C.A. No. 1376

IN THE COURT OF APPEAL FOR SASKATCHEWAN
ON APPEAL FROM THE COURT OF QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

UNIVERSITY OF SASKATCHEWAN STUDENTS' UNION

APPELLANT
(Respondent)

- and –

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

APPELLANTS
(Added Respondents)

- and -

ROBIN MOWAT

RESPONDENT
(Applicant)

INDEX

I. INTRODUCTION

1. The University of Saskatchewan Students' Union ("USSU") held a Referendum between October 4 and 5, 2005, to determine whether the USSU should join the Canadian Federation of Students ("CFS") (the "Referendum"). Before the Referendum could be binding on the undergraduate students at the University of Saskatchewan, the results required ratification by the Referendum Oversight Committee ("ROC") and the USSU's Elections Board ("EB"). On January 28, 2006, the EB refused to ratify the Referendum results. On March 30, 2006 USSU Council ("USC") overruled its own EB and ratified the Referendum.

2. Shortly thereafter Robin Mowat ("Mr. Mowat") brought an application before the Court of Queen's Bench pursuant to ss. 135 and 225 of ***The Non-Profit Corporations Act, 1995,*** S.S. 1995, c.N-4.2 to over turn the results of the Referendum.

3. Justice S. Smith provided his reasons for judgment on October 13, 2006. There Justice Smith concluded at paragraph 63:

> In my view, no reasonable observer could conclude that the USC approached the post-vote process in good faith or in a fashion that is in harmony with the broad rules of natural justice. When faced with a result (rendered by a procedure which it had specifically established for the referendum) which was not consistent with its wishes, the USC simply ignored its own rules and imposed its own preordained outcome.

4. Justice Smith held that the Referendum was of no force or effect. In arriving at his decision, Justice Smith found that the USSU had acted oppressively and unfairly prejudicial contrary to s. 225 of the ***Act***.

5. The Respondent submits that Justice Smith's decision be upheld in this matter. The heart of Mr. Mowat's application was whether a non-profit corporation had acted in good faith as required by the ***Act***. Justice Smith found that the USSU had not acted in accordance with the broad rules of natural and this finding should be maintained.

II. STANDARD OF REVIEW

6. The source of the Appellant's right of appeal and the source of the Court's jurisdiction to entertain the appeal are s. 7(2)(a) and s. 10 of ***The Court of Appeal Act, 2000***, S.S. 2000, c. C-42.1. & s. 233 of Non-Profit Corp. s Act.

7. The appeal is from the chambers Judge's exercise of discretion, ordering the Referendum held by the USSU null and void. In ***Bouchard v. Carruthers et al.*** (2001), 203 Sask. R. 308 (C.A.) at paragraph 5, this Honourable Court set out the standard of review for an appeal from a discretionary decision:

> The standard of review applicable to an appellate court's consideration of an appeal from a decision involving a judge's exercise of discretion is decidedly narrow. Before an appellate Court will intervene in such a case, it must conclude that the judge of first instance:
>
> a. acted upon some wrong principle of law;
>
> b. took into consideration irrelevant factors;
>
> c. overlooked or misapprehended some material evidence;
>
> d. failed to act judicially; or
>
> e. was so clearly wrong that the decision will result in an injustice.
>
> ***Bouchard v. Carruthers et al.*** (2001), 203 Sask. R. 308 (C.A.), para. 5 [Mowat B.A. Tab 1].
>
> See also: ***Elsom v. Elsom***, [1989] 1 S.C.R. 1367 at 1374-1375, 1377 [Mowat B.A. Tab 2].

consider esp. re: RM = "complainant"

8. The Respondent submits that the chambers Judge made no error in principle nor did he misapprehend some material evidence in exercising his discretion. The decision was not so clearly wrong that the decision will result in an injustice. As such, this appeal should fail and the Referendum should remain to be of no force or affect.

III. SUMMARY OF FACTS

A. THE REFERENDUM

9. A Referendum was held by the USSU on October 4th through 6th 2005, to determine whether or not it should join the CFS.

10. The USSU had to administer the Referendum in accordance with Bylaw I of the CFS constitution. As such, the USSU had to temporarily release its authority to run certain referenda to the ROC.

> Affidavit of Lucy Watson, Tab 8, A.B. Vol. 1, p. 52 (para. 6).

11. The ROC was a committee of four members, two representing the interests of the CFS and two representing the interests of the USSU. The members representing the USSU were a Chief Returning Officer, Dorinda Stahl, and an Assistant Chief Returning Officer, Martin Olszynski. Those representing the CFS were their National Deputy Chairperson, Angela Regnier, and a senior staff member, Lucy Watson. Both members from the USSU were to remain neutral in order to adhere to the USSU's Code of Ethics.

> Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, pp. 698-699 (para. 8).

12. The motion to give the ROC authority over the Referendum was made on September 22, 2005. USSU President, Gavin Gardiner, wanted the motion passed that night, but Council was persuaded to follow its standard procedure of giving new business a week in order for Councillors to meet with their constituents.

> Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, p. 699 (para.9 and Exhibit H).

13. Concurrent to the USC motion granting the ROC authority to administer the Referendum, the ROC met itself on September 21st and 22nd, 2005. The minutes from these meetings state that: "At this point, the CRO and ACRO were unanimous in their opinion that the Referendum could not be held."

Affidavit of Trent Evaninsky, A.B. Vol. 4, p. 604 (para. 10 and Exhibit C).

14. At a USC meeting held on September 29, 2005, [just two school days prior to the commencement of voting], Mr. Olszynski admitted that certain violations of both USSU and CFS policy had been made. In particular he noted that:

(a) The CRO had not been given the Referendum question as it would appear on the ballot within the two-week limit, as required by both CFS Bylaws and the USSU Elections Policy; and

(b) In the case of the Elections Policy, the Referendum question needed to be approved by the USSU solicitor prior to being passed to the CRO. Mr. Olszynski stated that this had not been done.

Affidavit of Robin Mowat, A.B. Vol. 4 pp. 623-624 (paras. 15-16).

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

Affidavit of Robin Mowat, A.B. Vol. 4, p. 623 (para. 15).

16. Prior to the Referendum, the process that the USSU followed with respect to elections and previous referenda was that:

(a) The USSU made an official call to register campaigns;

(b) The USSU held a mandatory information meeting to brief all campaigners on the rules; and

(c) Only then could campaigning commence.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 623 (para. 12).

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

Affidavit of Robin Mowat, A.B. Vol. 4, pp. 621-622 (paras. 7 and 9).

18. The copy of the Referendum rules that Mr. Mowat received from Mr. Olszynski were not signed by any member of the ROC.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 622 (para. 9 and Exhibit B).

19. Mr. Mowat was confused with respect to which rules would govern the Referendum. USSU election and Referendum rules and procedures are clearly outlined in the Elections Policy; however Mr. Mowat had received a draft, unauthorized set of rules established by the ROC. There was no official registry for campaigns, nor was there a meeting with students to review the Referendum rules.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 622 (para. 11).

20. It is unclear when the official campaign period for the Referendum began. Over the course of September and early October of 2005, it was visually apparent on campus that the CFS was involved in a campaign at the University of Saskatchewan. There were posters supporting the CFS put up all over campus. Jeremy Ring noticed these posters before he was aware that there was a Referendum.

Affidavit of Jeremy Ring, A.B. Vol. 4, pp. 594-595 (para. 3).

21. Voting occurred on October 4, 5 and 6 by paper ballot.

Affidavit of Gavin Gardiner, A.B. Vol. 2, p. 368 (para. 11).

22. Polling stations were not set up in their traditional locations for the Referendum.

Affidavit of Trent Evaninsky, A.B. Vol. 4, pp. 604-605 (paras. 11-13).

23. The result of the Referendum was that the majority was in favour of joining CFS.

Affidavit of Gavin Gardiner, A.B. Vol. 2, p. 369 (para. 31).

24. Following the Referendum the ROC prepared a report outlining the official results of the vote. It was released on December 5, 2005. The ROC concluded that the Referendum was valid.

Affidavit of Robin Mowat, A.B. Vol. 4, pp. 625-626 (para. 24).

25. The CRO and ACRO resigned immediately after the ROC report was released.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 626 (para. 25).

26. On January 17, 2006 the EB, under the chairmanship of the new ACRO, Victoria Coffin, began to consider how it would evaluate whether or not to ratify the Referendum. It attempted to clarify key dates of the Referendum process and created a list of factors that it felt might have influenced student decisions.

Affidavit of Victoria Coffin, A.B. Vol. 3, p. 551 (para. 12).

27. As a result of its investigation the EB chose not to ratify the results of the Referendum on January 28, 2006. The EB issued a report that was submitted to USC on February 9, 2006. The key concerns outlined by the EB were:

(a) Although there was close to one year between taking out a prospective membership and the Referendum, the ROC still had to deal with fundamental issues on a compressed timeline;

(b) No formal notice requesting campaign team registration;

(c) No formal declaration of the date that campaigning was to begin;

(d) No notice of questions was served to the student body;

(e) ROC Protocol (the "Protocol") was an evolving document;

(f) There was no agreement on specific key issues: spending limits, classroom campaigning, and campus participation;

(g) There was no clear resolution on the inconsistencies of USSU and CFS bylaws prior to the campaign;

(h) Only those complaints that violated the Protocol were considered;

(i) CFS members of ROC were involved in Referendum campaigning; and

(j) No separate appeals board was struck in accordance with CFS Bylaw No. 4(g).

Affidavit of Victoria Coffin, A.B. Vol. 3, p. 552 (para. 18 and Exhibit G).

28. At the last USC meeting of the 2005/2006 academic year (held on March 30, 2006), USC heard from both President Gardiner and USSU General Manager Caroline Cottrell that the USSU would face a lawsuit from the CFS if they did not ratify the Referendum. USC also heard about Robin Mowat's intention to have the Referendum results looked at by a judge.

Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, p. 700 (para. 15).

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

Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, p. 700 (para. 16 and Exhibit E).

30. Mr. Mowat wrote to the USSU and CFS indicating his intention to bring an application for review on April 3, 2006.

Affidavit of Lucy Watson, A.B. Vol. 1, p. 68 (para. 69 and Exhibit FF).

31. Mr. Mowat served and filed his application pursuant to ss. 135 and 225 of ***The Non-Profit Corporations Act*** to turn over the results of the Referendum on May 19, 2006. His application was heard on October 13, 2006.

B. MR. MOWAT'S STANDING

32. Mr. Mowat commenced his undergraduate studies at the University of Saskatchewan in the fall of 2000. Since that time he served as the Managing Editor of the student newspaper, *The Sheaf*; served one year as a member-at-large on the University of Saskatchewan Students' Union (USSU) Student Affairs Board; served as a Student Senator for three years; and served as President of the USSU for 2003-2004.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 620 (para. 2).

33. USSU members who have paid their dues for Term 1 and Term 2 are, by convention, still members until August 31.

> Rebuttal Affidavit of Robin Mowat, A.B. Vol. 5 , p. 863 (para. 9).
>
> Reasons for Judgement by Justice Smith, A.B. Vol. 1, p. 41 (para. 38).

34. Many of the benefits associated with USSU membership continue in force until August 31. For example, coverage under the USSU's Health and Dental plan is effective until August 31, regardless of if the member is registered in classes during the Spring-Summer Sessions. According to the USSU's Health and Benefit Plan at page 11, under the heading "When" the policy states:

> **When :** All enrolments must be completed between Sept. 2 - 20, 2005 (for full-year coverage). Only new Term 2 students can enrol themselves and their spouse/ dependants between Jan. 4 - 17, 2006 for coverage from Jan. 1 - Aug. 31, 2006.
>
> Rebuttal Affidavit of Robin Mowat, Vol. 5, p. 863 (para. 10).
>
> Reasons for Judgement by Justice Smith, A.B. Vol. 1, p. 41 (para. 38).

35. Most USSU Executive members, who must remain ordinary USSU members (ie, registered students) during their one-year term, do not take classes during the summer period, but are considered to still be members of the USSU. This is also the case for most members elected to the USSU Legislative body, University Student Council. In general, since many undergraduate students only take classes (and pay USSU dues) during Term 1/Term 2 and take the summer off in order to work, they are still considered USSU members.

> Rebuttal Affidavit of Robin Mowat, Vol. 5, p. 863 (para. 11).

IV. POINTS IN ISSUE

A. Robin Mowat has standing.

B. Justice Smith properly exercised his discretion.

C. By ignoring the opinion of the Elections Board, the USSU imposed its own pre-ordained outcome.

V. ANALYSIS

A. ROBIN MOWAT HAS STANDING

36. The Honourable Mr. Justice Smith correctly found that Mr. Mowat was entitled to a remedy under s. 225 of *The Non-Profit Corporations Act* as a former director of the USSU.

37. Section 222 of the Act defines a "complainant" as:

> (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;
>
> ...
>
> (d) any other person who, in the discretion of the court, is a proper person to make an application pursuant to this Division.

38. Section 225(1) provides that a complainant may apply to the court for an order where the result of the actions of the corporation or the exercise of the powers of the directors is oppressive or unfairly prejudicial to any member, or unfairly disregards the interests of any member.

39. A former director has a statutory right to bring an oppression remedy application. However, some courts have found that former directors must establish that they have a "sufficient interest" before they can make application for an oppression remedy. None of these decisions are binding on Saskatchewan courts.

> ***Michalak v. Biotech Electronics Ltd.***, [1986] Q.J. 1882 at para. 22 (Que. Sup. Ct.)[CFS B.A. Tab 2].
>
> ***Litz v. Litz***, [1995 4 W.W.R. 425 at 429 (Man Q.B.)[CFS B.A. Tab 6].

40. Some courts, including the Saskatchewan Court of Queen's Bench, have found that a former director must have a sufficient interest to be granted leave to commence a

derivative action. The Appellants suggest that the reasoning from these cases should be applied to oppression applications. We submit that this is not appropriate.

41. A complainant, given leave, would prosecute a derivative action on behalf of the corporation. In those circumstances, it is reasonable to require that a former director have a sufficient interest in the corporation, such that he or she may benefit along with the corporation in a successful action. The sufficient interest requirement ensures that the complainant is bringing the action for the benefit of the corporation, not only for personal benefit.

> ***Schafer v. International Capital Corp.***, [1997] 5 W.W.R. 98 (Sask. Q.B.) [CFS BA Tab 3], varied on other grounds, [1997] S.J. No. 374 (Sask. C.A.)[CFS B.A. Tab 4].
>
> ***Jacob Farms Ltd. v. Jacobs***, [1992] O.J. No 813 (Ont. Gen. Div.)[CFS B.A. Tab 5].

42. The reasoning for sufficient interest in a derivative action does not transfer to oppression remedy applications. An oppression remedy is sought against, not for, the corporation and its directing minds. There is no need to ensure that a former director as complainant has a sufficient interest in the corporation, because the former director is not being relied upon to represent the corporation.

43. All that is required to bring an oppression application is that the person bringing the application fits the s. 222 definition of "complainant", which includes a former director, and that an interest is oppressed. Section 225(1) does not require the complainant to be oppressed in order to bring an application: the section refers to oppression of "*any* member, security holder, creditor, director or officer". For the court to require that a former director have a sufficient interest in the corporation and that interest to be oppressed, unnecessarily narrows the broad scope afforded to this section by the legislators. "[T]he oppression remedy provisions are remedial in nature and should be given a broad and liberal interpretation."

> ***Lenstra v. Lenstra***, 1995 CarswellOnt 2678 at para. 8, 56 A.C.W.S. (3d) 833 (Ont. Gen. Div.). [Mowat B.A. Tab 3]

44. The cases that require former directors to have a sufficient interest to be granted oppression remedies can be distinguished based on the above reasoning. There

should be no need for a former director to show any interest in the corporation if the court is satisfied that there is oppression as described in s. 225(1)(a) and (b). If it exists, the oppression should be remedied regardless of who brings the complaint, as long as they meet the criteria of s. 222.

45. We submit that, in Saskatchewan, a former director has standing to apply for an oppression remedy pursuant to s. 225 of the Act without proof of sufficient interest, and that the Honourable Mr. Justice Smith correctly found that Mr. Mowat had standing to bring the subject application.

46. If this Honourable Court finds that a former director must have a sufficient interest in order to bring an application for an oppression remedy, we submit that Mr. Mowat had a sufficient interest.

47. Mr. Mowat was a former director of the USSU at the time of the events complained of. However, he was a current USSU member. As such, although not required by the Act, Mr. Mowat was oppressed by the actions of the USSU. This most certainly creates a sufficient interest in the events complained of. The Honourable Mr. Justice Smith correctly granted a remedy on the basis that Mr. Mowat was a former director of the USSU.

48. Should this Honourable Court find that Mr. Mowat was not a former director with sufficient interest to bring the application, we submit that Mr. Mowat had standing as both a member and as a proper person.

49. Mr. Mowat was a USSU member for the 2005-2006 academic year. He attended classes for the two regular semesters of that year, from September through to April, which was the time at which the events complained of took place. Although no longer attending classes in May, when this application was made, he continued as a member of the USSU. USSU membership is for the entire academic year, which runs until August 31. Mr. Mowat had standing to bring this application as a member.

50. If this Court finds that Mr. Mowat was not a member at the time of this application, we submit that this Honourable Court exercise its discretion to find that he was a "proper person" to bring this application. Mr. Mowat, as a former President of the USSU and USSU member during the events complained of, has an interest in ensuring that the undergraduate students at the University of Saskatchewan are not oppressed by the actions of their decision-making body. The mere fact that Mr. Mowat may not have been a current member at the time the application was heard, or that he may not have a sufficient interest as a former director, should not deny him standing.

51. The Honourable Mr. Justice Smith was correct in finding that Mr. Mowat was a "former director" entitled to relief under s. 225 of the Act. If he was not correct, Mr. Mowat has standing as a member and a proper person, and the result would be the same.

B. JUSTICE SMITH PROPERLY EXERCISED HIS DISCRETION

52. Where a trial judge makes a decision from evidence adduced solely from affidavit evidence, the question on appeal is whether such a finding might reasonably have been made.

> ***Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd. et al*** (2002), 223 Sask. R. 236 (Sask. C.A.); reaffirmed in ***Dinius v. Derkach***, 2006 CarswellSask 143, 2006 SKCA 32 (Sask. C.A.). [Mowat B.A. Tab 4 and Tab 5]

53. In considering this question, the Court of Appeal is limited to the evidence that was adduced at chambers -the affidavits that were placed before Justice Smith.

54. Justice Smith found that the Referendum was of no force or effect. In arriving at his decision, Justice Smith held that the USSU had acted oppressively and unfairly prejudicial contrary to s. 225 of the Act.

55. In reaching this decision Justice Smith considered at para. 55:

> On September 29, 2005, the USC, with forethought, laid down a protocol for the referendum. The protocol was not precipitously created but was a focussed attempt to dovetail the existing USSU rules for

> referenda and the requirements of the CFS. A critical part of the protocol for the CFS referendum was that the Elections Board "must ratify the results of this referendum".

56. The Appellants suggest that controverted elections jurisprudence should have been applied to Mr. Mowat's application. The Respondent respectfully submits that Justice Smith properly applied the test as to whether or not the USSU, as a non-profit organization, acted oppressively.

57. It is not disputed that in Canada, when dealing with elections, a court should not interfere with the results of an election unless it is satisfied that the irregularities prevented the voters from having a "free and unfettered" opportunity to express their choice.

58. However the distinction between the elections cases and the issue at hand is the fact that the USSU is a non-profit organization that is governed by ***The Non-Profit Corporations Act.*** The Act imposes a legislated duty on the non-profit corporation to act fairly.

59. The Supreme Court of Canada has dealt with the relationship between non-profit organizations and its members. In ***Senez v. Montreal Real Estate Board*** (1980) 35 N.R. 545 (S.C.C.) at page 557 the Court concurred with a comment that *equated the by-laws of such corporations to provisions of a contractual nature*. A breach of by-laws, by either a member or the non-profit corporation itself would be a breach of contractual obligations.

> ***Senez v. Montreal Real Estate Board*** (1980) 35 N.R. 545 (S.C.C.) [Mowat B.A. Tab 6].

60. Where the non-profit corporation does not adhere to its own bylaws, there has been a breach of a contractual obligation to its members. Thus the appropriate case law to apply is that of non-profit organizations as opposed to elections. The USSU must:

(a) act in good faith;

(b) not act illegally; and

(c) act in accordance with the rules of natural justice.

> ***Walton (Litigation Guardian of) v. Saskatchewan Hockey Association*** (1998), [1999] 1 W.W.R. 135 (Sask. Q.B.) [CFS B.A. Tab 7]

61. The USSU had a Referenda and Election Policy in place prior to taking out a prospective membership in the CFS.

62. Upon becoming a prospective member in the CFS, the USSU struggled with reconciling its own referndum rules and those imposed by the CFS. The struggle stemmed from the fact that there were gross discrepancies between the two procedures.

63. At the September 29, 2005 USC meeting, various councillors raised concerns about the progress of the Referendum. In the end the USC decided to insert a requirement that the Elections Board ratify the Referendum. According to the Minutes of this meeting, solicitors for the USSU advised that Elections Board ratification would reconcile the two different procedures. President Gardiner is quoted in the minutes as stating:

> ... the Elections Board is going to have the final authority on this from the USSU end. All of us on both sides have expressed our explicit faith in the CRO and ACRO. They are the chair and the deputy chair of the Elections Board. It is completely for members of council and members from the student body that were appointed by the Appointments Board. That can be the house of sober second thought. Everything has been done completely legitimately. I must repeat that the USSU Solicitor who has absolutely no care whether any national lobby group represents us recommended this. He is just looking out for the best interest of the USSU. Our General Manager who again has no care, also recommended this.

64. The USSU was troubled by the lack of cohesion between its own election policy and that of the CFS. The USSU sought a legal opinion and passed a motion that would impose a "house of sober second thought" on the process. The sober second

thought did not have to come from the elections board. USC could have appointed its solicitor to ratify the election or have done nothing at all. Instead, the USC, an administrative body made up of students, passed a motion requiring that impartial students would have the final say about the outcome of its Referendum.

65. It is submitted that the September 29, 2005 motion that required EB ratification of the Referendum was put in place to satisfy student concerns. These concerns included:

(a) a loss of USSU autonomy in the conduct of a Referendum by following CFS Referendum rules instead of its own election policy; and

(b) the administration of the Referendum by the ROC that included two partisan members.

66. The September 29, 2005 motion that required EB ratification was not a make work project for the ACRO. Rather it was a calculated decision to satisfy the concerns of students in order to ensure that the Referendum was held as planned.

67. Both Appellants cite case law where breaches of election rules were found to be inconsequential to the ultimate result of the election. These can be summarized as follows:

(a) Nomination papers of candidate were not sworn;

Anderson v. Stewart and Diotte (1921), 62 D.L.R. 98 [CFS B.A. at Tab 11]

(b) Appointed election officials were not qualified as defined by the Act;

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

(c) Electors voted in polls where they did not reside;

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

(d) Electors did not have capacity;

> ***Flookes v. Shrake***, [1989] A.J. No.1011 (Alta. Q.B.) [CFS B.A. at Tab 12]

(e) A recount was impossible as the ballots were prematurely destroyed.

> ***Re Bennett***, [1972], N.J. No. 38 (Nfld. S.C.) [USSU B.A. at Tab 1]

68. None of these cases deal with non-profit organizations. Justice Smith concluded that the requirement for EB ratification was in fact part of the vote process itself. The USC set up a systematic process to ensure the vote was fair, which specifically required the EB to ratify, and until that process was completed properly there was no official result to the vote.

69. In this case, the EB ratification was just as much a part of the vote process as was the counting of the votes by the Chief Returning Officer. By failing to enforce its own Election and Referenda policy [as amended on September 29, 2005], the USSU unfairly disregarded the interests of its members. These procedures were put in place by elected representatives on behalf of USSU members to ensure that Referenda held by the USSU would be done in a manner that would reconcile the competing interests of the CFS and a neutral USSU.

C. BY IGNORING THE OPINION OF THE ELECTIONS BOARD, THE USSU IMPOSED ITS OWN PRE-ORDAINED OUTCOME

70. In his book, The Law of Charitable and Not-For Profit Organizations, Donald J. Bourgeois states at page 231:

> In practical terms, a prudent director or officer of a not-for-profit organization, either incorporated or an unincorporated association, should probably avoid having any interest in any contract of the corporation.
>
> D. Bourgeois. The Law of Charitable and Not-For-Profit Organizations, 3 ed. (Markham: Butterworths Canada Ltd., 2002), 231. [Mowat B.A. Tab 7]

71. At all relevant times leading up to the Referendum and during the Referendum, Gavin Gardiner, USSU President, was also a member of the National Executive of the CFS, sitting as Saskatchewan Representative.

> Rebuttal Affidavit of Robin Mowat, [not included in A.B.] para. 3.

72. The 2005/2006 Executive first formally discussed the issue of a referendum to seek membership with the Canadian Federation of Students (CFS) at an Executive meeting on September 15, 2005. At that meeting, a motion was made that the Executive "support the Canadian Federation of Students in the upcoming referendum."

> Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, pp. 697-698 (para. 4 and Exhibit A).

73. On September 15, 2005 a USC councillor moved that "USC endorse CFS in the referendum."

> Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, p. 698 (para. 5 and Exhibit B).

74. Both the Executive of the USSU and its councillors voted in favour of supporting the CFS. At both levels there were concerns by students about the prudence of becoming partisan in the Referendum. Despite various objections both the majority of the USSU Executive and USC voted in favour of supporting the CFS.

> Supplemental Affidavit of Trent Evanisky, A.B. Vol. 4, (Exhibits A and B).

75. Pursuant to the USSU's Elections and Refendum Policy the USSU was obliged by its own rules to remain neutral. The policy provides:

> 4. The USSU must provide information to its membership about the subject of referenda in an unbiased manner.
>
> Affidavit of Robin Mowat, A.B. Vol. 4, p.632 (point 4).

76. After endorsements by the USSU Executive and USC, the administration of the Referendum encountered many difficulties:

(a) Minutes from ROC meetings held on September 21 and 22, 2005, record the following: "At this point, the CRO and ACRO were unanimous in their opinion that the Referendum could not be held."

Affidavit of Trent Evaninsky, A.B. Vol. 4, p. 604 (para. 10 and Exhibit C).

(i) By reading these minutes it appears as though there was a total collapse of the ROC and that a consensus had been broken on conducting the Referendum.

(ii) Despite objections by the neutral members of the USSU, the Referendum proceeded between October 4 and 6, 2005.

(b) At a USC meeting on September 29, 2005, the Assistant Chief Returning Officer informed the student representatives of the problems with the Referendum.

(i) During this meeting, the Assistant Chief Returning Officer admitted that certain violations of both USSU and CFS policy had been made. In particular he noted that the CRO had not been given the referendum question as it would appear on the ballot within the two-week limit, as required by both CFS Bylaws and the USSU Elections Policy. In the case of the Elections Policy, the referendum question needed to be approved by the USSU solicitor prior to being passed to the CRO. The ACRO reported that this had not been done.

Affidavit of Robin Mowat, A.B. Vol. 4 pp. 623-624 (paras. 15-16).

(c) At the September 29, 2005, meeting Mr. Gardiner and other members of the USSU actively encouraged people to vote for the CFS, openly arguing on behalf of the CFS. They had already been actively campaigning for the "yes campaign" in previous days and continued to do so publicly and actively until the end of voting.

Supplemental Affidavit of Trent Evaninsky, A.B. Vol. 4, p. 768 (Exhibit I).

(d) The Protocol that set out the Referendum rules was an evolving one that was not completed until after the Referendum was held. In fact three different versions of the Protocol were appended to Affidavits in this matter.

(i) Version 1 is dated "Sunday, September 11, 2005." It is attached to Ms. Watson's Affidavit as Exhibit "N".

Affidavit of Lucy Watson, A.B. Vol. 2, p. 208 (Exhibit N).

(ii) Version 2 is dated "Tuesday, September 20, 2005." It is attached to Mr. Gardiner's Affidavit as Exhibit "N". However, Mr. Gardiner's version lacks the cover page showing the date. It is the same document submitted by Mr. Mowat as Exhibit "A" of his Affidavit.

Affidavit of Gavin Gardiner, A.B. Vol. 3, p.472 (Exhibit N).

Affidavit of Robin Mowat, A.B. vol. 4, p. 629 (Exhibit A).

(iii) Version 3 was included in the final ROC report and is the only copy of the Protocol which bears the signatures of the ROC. Its cover page shows a date of "Friday, September 30, 2005" but its signatures are dated "Dec. 3, 2005". This was attached as Exhibit "T" of Mr. Gardiner's affidavit.

Affidavit of Gavin Gardiner, A.B. Vol. 3, p.623 (Exhibit T).

(A) The minutes from the September 11, 2005 meeting of the ROC [attached as Exhibit "M" of Ms. Watson's affidavit] do not mention the Protocol, let alone state that it is effective or has been passed. The next meeting of the ROC was not until September 18, 2005 [the minutes of the meeting are attached to Ms. Watson's affidavit as Exhibit "O"].

Affidavit of Lucy Watson, A.B. Vol. 2, p. 207 (Exhibit M).

Affidavit of Lucy Watson, A.B. Vol. 2, p. 216 (Exhibit O).

(B) The Election Rules were not readily available to students. In Mr. Mowat's case, the Protocol was not made available to him until September 27, 2005, seven days prior to the first day of voting.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 621(paras. 5-6).

(iv) Mr. Mowat received a copy of the Referendum rules directly from the ACRO on September 27, 2005.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 621(para. 6).

(v) At this time, Mr. Mowat had received the USSU's only copy of the Protocol since he was contacted by the USSU's secretary to return his copy.

Affidavit of Robin Mowat, A.B. Vol. 4, p. 622 (para. 9).

(e) Despite recorded objections by the ACRO and CRO with the administration of the Referendum, the election went ahead between October 4 and 6, 2005. After the Referendum, the USSU continued to push its own agenda forward.

(f) The ROC submitted its report, ratifying the election on December 3, 2005. Shortly thereafter the ACRO and the CRO resigned.

(g) The Elections Board met under the chairmanship of the new ACRO, Victoria Coffin. The Elections Board made a thorough analysis of the referendum and declined to ratify the results of the referendum. The Elections Board recommended that a new referendum be held.

(h) At the last USC meeting of the academic year, (March 30, 2006) the USC decided to disregard the Elections Board decision and ratify the results of the referendum.

(i) USC's decision to go against its own properly constituted board, which had done a thorough analysis of the referendum, appears to be made under duress. It was clearly communicated by Mr. Gardiner, and others,

that if USC did not ratify the referendum that the CFS could or would sue the USSU. The issue seemed to divorce itself from whether or not the Elections Board was right in striking down the referendum results, but whether or not the CFS would indeed sue the USSU if USC did not ratify the referendum.

77. In The Law of Charitable and Not-For Profit Organizations, Mr. Bourgeois warned that officers should avoid having an interest in any contract of the corporation. When the USSU took out a prospective membership in the CFS it was contractually obligated to hold a Referendum which would determine if the USSU would become a full member. There were individuals on the USSU and USC that were interested from the beginning in seeing that the USSU join the CFS. Most apparent was the USSU President Gardiner, who was also a member of the CFS National Executive. Rather than separate himself from the Referendum, President Gardiner was a vocal supporter of the CFS at USSU Executive and USC meetings and also became a campaigner for the CFS.

78. There were a number of administrative issues that would have made any other executive simply delay the Referendum. These included CFS Referendum rules that could not be followed due to compressed time-lines and, more egregiously, a lack of Referendum rules that would determine when campaigning could begin and how campaigners could conduct themselves. Despite these shortcomings the USSU pressed ahead with its own agenda.

79. When the EB refused to rubberstamp the Referendum, the USSU ignored the very body it empowered to satisfy students' desire for a fair Referendum and became a CFS member. As stated by Justice Smith at paras. 62 and 63:

> In this case, it is instructive to reflect upon the USC's reaction to the report of the Elections Board and the inconvenient truths noted therein. The USC's response to the report was to ignore the very process it created to ensure there was a fair referendum. Does that have the badges of good faith, fair play or the general notions of natural justice?

> 63) In my view, no reasonable observer could conclude that the USC approached the post-vote process in good faith or in a fashion that is in harmony with the broad rules of natural justice...
>
> Reasons for Judgement by Justice Smith, A.B. Vol. 1, pp. 48-49 (paras. 62-63).

80. The USSU set up a process to show students that the Referendum was being held fairly. When it faced a result that it didn't like, the USSU did what it wanted from the beginning –it joined the CFS.

V. RELEIF

81. The Respondent asks that the Order of Justice Smith declaring the Referendum held by the USSU on the issue as to whether it should join the CFS of no force or effect be upheld.

82. The Respondent prays for his costs in this matter.

ALL OF WHICH is respectfully submitted this ___ of March, 2007.

ROBERTSON STROMBERG PEDERSEN LLP

_____

Jennifer D. Pereira, Solicitor for the
Respondent, Robin Mowat

This document delivered by:
Robertson Stromberg Pedersen LLP
600-105 21st Street East
Saskatoon, SK S7K 2M9

Telephone: (306) 933-1320
Facsimile: (306) 652-2445

Lawyer in Charge of file: Jennifer D. Pereira

IV. AUTHORITIES

A. ACADEMIC TEXT

1. D. Bourgeois. The Law of Charitable and Not-For-Profit Organizations, 3 ed. (Markham: Butterworths Canada Ltd., 2002).

B. CASE LAW

2. ***Anderson v. Stewart and Diotte*** (1921), 62 D.L.R. 98

3. ***Bouchard v. Carruthers et al.*** (2001), 203 Sask. R. 308 (C.A.)

4. ***Dinius v. Derkach***, 2006 CarswellSask 143, 2006 SKCA 32 (Sask. C.A.)

5. ***Elsom v. Elsom***, [1989] 1 S.C.R. 1367 (S.C.C.)

6. ***Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd. et al*** (2002), 223 Sask. R. 236 (Sask. C.A.)

7. ***Flookes v. Shrake***, [1989] A.J. No.1011 (Alta. Q.B.)

8. ***Jacob Farms Ltd. v. Jacobs***, [1992] O.J. No 813 (Ont. Gen. Div.)

9. ***Lenstra v. Lenstra***, 1995 CarswellOnt 2678 at para. 8, 56 A.C.W.S. (3d) 833 (Ont. Gen. Div.)

10. ***Litz v. Litz***, [1995 4 W.W.R. 425 at 429 (Man Q.B.)

11. ***Michalak v. Biotech Electronics Ltd.***, [1986] Q.J. 1882

12. ***Re Bennett***, [1972], N.J. No. 38 (Nfld. S.C.)

13. ***Schafer v. International Capital Corp.***, [1997] 5 W.W.R. 98 (Sask. Q.B.) varied on other grounds, [1997] S.J. No. 374 (Sask. C.A.)

14. ***Senez v. Montreal Real Estate Board*** (1980) 35 N.R. 545 (S.C.C.)

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

C. STATUTES

16. ***The Court of Appeal Act, 2000***, S.S. 2000, c. C-42.1

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

The Court of Appeal Act, 2000, S.S. 2000, c. C-42.1:

> 7(1) In this section and section 9, "enactment" means:
>
> (a) an Act;
>
> (b) an Act of the Parliament of Canada; or
>
> (c) a regulation made pursuant to an Act or an Act of the Parliament of Canada;
>
> but does not include this Act.
>
> (2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:
>
> (a) of the Court of Queen's Bench or a judge of that court; and
>
> (b) of any other court or tribunal where a right of appeal to the court is conferred by an enactment.
>
> (3) If an enactment provides that there is no appeal from a decision mentioned in subsection (2) or confers only a limited right of appeal, that enactment prevails.
>
> ...
>
> 10 The court has appellate jurisdiction in civil and criminal matters where an appeal lies to the court, with any original jurisdiction that is necessary or incidental to the hearing and determination of an appeal.

The Non-Profit Corporations Act, 1995, S.S. 1995, c.N-4.2:

> **135**(1) A corporation or a member or director may apply to the court to determine any controversy respecting an election or the appointment of a director or an auditor of the corporation.
>
> (2) On an application pursuant to this section, the court may make any order it considers appropriate, including:
>
> (a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;

(b) an order declaring the result of the disputed election or appointment;

(c) an order requiring a new election or appointment and including directions for the management of the activities and affairs of the corporation until a new election is held or appointment made;

(d) an order determining the voting rights of members and of persons claiming to have membership interests.

...

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 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.