C.A. No. 1376

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

UNIVERSITY OF SASKATCHEWAN STUDENTS' UNION

APPELLANT
(RESPONDENT)

AND:

THE CANADIAN FEDERATION OF STUDENTS AND THE CANADIAN FEDERATION OF STUDENT SERVICES

APPELLANT
(ADDED RESPONDENT)

AND:

ROBIN MOWAT

RESPONDENT
(APPLICANT)

FACTUM ON BEHALF OF THE APPELLANT, UNIVERSITY OF SASKATCHEWAN STUDENTS' UNION

PART I. INTRODUCTION

1. This is an appeal of a Judgment dated October 13, 2006 following a Chambers hearing before the Honourable Mr. Justice R.S. Smith. In his Judgment, the Learned Chambers Judge held that a referendum held between October 4 and 6, 2005 ("the referendum") by the University of Saskatchewan Students' Union ("the USSU") respecting the issue of federation with the Canadian Federation of Students ("the CFS") was of no force and effect.

2. It is respectfully submitted by the USSU that the Learned Chambers Judge erred in law and in fact in rendering his decision. Undergraduate students at the University of Saskatchewan had a free and unfettered opportunity to exercise their democratic will in the referendum. A clear majority of voters decided that the USSU should federate with the CFS. Any irregularities in the process leading up to the vote could not, either individually or cumulatively, have affected the ultimate outcome of the referendum.

3. However, the Learned Chambers Judge found that, because of certain events that transpired *after* the ballots were counted, the referendum should be deemed invalid. It is argued in this factum that the Learned Chambers Judge simply employed the wrong legal test in deciding that the Applicant (Respondent), Robin Mowat, was "oppressed" within the meaning of *The Non-Profit Corporations Act, 1995*, S.S. 1995, c. C-42.1 ("the Act") such that the referendum ought to be overturned.

4. It is submitted that, if the Judge had applied the proper legal principles to his analysis, he would have come to the conclusion that none of the alleged problems with the referendum process would have changed the result of the referendum, and that the democratic will of undergraduate students at the University of Saskatchewan ought to be upheld. He would have concluded that Robin Mowat was therefore not entitled to a remedy under the oppression provision of the Act.

PART II. JURISDICTION AND STANDARD OF REVIEW

5. The source of the right of appeal and the basis for the jurisdiction of the Court of Appeal to determine this appeal is found in section 7(2)(a) of *The Court of Appeal*

Act, 2000, S.S. 2000, c. C-42.1, as well as Section 233 of *The Non-Profit Corporations Act, 1995*, S.S. 1995, c. C-42.1.

6. The standard of review with respect to a question of law is one of correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

7. With respect to a finding of fact made on the basis of affidavit evidence, the standard of review is one of "palpable and overriding error": *Housen v. Nikolaisen, supra.* However, because the decisions of fact were made on the basis of affidavit evidence and not *vive voce* evidence, it is submitted that the standard of review is perhaps less exacting in this regard.

PART III. SUMMARY OF FACTS

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

Appeal Book, Vol. 2, pp. 358-359
(Affidavit of Gavin Gardiner, para. 3)

9. The CFS is an organization that advocates on behalf of university students across Canada. The Canadian Federation of Student Services ("the CFS-S") enables students to collectively pool their resources to provide student owned and operated services.

Appeal Book, Vol. 1, pp. 29, 50 & 51
(Judgment, para. 3)
(Affidavit of Lucy Watson, para. 2 & 3)

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

Appeal Book, Vol. 2, p. 359
(Affidavit of Gavin Gardiner, para. 4)

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

Appeal Book, Vol. 1, p. 31
(Judgment, para. 13)

Appeal Book, Vol. 2, p. 361
(Affidavit of Gavin Gardiner, para. 8)

12. According to Article 5 of the USSU Constitution, membership in the USSU "shall consist of all undergraduate students of the University of Saskatchewan who have been assessed student union fees and who are registered as students and all individuals who have been assessed, voluntarily or otherwise, student union fees." There are approximately 17,000 full and part-time students who are members of the USSU.

Appeal Book, Vol. 2, p. 359
(Affidavit of Gavin Gardiner, para. 5)

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

Appeal Book, Vol. 2, p. 361
(Affidavit of Gavin Gardiner, para. 8)

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

Appeal Book, Vol. 1, p. 29
(Judgment, para. 4)

Appeal Book, Vol. 2, p. 362
(Affidavit of Gavin Gardiner, para. 12)

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

Appeal Book, Vol. 1, p. 29
(Judgment, para. 4)

Appeal Book, Vol. 2, pp. 362-363
(Affidavit of Gavin Gardiner, paras. 13 & 14)

16. By applying for and being granted prospective membership in the CFS, the USSU agreed to accept the rights and responsibilities of prospective membership (as per Bylaw I, Art. 2b(ii) of the CFS Bylaws). One of the responsibilities of a prospective member is to conduct a binding referendum on the question of full membership in the CFS in accordance with the Referendum regulations described in Bylaw I, Art. 4 of the CFS Bylaws. The USSU was also required to hold a referendum by virtue of its own Constitution, which requires a referendum to be held for the purpose of

establishing a "dedicated student fee'; federation with the CFS requires an annual fee of approximately $9 per full-time student.

Appeal Book, Vol. 1, pp. 29-30
(Judgment, paras. 5 & 7)

Appeal Book, Vol. 2, pp. 363
(Affidavit of Gavin Gardiner, para. 15)

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

Appeal Book, Vol. 1, pp. 29-30
(Judgment, para. 6)

Appeal Book, Vol. 2, p. 363
(Affidavit of Gavin Gardiner, para. 16)

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

Appeal Book, Vol. 1, p. 31
(Judgment, para. 12)

Appeal Book, Vol. 2, p. 365
(Affidavit of Gavin Gardiner, para. 21)

19. The ROC had established its Protocol setting out rules for the referendum prior to the September 29 USC meeting. This Protocol had been available to students and campaigners beginning on September 18, 2005, just prior to the official launch of the campaign period. The ROC protocol was available at the USSU office throughout the campaign period, except for a short period of time when Robin Mowat removed it from the USSU office.

Appeal Book, Vol. 2, p. 366
(Affidavit of Gavin Gardiner, para. 22)

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

Appeal Book, Vol. 1, p. 33
(Judgment, para. 16)

Appeal Book, Vol. 2, p. 366
(Affidavit of Gavin Gardiner, para. 23)

21. The USSU informed students that a referendum regarding federation with the CFS would be occurring. In addition, it organized two forums to provide information about the referendum to students. Proponents of both the "yes" and "no" sides spoke at the forums.

Appeal Book, Vol. 2, p. 366
(Affidavit of Gavin Gardiner, para. 24)

22. The "no" campaign was a very visible presence on campus during the campaign period leading up to the referendum, with an information booth, posters across campus and an active leafleting and information campaign. "No" campaign team members wore "No CFS!" t-shirts throughout the campaign and placed a full-page

advertisement in the University of Saskatchewan student newspaper, the *Sheaf*, on October 6th. The "no CFS" campaign literature dealt extensively with the fact that a fee would be associated with membership in the CFS. In addition, members of the Canadian Alliance of Student Associations (CASA) were visibly present on campus and active in the "no" campaign.

Appeal Book, Vol. 2, pp. 367-368
(Affidavit of Gavin Gardiner, para. 25, 26 & 27)

23. Voting occurred on October 4, 5 and 6, 2005, by paper ballot, following a total of 18 days of campaigning. Polling stations were set up in all the major colleges across campus. The question on the ballot read as follows: "Are you in favour of membership in the Canadian Federation of Students?" Voters were required to check one of two boxes indicating a response of "yes" or "no" to the question.

Appeal Book, Vol. 1, p. 33
(Judgment, para. 17)

Appeal Book, Vol. 2, p. 368
(Affidavit of Gavin Gardiner, para. 30)

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

Appeal Book, Vol. 1, p. 33
(Judgment, para. 19 and 20)

Appeal Book, Vol. 2, p. 369
(Affidavit of Gavin Gardiner, para. 31 & 32)

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

Appeal Book, Vol. 2, p. 369
(Affidavit of Gavin Gardiner, para. 33)

26. Following the referendum, the ROC met to deal with complaints and released its report on December 3, 2005. Following a thorough analysis, the report concluded that "none of the alleged violations, individually or cumulatively, had a significant impact on the referendum so as to change the outcome," and further that "The members of the Referendum Oversight Committee are satisfied that the referendum results are an accurate reflection of the will of the members of the University of Saskatchewan Students' Union." Complaints were made by both sides, and included, *inter alia,* a complaint by an individual who claimed that Robin Mowat swore at her and threw a button at her. Robin Mowat apologized for this incident according to the ROC report.

Appeal Book, Vol. 1, p. 34
(Judgment, para. 21)

Appeal Book, Vol. 2, p. 369
(Affidavit of Gavin Gardiner, para. 34)

Appeal Book, Vol. 3, p. 489
(Exhibit "T" of Affidavit of Gavin Gardiner)

27. According to the resolution passed by the USC on September 29, 2005, ratification of the referendum results was now up to the Elections Board. Following several meetings, the Elections Board released its report on February 23, 2006, in which it determined not to ratify the results as a result of concerns about the process. The

Elections Board wrote that its "decision was not an easy one" as it was "very conscious of the fact that there was a strong student participation in the referendum, and the results were not equivocal." The Elections Board recommended that another referendum be held.

Appeal Book, Vol. 1, pp. 34-35
(Judgment, paras. 22-23)

Appeal Book, Vol. 2, p. 370
(Affidavit of Gavin Gardiner, para 35)

Appeal Book, Vol. 3, p. 523
(Exhibit "U" of Affidavit of Gavin Gardiner)

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

Appeal Book, Vol. 1, p. 35
(Judgment, para. 24)

Appeal Book, Vol. 2, p. 370
(Affidavit of Gavin Gardiner, para. 36)

29. Robin Mowat convocated from the University of Saskatchewan in the spring of 2006 and is no longer a student at the University of Saskatchewan or a member of the USSU. However, he was the President of the USSU during the 2003-2004 academic year.

Appeal Book, Vol. 4, p. 620
(Affidavit of Robin Mowat, para. 2)

Appeal Book, Vol. 2, p. 371
(Affidavit of Gavin Gardiner, para. 39)

PART IV. POINTS IN ISSUE

30. The USSU submits that the following points are in issue:

(a) **Did the Learned Chambers Judge err in law in determining that Robin Mowat was entitled to a remedy under Section 225 of *The Non-Profit Corporations Act* as a former director of the USSU?**

(b) **Did the Learned Chambers Judge err in law and in fact by finding that the University Students' Council ("USC") of the USSU breached standards of procedural fairness or natural justice by overruling the Elections Board's decision not to ratify the results of the referendum?;**

(c) **Did the Learned Chambers Judge err in law by applying the doctrine of procedural fairness to the "post-vote process", thereby determining that the referendum was invalid?**

(d) **Did the Learned Chambers Judge err by failing to analyze the specific alleged irregularities with respect to the referendum and determining whether these irregularities rendered the referendum invalid? Specifically, did the Learned Chambers Judge err by accepting the determination of the Elections Board in this respect?**

(e) **Did the Learned Chambers Judge err in fact by stating that the USSU imposed its own "preordained outcome" with respect to the referendum?**

PART V ARGUMENT

(a) Did the Learned Chambers Judge err in law in determining that Robin Mowat was entitled to a remedy under Section 225 of *The Non-Profit Corporations Act, 1995* as a former director of the USSU?

31. The Learned Chambers Judge found that Robin Mowat had standing as a former director of the USSU to bring an application for relief under section 225 of the Act. He found that Mowat was a legitimate "complainant" within the meaning of that section. A "complainant" is defined by Section 222 of the Act as including a "former director".

32. It must be reiterated that Robin Mowat was no longer a student of the USSU and was therefore no longer a member of that organization at the time of his application to the Court. However, he had been the President of the USSU during the 2003-2004 academic year.

33. While the wording of section 222 *prima facie* entitles a former director to bring an application under section 225 of the Act, it is submitted that the case law establishes that a "sufficient interest" test should be used in the interpretation of that section.

34. Specifically, the courts have held that in order to show a "sufficient interest" in the alleged oppressive conduct so as to be entitled to relief, a former director must show that there is some connection between the alleged oppressive conduct and his or her status as director. (*Jacob Farms Ltd. v. Jacobs* [1992] OJ No 813 at 5 Ont Gen Div).

CFS's Book of Authorities at Tab 5

35. Clearly, in this case, the referendum and the events leading up to the referendum occurred between September 2005 and March 2006. There was no overlap whatsoever with Robin Mowat's tenure as director of the USSU. Furthermore, Robin Mowat was unable to show that he was in any way affected by the conduct of the USSU. Indeed, he had convocated and was no longer a student at the time of the application.

36. It is submitted that the legislature simply could not have intended that *any* former director can have status as a complainant to bring an application for relief under the Act, especially in cases where such individual is not in any way affected by the conduct.

37. The Learned Chambers Judge failed to conduct any analysis whatsoever into the issue of Robin Mowat's standing to bring an application under section 225 in the circumstances. It is submitted that the sufficient interest test could simply not justify Robin Mowat's status as a complainant entitled to relief under section 225 of the Act.

(b) Did the Learned Chambers Judge err in law and in fact by finding that the University Students' Council ("USC") of the USSU breached standards of procedural fairness or natural justice by overruling the Elections Board's decision not to ratify the results of the referendum?

(c) Did the Learned Chambers Judge err in law by applying the doctrine of procedural fairness to the "post-vote process", thereby determining that the referendum was invalid?

(d) **Did the Learned Chambers Judge err by failing to analyze the specific alleged irregularities with respect to the referendum and determine whether these irregularities rendered the referendum invalid? Specifically, did the Learned Chambers Judge err by accepting the determination of the Elections Board in this respect?**

38. The above three issues can be dealt with together.

39. It is submitted that the Learned Chambers Judge applied the wrong legal test in his analysis of the referendum and its aftermath. The USSU submits that the Learned Chambers Judge ought to have applied the test from the line of cases dealing with controverted elections in his analysis of whether the referendum ought to have been upheld. Unfortunately, he applied the doctrine of procedural fairness and natural justice, primarily to the "post-referendum" process. In other words, he failed to undertake a proper analysis of the referendum itself. Without such analysis, it is submitted that he cannot have properly made a decision about its validity.

40. The issue in the application before the Learned Chambers Judge was whether the referendum should be declared of no force and effect because of various alleged irregularities before, during and after the campaign period. It was Robin Mowat's position that the conduct of the USSU in holding the referendum constituted "oppressive conduct" within the meaning of the Act, and that the referendum result should therefore not be allowed to stand. The Learned Chambers Judge decided to rely on several cases dealing with non-profit corporations and held that, in accordance with these cases, the proper test was whether or not the USSU had acted in good faith and in accordance with the principles of natural justice. He stated:

> [59]...I do not believe the test emanating from the controverted elections cases is applicable. I believe that in debates of this type, the preferred guidance is from the test articulated in *Walton (Litigation Guardian of) v Saskatchewan Hockey Association, supra*, and the related cases dealing with non-profit corporations.
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> [60] In those cases, the Court does not ask itself whether the results have been skewed, but rather has the organization acted in good faith and generally in accord with the concepts of natural justice? This does not mean, as noted in *Martineau, supra*, that there must be an exacting legal process or an application of the full "panoply" of procedural natural justice rules. The question is, has the organization acted in a fashion that meets the legitimate expectations of a fair-minded observer?
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> Appeal Book, Vol 1, p. 48
> (Judgment, paras. 59 & 60)

41. Interestingly, the cases referred to by the Learned Chambers Judge mostly involved hockey associations which had decided to suspend players. None of the decisions were related to a democratic process, but rather concerned discretionary decisions made by administrative bodies. None of the decisions referred to related to the application or interpretation of the oppression remedy under section 225 of the Act. Thus, it was an error for the Learned Chambers Judge to attempt to apply this body of case authority to the fact scenario in front of him, which dealt squarely with a democratic process involving members of a non-profit corporation rather than a discretionary decision of an administrative decision-maker.

42. In applying this procedural fairness/ natural justice test, the Learned Chambers Judge found that the "post-referendum" conduct of the USSU, wherein the USC decided to ratify the results of the referendum despite the Election Board's refusal to do so, was not in accordance with the principles of natural justice and therefore oppressive

under section 225 of the Act. He identified no particular breaches of the duty of fairness with respect to any of the other aspects of the referendum process. In other words, his analysis was solely on the post-referendum process of ratifying the results of the referendum, and not with the referendum itself.

43. In reaching his conclusion that, in fact, the post-referendum process constituted "oppressive conduct" by the USSU, the Chambers Judge relied completely upon the decision of the Elections Board. As outlined above, the Elections Board was the group of students who were charged with the task of "ratifying" the results of the referendum. Rather than undertaking any review or analysis of the Election Board's report, the Chambers Judge simply deferred completely to its decision not to ratify the results. He stated at paragraph 58 of his reasons that

> It is telling that the Elections Board, which was much closer to the ground than any Court could possibly be, concluded that it could not, in good faith, ratify the referendum result. It stated its underlying concern was whether any of the problems "would have significantly affected the will of the voters". From its decision, I must conclude it did.
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> Appeal Book, Vol. 1, p. 47
> (Judgment, para 58)

44. The Learned Judge showed no indication in his reasons that he had considered the reasons provided by the Elections Board for its decision. As stated above, the Elections Board was comprised of a group of university students with no particular expertise. The Elections Board report shows significant errors of logic and of law, and it is submitted that, had the Chambers Judge analyzed the record before him as well as the report of the Elections Board, he would have found that the Elections Board's decision was simply incorrect by any measure, and that the USC was justified in refusing to accept its recommendations and to instead ratify the results of the referendum. A further analysis of the Election Board's decision will be provided below.

45. In other words, even if the Chambers Judge was correct in applying a natural justice test to the post-referendum process, it is submitted that he erred by being unequivocally deferential to the Elections Board.

46. It is submitted that the proper test to be used by the Chambers Judge was the following: did the alleged irregularities, either individually or cumulatively, in any way affect the final result of the referendum? This places the focus squarely on the electoral process itself. It was a substantial error by the Learned Chambers Judge to fail to analyze this question. The controverted elections case law, which deals with the role of Courts in the electoral process, was the proper line of authority. The Chambers Judge should have applied the controverted elections cases in his determination as to whether the referendum involved conduct that could be considered oppressive or unfairly prejudicial, or whether it unfairly disregarded Robin Mowat's interests within the meaning of the Act.

47. The overriding theme that emerges from controverted elections case law is that courts approach their jurisdiction over democratic processes with significant caution and are hesitant to interfere with the will of the electorate unless an application shows on its face that non-compliance with election rules affected the ultimate *result* (as opposed to simply the number of votes) of the election: *Reaburn v. Lorje,* 2000 SKQB 81.

48. The Court in *Re Bennett* [1972] N.J. No. 38 (Nfld. S.C.), (at para. 13, 14 & 19) set out the common law rule respecting controverted elections as follows (quoting, in part, *Crozier v. Rylands* (1869, 19 LTR. 812):

> [13] ...before a judge upsets an election he ought to be satisfied beyond all manner of doubt that the election was thoroughly void.

> [14] I think the law to be clear: if the election was carried out properly and in substantial manner in the spirit of the Act, and if the voters were able to express their choice clearly and decisively without any obstruction or hindrance an election should not be set aside because of some failure to observe the letter of the Act. This admits of only one qualification, and that is, if the failure to observe the letter of the Act in the opinion of the election court could have altered the result of the election then it may be set aside. I would add to this that by the result, I mean the ultimate election of one or other of the candidates, and not the number of votes which one received more than another
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> [19] This view I think accords with the general proposition of law which says that where the voters have had a free and unfettered opportunity to express their choice, then the Court should not interfere without being satisfied that there was in fact no true election.

49. In other words, courts are slow to overturn election results on the basis of irregularities or problems with procedure. If, and only if, the Court is satisfied that the irregularities *prevented* the voters from having a "free and unfettered" opportunity to express their choice, and the Court is satisfied that the "ultimate result" as opposed to the number of votes cast one way or another would have been affected, should the Court intervene.

50. Thus, if the actions of the USSU created a situation where there was no true election and the *ultimate election result* was invalid, then the Court may intervene under section 225 of the Act. It must be reiterated that there were no allegations of stuffing ballot boxes, of students being intimidated to vote in a certain manner, or of students being refused the opportunity to vote or otherwise disenfranchised. Rather, the allegations made by Robin Mowat involved relatively minor problems, none of which, when considered, could be said to have affected the ultimate outcome of the referendum.

51. It was therefore necessary for the Chambers Judge to analyze the various alleged irregularities and determine whether they individually, or cumulatively, could have affected the outcome of the referendum. It is submitted that the Learned Chambers Judge failed to do so, instead deferring completely to the Elections Board. This was a clear mistake of law.

52. A review of the Elections Board report shows clearly that the Election Board struggled with articulating the issues and the principles in its analysis.

Appeal Book, Vol. 3, p. 523
(Exhibit "U" of the Affidavit of Gavin Gardiner)

53. The Elections Board's report notes certain problems with the process: for example, that the ROC had to "deal with fundamental issues on a compressed time line". This cannot, on its own, be said to have had an impact on the outcome of the referendum.

Appeal Book, Vol. 3, p. 525
(Elections Board Report)

54. The Elections Board noted also that there was "no formal notice requesting campaign team registration" and that there was "no formal declaration of the date that campaigning was to begin". However, whether or not campaign teams were formally registered cannot have affected the outcome of the referendum: as shown by the evidence, both the "yes" and the "no" sides ran equally vigorous campaigns. Campaigning for both sides began at the same time, regardless of the formal declaration of the commencement of a campaign period.

Appeal Book, Vol. 1, p. 33
(Judgment, para. 16)

Appeal Book, Vol. 3, p. 526
(Elections Board Report)

Appeal Book, Vol. 2, pp 366 and 368
(Affidavit of Gavin Gardiner, paras 22 & 23)

55. The Elections Board noted, as a further concern, that there was "no notice of questions" "served to the student body". Whether or not there was a technical requirement for such, the evidence shows that the student body was well aware of the question and the issue. The USSU made information about the referendum available to the student body in plenty of time and, in this case, ensured a campaign period of 18 days. It is submitted that any reasonable student would have been well aware of what the referendum was about. Regardless of the specific date that the "no" team registered, it was actively campaigning by September 19.

Appeal Book, Vol. 1, p. 33
(Judgment, para. 16)

Appeal Book, Vol. 3, p. 526
(Elections Board Report)

Appeal Book, Vol. 2, pp 366-367
(Affidavit of Gavin Gardiner, para. 21, 22 & 23)

56. The Elections Board was further concerned that the ROC Protocol was an "evolving document" and that this posed a problem in that it may have impacted the ability of the campaigners to run their campaigns. Evidence makes it clear that the ROC Protocol applied equally to the "yes" and "no" campaign teams and was available to campaigners throughout the campaign period (except for a brief period of time when it was removed by Robin Mowat himself). It is not clear how the fact that the ROC Protocol may have been amended during the campaign period in any way impacted the actual campaigns. In fact, the evidence shows that rather than being hampered

in any way, the "no" campaign was effective and energetic throughout the campaign period.

Appeal Book, Vol. 3, p. 526
(Elections Board Report)

Appeal Book, Vol. 2, p. 366
(Affidavit of Gavin Gardiner, para. 22)

57. The Elections Board noted that a further concern was that "there was no agreement on specific key issues: spending limits, classroom campaigning, and CASA participation." The facts show that, regardless of whether or not there were clear rules about spending limits, classroom campaigning or participation by CASA, the reality was that none of these allegations could have affected the outcome of the referendum. Both sides used very similar campaign techniques: posters, leafleting, and so on. Robin Mowat's campaign placed a full-page ad in the *Sheaf*, printed thousands of full-colour leaflets, and otherwise got their message out effectively. It should be noted that there were allegations regarding classroom campaigning by both sides. None of these matters could have affected the will of voting students to the point where the ultimate outcome of the referendum would have been affected.

Appeal Book, Vol. 3, p. 527
(Elections Board Report)

Appeal Book, Vol. 2, pp. 366-367
(Affidavit of Gavin Gardiner, paras. 24, 25, 26 & 28)

58. The Elections Board went on to note that there was "no clear resolution on the inconsistencies of the USSU and CFS' bylaw's [sic] prior to the campaign period." Again, the evidence shows this is not the case. However, even if it was, there is no indication that this would have affected the ultimate outcome of the referendum.

Appeal Book, Vol. 3, p. 527
(Elections Board Report)

59. The Elections Board also noted that after the referendum, there were imperfections in the complaint consideration process, and that "no separate appeal board was struck" post-referendum. This issue does not impact on the outcome of the referendum.

Appeal Book, Vol. 3, p. 527
(Elections Board Report)

60. Finally, the Elections Board noted that CFS members were involved in referendum campaigning. It was admitted that there was no rule against this. There was no evidence of any actions on behalf of either CFS members that would be cause for any concern in this regard or that this could have impacted the outcome of the referendum.

Appeal Book, Vol. 3, p. 527
(Elections Board Report)

61. Overall, the Elections Board Report shows considerable confusion and inconsistency. Although it claims that the identified issues would have, in its view, significantly impacted the outcome of the referendum, it failed to provide any indication of how this could be so.

62. Ultimately, the decision of the Elections Board to decline to ratify the results of the referendum was not binding on the USC. As a committee of the USC, the Elections Board does not have that authority. Rather, the USC has the final authority over the interpretation of its own Constitution and Bylaws. Its decision to ratify the results

was a proper and appropriate exercise of authority, especially in light of the fact that a clear majority of students had voted to federate with the CFS.

Appeal Book, Vol. 2, p. 361
(Affidavit of Gavin Gardiner, para. 8)

(e) Did the Learned Chambers Judge err in fact by stating that the USSU imposed its own "preordained outcome" with respect to the referendum?

63. The Learned Chambers Judge made a finding of fact that the USSU ignored its own rules and "imposed its own preordained outcome" when it ratified the results of the referendum.

Appeal Book, Vol. 1, p. 48
(Judgment, para. 62)

64. It is submitted that there was absolutely no factual basis for the Learned Chambers Judge's finding in this regard.

65. Rather, the USC's decision to ratify the referendum results, and thereby override the recommendation of the Elections Board, was made as the result of an intense debate involving members of the USC who were pro- and anti-ratification.

Appeal Book, Vol. 3, pp 423-431
(Minutes of USC Meeting Sep 15 2006)
(Affidavit of Gavin Gardiner)

66. The USC was, in fact, reflecting the will of the majority of voters and not imposing a "pre-ordained outcome". The Learned Chambers Judge committed a palpable and overriding error in making this conclusion of fact.

PART VI CONCLUSION

67. The Learned Chambers Judge erred in law and in fact in his decision. He failed to apply the proper legal analysis to the matter before him. A proper legal analysis would have led the Learned Chambers Judge to the conclusion that none of the alleged issues pertaining to the conduct of the referendum could possibly have affected the ultimate outcome. The referendum results were valid and should have been upheld. Furthermore, Robin Mowat's interests were not "oppressed" within the meaning of section 225 of the Act.

PART VII. RELIEF

68. The Appellant, USSU, therefore requests the following relief:

(a) That this Honourable Court allow the appeal and set aside the Order of the Honourable Mr. Justice Smith declaring that the referendum by the USSU on the issue of federation with the CFS was of no force and effect, and make an order that the referendum was valid and binding;

(b) Costs to the appellant of this appeal;

(c) Such further and other relief which this Honourable Court should find appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Saskatoon, in the Province of Saskatchewan, this 11th day of January, 2007.

SCHARFSTEIN GIBBINGS WALEN & FISHER LLP

Per: _____

Solicitors for the Appellant,
UNIVERSITY OF SASKATCHEWAN
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PART VIII. AUTHORITIES

Statutes and Regulations

1. *The Court of Appeal Act, 2000*, S.S. 2000, cc.-42.1.

2. *The Non-Profit Corporations Act*, 1995, S.S. 1995, c. C-42.1.

Cases

1. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235
[Tab 1 of CFS's Book of Authorities]

2. *Jacob Farms Ltd. v. Jacobs* [1992] OJ No 813 at 5 Ont Gen Div
[Tab 5 of CFS's Book of Authorities]

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

4. *Reaburn v. Lorje,* 2000 SKQB 81.

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