy Watson, Tab 8EE, AB Volume 2, pp. 346-347.

81. It is clear from the minutes of the meeting that all members of the USC took the decision as to whether to ratify the results of the referendum seriously. While some members of the USC were in favour of joining the CFS and CFS-S, the decision to ignore the recommendation by the Elections Board was not made on the basis that some members wanted to join the CFS and CFS-S. The decision to ratify the results of the referendum was made after councillors carefully considered of all of the issues before them.

Minutes of USC Meeting March 30, 2006, Affidavit of Lucy Watson, Tab 8EE, AB Volume 2, pp. 343-355

82. While the Elections Board of the USSU may have declined to ratify the results of the referendum, their decision was not binding upon the USC. The USC is bound its own By-Laws and by the articles contained within its Constitution. The USC is not bound by

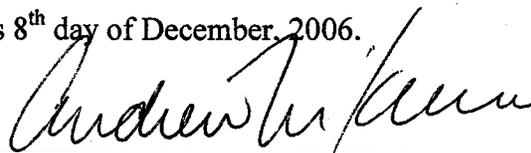
the Elections and Referenda Policy as it is not a bylaw nor is it a part of the USSU Constitution. Pursuant to Part 2 of Article 7 of the USSU Constitution, the USC has final authority over the interpretation of the University of Saskatchewan Students' Union Constitution and Bylaws. Accordingly, the decision by the USC to ratify the referendum results was a proper exercise of the USC's jurisdiction and binding upon the members of the USSU.

83. The decision of the USC to ratify the results of the referendum was within its authority and accurately reflected the desired outcome as voted on by the students. Accordingly, the evidence before the Court does not support Justice Smith's conclusion that the USSU had ignored its own rules and imposed its own preordained outcome when it ratified the results of the referendum, despite the position adopted by the Elections Board. In concluding that the USC had imposed its own preordained outcome, Justice Smith committed a palpable and overriding error.

PART VI – RELIEF

84. The Appellants ask that the Order of Justice Smith declaring that the referendum by the USSU on the issue as to whether it should join the CFS and CFS-S is of not force or effect, be set aside and that an Order be made:
- a. Declaring that the referendum result was properly ratified and is valid;
 - b. In the alternative, sending this matter back to the Court of Queens' Bench for Saskatchewan for reconsideration; and
 - c. That the costs of this Appeal be awarded to the Appellants.

ALL OF WHICH is respectfully submitted this 8th day of December, 2006.



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PART VII- AUTHORITIES**Judicial Authorities**

1. *Anderson v. Stewart and Diotte* (1921), 62 D.L.R. 98 at 115 (N.B.S.C.)
2. *Banda v. Romanian Canadian Cultural Club*, [1986] S.J. No. 758 (Sask. C.A.)
3. *Beauchamp v. North Central Predators AAA Hockey Association et al* (2004), 247 D.L.R. 4th 745 (ON S.C.)
4. *Eric D. McLaine Construction Ltd. v. Southport (Community)*, [1990] P.E.I.J. No. 45 (S.C.)
5. *Flookes v. Shrake*, [1989] A.J. No. 1011 (Q.B.)
6. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235
7. *Jacob Farms Ltd. v. Jacobs*, [1992] O.J. No. 813 (Gen. Div.) (QL)
8. *Kanigan (Guardian ad Litem if) v. Castlegar Minor Hockey Association* (1996) 141 D.L.R. 4th 563 (B.C. S.C.)
9. *Litz v. Litz*, [1995] 4 W.W.R. 425 (Q.B.)
10. *Michalak v. Bio Electronics Ltd. et al.* (1986), 35 B.L.R. 1 (PQ S.C.)
11. *Miramichi Minor Hockey Club v. New Brunswick Amateur Hockey Association Inc.*, [1997] N.B.R. (2d) Supp. No. 26 (N.B. Q.B.)
12. *Schafer v. International Capital Corp*, [1996] 5 W.W.R. 98 (Q.B.)
13. *Schafer v. International Capital Corp*, [1997] S.J. No. 374 (C.A)
14. *Walton (Litigation Guardian of) v. Saskatchewan Hockey Association*, [1997] 1 W.W.R. 135 (Sask. Q.B.)

Statutes

1. *Non-Profit Corporations Act, 1995, S.S. 1995, c. N-4.2*

Interpretation of Division

222 In this Division:

"**action**" means an action pursuant to this Act;

"**complainant**" means:

- (a) a member or a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
- (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates;
- (c) the Director; or
- (d) any other person who, in the discretion of the court, is a proper person to make an application pursuant to this Division.

1995, c.N-4.2, s.222.

Application to court re oppression

225(1) A complainant may apply to the court for an order pursuant to this section and the court may make an order to rectify the matters complained of where the court is satisfied that the result of any act or omission of the corporation or any of its affiliates, the manner in which any of the activities or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the manner in which the powers of the directors of the corporation or any of its affiliates are or have been exercised:

- (a) is oppressive or unfairly prejudicial to any member, security holder, creditor, director or officer or, where the corporation is a charitable corporation, the public generally; or
- (b) unfairly disregards the interests of any member, security holder, creditor, director or officer or, where the corporation is a charitable corporation, the public generally.

(2) In connection with an application pursuant to this section, the court may make any interim or final order it considers appropriate, including an order:

- (a) restraining the conduct complained of;
- (b) appointing a receiver or receiver-manager;
- (c) amending the articles or bylaws or creating or amending a unanimous member agreement to regulate a corporation's affairs;
- (d) directing an issue or exchange of securities;
- (e) appointing directors in place of or in addition to all or any of the directors then in office;

(f) directing a corporation, subject to subsection (5), or any other person, to purchase securities of a security holder;

(g) directing a corporation, subject to subsection (5), or any other person:

(i) to pay to a member any part of the moneys paid by the member for a membership interest; and

(ii) to pay to a security holder any part of the moneys paid by the security holder for securities;

(h) varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any (h) varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 142 or an accounting in whatever form the court may determine;

(j) compensating an aggrieved person;

(k) directing rectification of the registers or other records of a corporation pursuant to section 227;

(l) liquidating and dissolving the corporation;

(m) directing an investigation pursuant to Division XVII to be made;

(n) directing a corporation as to the future investment, disposition and application of its property or property under its control;

(o) upholding, modifying or setting aside a decision made pursuant to section 119; or

(p) requiring the trial of any issue.

(3) Where an order made pursuant to this section directs amendment of the articles or bylaws of a corporation:

(a) the directors shall immediately comply with subsection 182(4); and

(b) no other amendment to the articles or bylaws shall be made without the consent of the court, until the court otherwise orders.

(4) A member is not entitled to dissent pursuant to sections 177 to 181 if an amendment to the articles is effected pursuant to this section.

(5) No corporation shall make a payment to a member pursuant to clause (2)(f) or (g) where there are reasonable grounds to believe that:

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would be less than the aggregate of its liabilities if the payment were made.

(6) An applicant pursuant to this section may apply in the alternative for an order pursuant to section 198.

1995, c.N-4.2, s.225.

Appeal

233 An appeal lies to the Court of Appeal from any order made by the Court pursuant to this Act.

1995, c.N-4.2, s.225.