1969

*May 8, 9
June 6

ROBERT DANIEL KING .....APPELLANT;

AND

THE UNIVERSITY OF SASKATCHEWAN .....} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Mandamus—Application to compel university through its faculty council to hear and determine applicant's appeal—Applicant failing to obtain required standing for degree in law—Jurisdiction of Court to entertain application—Whether proceedings before various university bodies amounted to denial of natural justice—The University Act, R.S.S. 1953, c. 167 [later R.S.S. 1965, c. 181], s. 76(c) [am. 1964, c. 17, s. 21].*

The appellant had, after several attempts, failed to obtain the standing required by the law school of the respondent university which would have entitled him to the degree of bachelor of laws. A special committee was appointed by the president of the university to consider an appeal by the appellant from the decision of the law school, and, after holding a number of hearings, the committee rendered its report which concluded with the recommendation that due to special circumstances and for compassionate reasons the appellant be granted his degree in law. This report was considered by an executive committee of the faculty council, and the executive committee, refusing to accept the recommendation of the special committee, recommended to the faculty council that the appellant be not granted the degree. The reports of the special committee and of the executive were presented to the council and the council agreed with the recommendation of the executive that the degree not be granted. The appellant then appealed to the chancellor. The latter considered the appeal to be one to the senate of the university and, in accordance with the provisions of statute XII of the statutes of the senate, he appointed a committee consisting of himself, the president of the university and three deans. Unlike the earlier hearings and meetings of the various university bodies, where the appellant was neither present nor represented by counsel, at the hearing of the senate committee the appellant was present in person and represented by counsel. The committee refused to allow the appeal.

An application for *mandamus* requiring the university through its faculty council, pursuant to s. 76(c) of *The University Act,* R.S.S. 1953, c. 167, to hear and determine the appeal of the applicant was dismissed on the ground that the granting of degrees was essentially a domestic matter and that therefore the jurisdiction of the visitor, as provided by s. 12(3) of *The Queen's Bench Act,* R.S.S. 1965, c. 73, excluded that of the ordinary Courts. An appeal from the judgment of the chambers judge to the Court of Appeal was dismissed. The Court of Appeal held that the respective duties of the faculty council and of the senate created by s. 76(c) were not domestic but public, and specially affected the rights of the appellant. There had been, how-

*PRESENT: Cartwright C.J. and Fauteux, Hall, Spence and Pigeon JJ.

ever, no failure by the council or the senate to perform their respective duties and for that reason the appellant had no right to a *mandamus*. The appellant was really taking the position that the proceedings were conducted in a manner which amounted to a denial of natural justice. Even if this were true, *mandamus* was not the appropriate remedy. An appeal from the judgment of the Court of Appeal was brought to this Court.

*Held:* The appeal should be dismissed.

On the question as to whether a denial of natural justice had occurred, an examination of the facts showed that there was no lack of natural justice before the senate appeal committee and that the proceedings in fact were carried out with the full knowledge and approval of the appellant and his counsel. Any possible failure of natural justice before the special appeal committee, the executive committee or the full faculty council, was quite unimportant when the senate, the appeal body under the provisions of *The University Act,* and also the body in control of the granting of degrees, had exercised its function with no failure to accord natural justice. If there were an absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee.

As to the submission that in each case when the appellant's appeals were being considered by the successive tribunals, there was a duplication of membership in the body with the earlier tribunal, the Court was not ready to agree that such duplication would result in any bias or constitute a breach of natural justice. In such matters as were the concern of the various university bodies here, duplication was proper and was to be expected. It was significant that no member of any of the bodies was a member of the law faculty, and that when the dean or members of that faculty attended any of the bodies they withdrew before voting.

*Posluns v. Toronto Stock Exchange,* [1968] S.C.R. 330, applied; *Frome United Breweries Co. v. Bath Justices,* [1926] A.C. 586; R. v. *Alberta Securities Commission, Ex p. Albrecht* (1962), 36 D.L.R. (2d) 199; *R. v. Ontario Labour Relations Board, Ex p. Hall,* [1963] 2 O.R. 239, distinguished.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of Johnson J. Appeal dismissed.

*K. C. Binks, Q.C.,* and *W. Simpson,* for the appellant.

*D. E. Gauley, Q.C.,* for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan[1], made on December 5, 1968, wherein that Court dismissed an appeal from the judgment of Johnson J. of the Court of Queen's Bench

[1] (1969), 67 W.W.R. 126, 1 D.L.R. (3d) 721.

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made on October 11, 1968. By the latter judgment, Johnson J. refused the application of the appellant for a *mandamus* requiring the University of Saskatchewan, through its delegated authority the faculty council, to properly hear and determine the appeal of the appellant.

The appellant had, after several attempts, failed to obtain the standing required by the Law School of the University of Saskatchewan which would have entitled him to the degree of bachelor of laws. After rather lengthy negotiations and discussions with the authorities of the university, the appellant on August 8, 1964, by letter addressed to the president of the university, appealed from the decision of the law school and requested that he be given opportunity to be present at any hearing of such appeal and the opportunity to be represented by counsel.

The president of the university appointed a special committee of the faculty council of the university to consider this appeal and by his letter dated August 14, 1964, suggested that the appellant should provide a detailed brief in support of his appeal of August 8. The appellant did so. The said special committee held four hearings, to which reference shall be made hereafter, and rendered its report which concluded with the recommendation that due to special circumstances and for compassionate reasons the appellant be granted his degree in law. This report was considered by an executive committee of the faculty council on December 15, 1964, and the executive committee, refusing to accept the recommendation of the special committee, recommended to the faculty council that the appellant be not granted the degree. The faculty council considered the matter at a meeting which evidently occurred on February 18, 1965. Although the material does not include the minutes of that meeting of the university council, there is in the material a notice calling the meeting for February 16; evidently, the meeting was postponed for two days. Included with that notice is an agenda outlining a very large number of matters amongst them the report of the special faculty committee of the council (sometimes known as the special appeal committee) and reciting:

> At a special meeting of the Executive held in December the recommendation of the Special Committee of the Executive was considered in considerable detail and the appeal was rejected by the Executive by a large majority.

In the minutes of a meeting of the faculty council (entitled Saskatoon Council) of June 14, 1967, called to consider the matter, their disposition of the reports of the special appeal committee and of the executive committee made at its meeting on February 18, 1965, is outlined in these words:

> This report [that of the Special Appeal Committee] and the decision of the Executive was presented to the Council and the Council agreed with the recommendation of the Executive that the degree not be granted. (There were no votes in Council against this motion.)

Evidently as a result of a suggestion that he could take such action, the appellant thereafter appealed to the chancellor of the University of Saskatchewan, Chief Justice E. M. Culliton. The chancellor considered that appeal to be one to the senate of the university and took cognizance of statute XII of the statutes of the senate which reads as follows:

> All appeals to the Senate under the provisions of Section 76 subsection (*c*) of the University Act shall be heard and decided by a committee consisting of the Chancellor the Vice-Chancellor and three other members of the Senate appointed by the Chancellor for that purpose.

The chancellor appointed the committee in accordance with the provisions of that statute of the senate. It consisted of himself, the president of the university who was the vice-chancellor thereof, and three deans. At the hearing of this senate committee so composed, the appellant was present in person and represented by counsel. Further reference shall be made hereafter to this circumstance.

The committee met on November 3, 1965, and on the same day determined to disallow the appeal. The chancellor has sworn that on the next day he notified the appellant's counsel of such decision and thereafter upon the instructions of the committee he prepared and submitted to the senate of the university a formal report. This report concludes with this statement:

> After reviewing the submissions the committee unanimously concluded there was no evidence whatever to substantiate King's allegations of any breach of terms of his registration or that there was any breach of ethics by the faculty of the College of Law. The committee further unanimously decided:
>
> (*a*) That there was no basis within the University regulations under which a degree in law could be granted to King;
>
> (*b*) That there were no grounds upon which the ruling of the faculty, as confirmed by the special committee and by council, could be disturbed.

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The appellant served upon the university two demands, dated April 14 and 25, 1967, and the university having failed to comply with those demands he commenced these proceedings for *mandamus*.

The respondent urged before Johnson J. upon the hearing of the appellant's application five preliminary objections. In this Court, the respondent pursued only the first of these objections. That objection is outlined in the material in an addendum to the reasons of Johnson J., and it was that the Court lacked jurisdiction to entertain the application. It was submitted that the conferring of a degree is a domestic matter coming within the exclusive jurisdiction of the visitor and consequently the Court had no jurisdiction to entertain this application.

*The University Act* has, since the year 1907, made provision for a visitor. The provisions perhaps may best be cited from *The University Act,* 1968 (Sask.), c. 80, s. 9 of which reads:

> The Lieutenant Governor shall be the visitor of the university with authority to do all those acts that pertain to visitors as to him seem meet.

Section 12(3) of *The Queen's Bench Act,* R.S.S. 1965, c. 73, provides:

> In respect of the jurisdiction and powers of the Lieutenant Governor as visitor of corporations, conferred by statute or otherwise, the court shall, upon the direction of the Lieutenant Governor, have and exercise the jurisdiction and powers that in England, prior to the passing of *The Supreme Court of Judicature Act 1873,* were vested in, or capable of being exercised by, the Lord Chancellor representing the Crown as visitor of corporations.

Johnson J. gave effect to this preliminary objection being of the opinion that the granting of degrees was essentially a domestic matter and that therefore the statutory jurisdiction of the visitor excluded that of the ordinary Courts. Johnson J. pointed out that although by the aforesaid s. 12(3) that jurisdiction was to be exercised by the Court of Queen's Bench in Saskatchewan, it was only to be so exercised upon direction of the Lieutenant Governor as visitor and determined that lacking such direction he had no power to act.

When the matter was considered by the Court of Appeal for Saskatchewan, that Court dealt with the same preliminary objection and, with respect, I am of the opinion

that it came to the proper conclusion in reference thereto. Hall J.A., giving the reasons for the Court, pointed out the provisions of s. 76(*c*) of *The University Act,* R.S.S. 1953, c. 167:

> 76. It shall be the duty of the council and it shall have power:
>
> * * *
>
> (*c*) to deal with and, subject to an appeal to the senate, to decide upon all applications and memorials by students or others in connection with any faculty of the university;

and noted that although the ultimate aim of the appellant was to obtain a degree in law, the immediate purpose of his application was to compel compliance with this s. 76(*c*) of *The University Act*. The actual words in the application for *mandamus* were:

> requiring the said University of Saskatchewan pursuant to s. 76(*c*), R.S.S. 1953, c. 167, through its delegated authority, the said faculty council, to properly hear and determine the appeal of the said applicant according to law.

It was the learned justice in appeal's opinion that the section created a statutory duty to be performed by the faculty council subject to appeal to the senate and that compliance with the statutory duty may be controlled and enforced by the ordinary Courts and therefore such decisions as *R. v. Dunsheath, Ex p. Meredith*[2], and *Thorne v. University of London*[3], do not apply to exclude the jurisdiction of the Courts. Hall J.A. concluded:

> The respective duties [of the faculty council and of the senate] so created are therefore not domestic matters within the university but are in the nature of public duties, and as they specially affect the rights of the appellant, mandamus may be granted if there has been a failure to perform them.

With respect, I agree with that conclusion and I reject this preliminary objection.

Hall J.A. continued in his reasons:

> It is quite apparent, however, that in the instant case the university council has dealt with and decided upon the application of the appellant and also that the senate has heard and determined the subsequent appeal. The material filed by the appellant in support of his motion establishes this beyond doubt. There has been, therefore, no failure by the university council or the senate to perform their respective duties and for that reason the appellant has no right to a mandamus.

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[2] [1950] 2 All E.R. 741.

[3] [1966] 2 All E.R. 338.

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The appellant contends that the conclusion of the learned justice in appeal is erroneous and that on the other hand there occurred a series of acts on the part of the various university bodies considering his appeals which amounted in each case to such a denial of natural justice as would render the decisions arrived at nullities.

Hall J.A. concluded his reasons with the statement:

> The appellant really takes the position that the proceedings were conducted in a manner which amounted to a denial of natural justice. Even if this were true, mandamus is not, however, the appropriate remedy to obtain a review of the proceedings.
>
> The appeal is dismissed with costs.

If this Court is of the opinion that there existed such a denial of natural justice as would nullify the decisions of the special appeal committee, the executive committee, the faculty council, and the senate appeal committee, it would be required to determine whether *mandamus* was a procedure available to the appellant. First, however, we must determine whether such denial of natural justice occurred.

Counsel for the university has admitted that the appellant in his letter of August 8, 1964, addressed to the president, by which he initiated his appeal, included a request that he have an opportunity to be present and to be represented upon the hearing of his appeal. The president replied to that letter by his letter of August 14, 1964, in which he stated, in part:

> It would be helpful if you would send a detailed plea, as mentioned in the second page of your letter. If the Committee feels that it would be helpful for you to appear before them, I will let you know.

In reply, the appellant did submit what might well be termed a "detailed brief". This brief was produced as an exhibit to the president's affidavit and runs to nine and a half closely-typed pages. In such brief, the appellant did not repeat his request that he be present in person at the hearing or that he be represented by counsel. On the other hand, of course, he did not withdraw that request.

The committee met on four occasions: September 25, 1964, October 6, 1964, November 18, 1964, and November 24, 1964, and it submitted to the executive committee of the faculty council a carefully considered report in some considerable detail. It is true the appellant was never notified of any of those four meetings or given any opportunity

to be either present in person or represented by counsel. On the other hand, Dean Otto Lang, the presiding officer of the University of Saskatchewan Law School, whom the appellant has regarded as his opponent throughout, was present at the last two meetings and was assisted by at least one law professor. Whatever allegations of denial of natural justice the appellant seeks to advance, based on the failure to permit him or his counsel to be present at the hearings of this special appeal committee, are met and defeated by the fact that this special appeal committee concluded its report with the recommendation which it set out in the following words:

> While this Committee recognizes that R. D. King has not fulfilled the requirements for graduation in Law either according to the old merit point regulations or the new average regulations, nevertheless, the Committee recommends that, due to the exceptional circumstances surrounding the case and for compassionate reasons, this student be awarded the Bachelor of Laws Degree.

In my view, such a recommendation disposes of the consideration of any allegations as to lack of natural justice in the hearings of the special appeal committee.

This report with the above recommendation was presented to the executive committee of council on December 15, 1964. The solicitors for the university informed those of the appellant that there were present at such meeting of the executive committee the president, eight deans, including Dean Lang of the law school, an acting dean and thirteen professors, including at least one from the law school. Again, the appellant was given no notice of that meeting or opportunity to be present or to be represented by counsel. According to the minutes of a full university council, dated June 14, 1967, to which I have referred above, the report of the special appeal committee was presented in full with its recommendation, and it was considered by this executive committee on December 15, 1964. The motion to adopt the report of the special appeal committee "was lost by large majority". The executive committee (sometimes in the material referred to simply as the "Executive") recommended that the appellant be not granted the degree. As I have said, the matter was then considered by the full university council on February 18, 1965. This is a very large body.

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Although the minutes of the particular meeting of February 18, 1965, are not amongst the material, at the later meeting of the council, referred to above, in which that body reviewed its decision of February 18, 1965, there were 179 members present. The minutes of the latter meeting recite that the report of the special appeal committee and the recommendation of the executive were presented to the full university council and that the university council rejected the recommendation of the special appeal committee and agreed with the recommendation of the executive committee that the appellant be not granted his degree. Again, at this meeting of the full faculty council the appellant was not given an opportunity to be present or to be represented by counsel.

I realize that each case must be considered on its own circumstances. This is not such a situation as was considered in *Ridge v. Baldwin*[4], where a chief constable had been discharged by a watch committee, or in *Posluns v. Toronto Stock Exchange*[5], where the plaintiff Posluns had been held by a committee of the Toronto Stock Exchange to be disqualified from acting as a director or employee of a particular firm. What was being considered here was whether the appellant had attained the necessary standing in his studies in the law school to justify the granting to him of a degree of bachelor of laws. As was pointed out in the *Dunsheath* case, *supra,* and the *Thorne* case, *supra,* such a matter is essentially a domestic one within the university. The considerations which are given to such an issue are not those which can be assisted by an adversary formula, and it is difficult to conceive of a situation which would have the representatives of a law school faculty confronting the representatives of a student in the trial of an issue as to whether a degree should be granted. It must be remembered, however, that this appellant in his brief, which need not be analyzed in detail, made many contentions which were not solely related to his attainment of academic qualifications, and indeed as the chancellor pointed out in his report, to which further reference shall be made hereafter, the essence of the appellant's complaints were:

(1) that there was a breach of the terms of registration between him and the university,

[4] [1964] A.C. 40.

[5] [1968] S.C.R. 330.

(2) that there was a breach of ethics which amounted to a value judgment.

Whether this allegation of the denial of natural justice, in what may be termed private or academic bodies, would provide the appellant with the basis for proceedings in the ordinary Courts to have the decisions of such bodies declared nullities is a question of some importance. In view of my opinion as expressed hereunder, it need not be decided in the present case.

The appellant was not satisfied to leave this matter as disposed of by the full faculty council but, as I have pointed out, appealed to the chancellor. The chancellor then appointed a committee, guided therein by the statutes of the university, and this committee met on November 3, 1965. The chancellor has sworn and, of course, there is no contradiction, that the procedure arrived at for the hearing of the appeal by the special senate appeal committee was only determined after consultation and discussion with counsel for the appellant and in the presence of the appellant and that that procedure was agreed upon. Both the appellant and his counsel were aware of the intention to first hear the appellant and his counsel and then to hear Dean Otto Lang in the absence of the appellant. No objection was made by either the appellant or his counsel to that procedure and the procedure was carried out. This senate appeal committee was composed of the chief justice of the province, the president of the university, and three deans, all being persons of eminent qualification, and it can only be presumed to have given the appeal of the present appellant every possible consideration. As I have said, the procedure adopted was one of which the appellant knew and both he and his counsel had approved.

Counsel for the appellant in this Court made the submission that at that hearing the appellant did not have the advantage of full knowledge of what had gone before, and noted that until after the special senate committee had conducted its hearing and made its report, he did not know that the special appeal committee had recommended that despite his lack of qualifications he be granted a degree because of the exceptional circumstances and upon compas-

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sionate grounds. I am of the opinion that counsel was in error in that submission. The appellant in his affidavit in support of the application for *mandamus* swore:

> 8. That I was informed both by telephone and letter during the latter part of December, 1964, by the President that an adverse report was to be made to the Faculty Council and that after some conversation by telephone, the President did admit to me that his own Special Committee had been interfered with and subsequently over-ruled by an ad hoc committee or committees which had sat and adjudicated on my case without notice to me and without my having any knowledge of the hearing, and had tried my case in my absence.

The only inference from that evidence is that the appellant knew in December 1964 that the special appeal committee had recommended that his appeal be granted and that that recommendation had been rejected by what the appellant there refers to as "an ad hoc committee or committees".

The president, in his affidavit, sworn on September 11, 1968, has taken issue with the appellant's affidavit on the grounds that he would not have used the word "overruled" because the special appeal committee was not empowered to make a ruling but only a recommendation. I am of the opinion that such a matter of wording is irrelevant upon the present issue. It matters not whether the president used the word "overruled" or whether the president spoke of a recommendation which was rejected. At any rate, it is perfectly plain that the appellant knew in December 1964 that the recommendation made by the special appeal committee was that he should have a degree and knew that that recommendation had been rejected by the executive, although he might not even have known that such a body as one formally termed the "executive" existed. Surely, in the hearing before the senate appeal committee this early success would have been strongly urged by either the appellant or his counsel.

I have come to the conclusion, upon this examination of the facts, that there was no lack of natural justice before the senate appeal committee and that the proceedings in fact were carried out with the full knowledge and approval of the appellant and his counsel. It must be noted that the statutory duty of the faculty council as enacted by s. 76(*c*)

of *The University Act* was expressly subject to appeal to the senate. Moreover, the senate, in the University of Saskatchewan as elsewhere, is the sole body determining to whom the degrees of the university may be granted. Any possible failure of natural justice before the special appeal committee, the executive committee, or the full faculty council, is quite unimportant when the senate, the appeal body under the provisions of *The University Act*, and also the body in control of the granting of degrees, has exercised its function with no failure to accord natural justice. If there were any absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee.

A similar matter was considered in *Posluns v. Toronto Stock Exchange, supra,* and Ritchie J., giving the reasons for the Court, distinguished the circumstances there present, where the second hearing was one in which the appellant was accorded a full measure of natural justice, from the situation in *Ridge v. Baldwin, supra,* where, as Lord Reid pointed out at p. 79:

> But here the appellant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgment, what was done on that day was a very inadequate substitute for a full rehearing.

I am of the opinion that the situation here resembles that in *Posluns v. Toronto Stock Exchange, supra,* and that the hearing before the senate appeal committee, a small and very able body, was such as accorded the appellant every advantage of natural justice and rendered nugatory any alleged earlier failure to accord him such natural justice in any of the earlier hearings.

Reference should be made to another submission by counsel for the appellant. That submission was that in each case when his appeals were being considered by the successive tribunals, there was a duplication of membership in the body with an earlier tribunal.

The special appeal committee was as follows:

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| President: | J. W. T. Spinks |
| Deans: | Booth, Haslam and Tracey |
| Professors: | Mann, Langley, Pepper. |

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The composition of the executive committee was:

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| Chairman: | The President, J. W. T. Spinks |
| Deans: | Begg, Booth, Currie, Haslam, Kirkpatrick, Lang and Smith |
| Acting Dean: | Goodspeed |
| Professors: | Buckley, Chambers, Douglas, DuWors, Katz, Langley, Ludwig, McMurray, Mann, Nind, Pepper, Rempel, D. C. Williams (I omit those not voting). |

As I have pointed out the full faculty council meeting on February 18, 1965, had a very large number present and I am ready to presume included many of those whom I have already named.

The senate appeal committee was composed of:

| | |
|---|---|
| The Chancellor: | Chief Justice Culliton |
| The President: | J. W. T. Spinks |
| Deans: | Barber, Begg, Currie. |

There was therefore the duplication of which the appellant complains. The appellant has cited a series of cases including *Frome United Breweries Co. v. Bath Justices*[6]; *R. v. Alberta Securities Commission, Ex p. Albrecht*[7]; and *R. v. Ontario Labour Relations Board, Ex p. Hall*[8], for the proposition that under such circumstances there is a presumption of bias in favour of the former decision to which the member objected to was a party and that the decision should therefore be quashed. It is to be noted that those decisions all deal with either appeals from one administrative body to another or appeals from a licensing committee to the justice of the peace. In my view, they are inappropriate to apply to the situation under review in this appeal. These were all university bodies. It was inevitable that there would be duplication as one proceeded from one body to another; so, it was perfectly proper that the president of the university should be a member of the special appeal

[6] [1926] A.C. 586.

[7] (1962), 36 D.L.R. (2d) 199.

[8] [1963] 2 O.R. 239.

committee which he set up to consider the appeal that had been made originally to him. Again, the executive of the faculty council could not be presided over by anyone more fit for the office than the chief member of the faculty, that is, the president. And finally, the president of the university as vice-chancellor thereof was required, by the university statute, to be a member of the senate appeal committee. The other duplications are of persons carrying out their ordinary duties as members of the faculty of the University of Saskatchewan.

It was significant that no member of any of the bodies was a member of the faculty of the law school, and that when the dean or members of that faculty attended any of the bodies they withdrew before voting. I am of the opinion that, in such matters as were the concern of the various university bodies here, duplication was proper and was to be expected, and I am not ready to agree that such duplication would result in any bias or constitute a breach of natural justice.

For these reasons, I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Newsham & Raney, Saskatoon.*

*Solicitors for the respondent: Francis, Gauley, Dierker & Dahlem, Saskatoon.*