

2008 was not a valid referendum held in accordance with the CFS Bylaws; (2) a declaration that the CBUSU continues to be a full member of the CFS; and (3) payment of unpaid membership fees owed by CBUSU.

[3] CBUSU maintains that it has complied with the requirements of the applicable Bylaws and that the referendum was validly held. It maintains that there was a valid notice of the scheduled referendum and, for that reason it claims it is no longer a member of the CFS. In the alternative, CBUSU asserts that any non-compliance with the Bylaws is a technicality and the courts should recognize the result of the referendum where 92% of the participating students voted to defederate from the CFS. CBUSU further disputes the quantum of damages claimed.

These facts are admitted

1. The CFS is a not-for-profit corporation incorporated under the laws of Canada, with its head office located in the City of Ottawa, in the Province of Ontario.
2. The CFS and its members have a binding contractual relationship pursuant to the Constitution and the Bylaws of the CFS.
3. The CFS maintains binding contractual relationships with local campus student associations referred to as voting member local union or voting members.
4. Each voting member is responsible for:
 - (a) supporting the objectives of the CFS and abiding by all provisions of the CFS' bylaws;
 - (b) communicating information from the CFS and the provincial CFS components to its students; and
 - (c) communicating and working cooperatively with CFS staff and members of the National Executive of the CFS
5. At all times material to this action, the CFS and its voting members were regulated by the Constitution and Bylaws of the CFS, as amended from time to time ("the Bylaws").
6. Bylaw 1 regulates the membership of local student unions in the CFS, including their admission into and their withdrawal from the CFS.

7. The CBUSU had the opportunity to participate in the formulation of policy of the CFS as Canada's largest student union for students attending post-secondary educational institutions.
8. The CFS has subsidized travel and accommodation and other related costs for the CBUSU to attend general meetings. The CBUSU exercised the power to vote at CFS general meetings, including on the elected leadership of the organization. Delegates of the CBUSU were entitled to seek elected office in the CFS.
9. The CBUSU participated in the bulk ordering of notebooks/day planners, which was facilitated and subsidized by the CFS.
10. The CFS first received a copy of the petition which CBUSU claimed was submitted in support of a decertification referendum on November 23, 2007.
11. By letter dated February 11, 2000, CBUSU advised that it still intended to proceed with a vote in March 2008.
12. A referendum was held by the CBUSU on March 11, 12 and 13, 2008.
13. Three hundred and sixty-six (366) students voted in the referendum, with 92% indicating they wished to withdraw from the CFS.
14. The total number of votes in the referendum was less than the number of students who had signed the petition.
15. The CBUSU destroyed all ballots associated with this referendum.
16. The CBUSU has not remitted membership fees to the CFS since the 2008/2009 academic year.

The Defendant further admitted the authenticity of a number of documents.

The Evidence of the Plaintiff

[4] Lucy Watson has been the Director of Organizing for the CFS since 2008 and an employee of the CFS since 1996. She described the CFS as an alliance of university student unions whose primary goal is to advocate for a high quality accessible university education system for students. It represents approximately 600,000 students across Canada. Its principal activities are advocacy and public policy work on behalf of students on issues such as tuition fee levels, financial assistance for students and funding for colleges and universities. It is also involved in public awareness campaigns.

[5] Ms. Watson liaises with members of the student unions, elected representatives, individual students, provincial representatives, and she assists with the implementation of campaigns and services on campuses. In 2007 and 2008, she held the position as internal coordinator of the CFS and she was primarily responsible for this issue when it arose.

[6] There are two types of memberships in the CFS and these are set out in Bylaw 1. There are Individual Members who are the individual students at a university or college and there are Voting Members which are the local student associations or the local students' union representing the individual members or students.

[7] The Constitution and Bylaws of the CFS were amended at the May 2007 national general meeting. The **Definitions** section defines a provincial component as follows:

A provincial component will be taken for all purposes as an organization within the Canadian Federation of Students comprised of all member local associations within a particular province.

[8] On becoming a member of the CFS, a member local association automatically belongs to the particular provincial component corresponding to the province in which the member is located. In 2007-2008, there was an active provincial component in Nova Scotia; namely, CFS Nova Scotia ("CFS-NS"). The provincial components implement the campaigns and services of the CFS within that particular region and implement campaigns specific to provincial issues.

[9] On becoming a member of the CFS, a member local association automatically belongs to the Canadian Federation of Students-Services ("CFS-S"), a sister organization to the CFS. The CFS-S focuses specifically on the provision of services or programs that saves students and student unions money on a daily basis.

[10] Bylaw 1, section 2 describes **Full Membership**. Section 2 (a) (ii) provides:

ii. A written application for full membership submitted by an eligible local student association will be considered as a binding contract to accept the rights and responsibilities of full membership in the Canadian Federation of students, the Canadian Federation of Students-Services, and the applicable provincial component.

[11] On May 12, 2000, the University College of Cape Breton Students' Union ("UCCBSU") sought and became a prospective member in the CFS and the provincial component. A vote was held pursuant to Bylaws and the question of membership was put to the individual students in the fall of 2000. The vote was 614 "YES" and 7 "NO." As a result, the individual students were accepted into membership as individual members. UCCBSU became a full member of the CFS known as local 95 of the CFS. As a result of that vote, the individual students automatically became members of CFS-NS. After the name of the university changed to Cape Breton University ("CBU"), local 95 became CBUSU.

[12] Ms. Watson said that the CBUSU was a very active member local union. Some of its elected representatives also held elected office within the CFS and CFS-NS throughout the 2000-2007 period.

[13] Membership fees are set out in Bylaw 1, s. 2 (a) (v) and (vi):

v. A local association's application for membership, once accepted by the Federation, shall constitute a binding contract to collect and remit to the Federation all membership fees for the duration of the membership.

vi. Notwithstanding s. 2 (a) (vii) of this Bylaw, its fees for full member local associations shall be:

\$3.00 per semester, or \$6.00 per academic year, per local association individual member of the Canadian Federation of Students/Canadian Federation of Students Services, pro-rated as per the policy of the member local association: and the applicable provincial component fee.

[14] A chart detailing the total damages claimed by the CFS was entered as Exhibit 4 and these are \$293,159.13 and represent the amounts claimed from the 2008-2009 academic year to the date of trial and include amounts claimed under three categories: CFS Annual Fees per Student; CFS-S Annual Fees per Student and CFS-NS Annual fees per student.

[15] The Bylaws in place during the summer of 2007 and spring of 2008 further provided as follows:

3. Membership Rights and Responsibilities.

a. Rights of Individual Members:

- i. The individual members of the Federation collectively belonging to a member local association will have sole authority to make decisions through referendum on all questions of membership in the Federation, subject to the other provisions of this Bylaw.
- ii. The individual members of the Federation collectively belonging to a member local association will have sole authority to initiate, by petition signed by not less than ten percent (10%) of the individual members and delivered to the National Executive, a referendum to federate as described in section 5 of this Bylaw.
- iii. The individual members of the Federation collectively belonging to a member local association will have sole authority to initiate a defederation referendum, as described in section 7 of this Bylaw, by submitting to the National Executive of the Federation the petition, signed by not less than ten percent (10%) of the individual members of the Association, calling for the referendum. (emphasis mine)

[16] Ms. Watson explained that the reference to s. 7 in Section 3(a) (iii) is an error. Section 6 deals with the Vote on Defederation and it provides :

6. Vote on Defederation

The individual members of the Federation belonging to a member local association may vote on whether to defederate subject to the following goals and procedures:

a. Petition

As per Bylaw 1, 3 (1) (a) (iii), a petition calling for a referendum shall be signed by no less than ten (10%) percent of the individual members of the Association and sent to the National Executive of the Federation.

b. Notice

- i. No vote and defederate in May be held between:
- April 15 and September 15; and December 15 and January 15.
- ii. Notice of a vote on defederating must be delivered by registered mail to the head office of the Federation not less than six (6) months prior to the vote.

iii. Notice of the vote must include the exact dates and times of voting.

iv. In the case of a withdrawal referendum incorporating a mail out component, the exact date of the referendum shall be the date the ballots are mailed out to the individual members;

v. Failure to adhere to the notice provisions in ss. b(i), b (ii), and b (iii), shall invalidate the results of the vote.

c. Campaigning

i. There shall be no less than two (2) weeks of campaigning immediately preceding the voting during which time classes are in session.

ii. Only individual members and representatives of the member Association, representatives of the Federation and representatives of other Federation member local associations shall be permitted to participate in the campaign.

d. Voting

i. Voting will be conducted at voting stations or, subject to the agreement of the Federation, at a general meeting of the member local association or by mail ballot.

ii. There shall be no less than sixteen (16) hours of polling over no less than two (2) days, except in the case of voting being conducted at a general meeting.

iii. In the event that polling is conducted at a general meeting, representatives of the Federation and Federation member local associations shall be extended full speaking rights at the meeting.

e. Quorum

Quorum for the vote shall be that of the member local associations or five percent (5%) of the individual members of the local association, whichever is higher.

f. Administering the campaign and voting

Within three (3) months of the receipt of notice, the committee composed of two (2) members appointed by the Federation and two (2) members appointed by the member local shall be formed. The committee shall be responsible for:

i. deciding the manner of voting, be that by referendum, general meeting or mail out ballot;

- ii. deciding the number of locations of polling stations;
- iii. approving all materials to be distributed during the campaign;
- iv. deciding the ballots question;
- v. overseeing the voting;
- vi. counting ballots;
- vii. adjudicating all appeals; and
- viii. establishing all other rules and regulations for the vote.

g. Advance remittance of outstanding membership fees

In addition to sections a. to f. in order for 80 federation referendums to proceed, a member local association must remit all outstanding Federation fees not less than six (6) weeks prior to the date of the referendum.

[17] CFS argues that the defederation process is initiated by the individual student members at a college or university who have sole the authority to make decisions through referendum and have sole authority to initiate that referendum by way of a petition. The petition informs the National Executive that there is a genuine interest on the part of the individual members in defederating. The petition triggers the defederation process.

[18] According to Ms. Watson, the “Notice” provision is important since there are subsequent steps to be taken before the referendum and she testified that the petition is generally received with the notice. The National Executive takes a very active role in the campaign process.

[19] A letter dated August 27, 2007 was sent by registered mail to the head office of the CFS from Sampson McDougall Barristers and Solicitors and was signed by Tony V. Mozvik. It reads:

Re: Cape Breton University Students Union

Please be advised that I am the lawyer for the Cape Breton University Students Union. The Cape Breton University Students Union is local 95 of the Canadian Federation of students.

As per s. 6(a)(ii) of the Constitution and Bylaws of the Canadian Federation of Students, my client is hereby serving notice it intends to hold a Referendum on

defederating the Cape Breton University Students Union from the Canadian Federation of students.

The proposed dates of the vote are March 11, 12 and 13 of 2008. Voting will commence at 8 AM in the morning and the polls will remain open until 7 PM at night.

The Cape Breton University Students Union does not intend on having a mail out component to its referendum. As per s. 6(e) of the Constitution and Bylaws of the Canadian Federation of Students, we are requesting the names and contact information for your two members of the Committee overseeing the Referendum.

[20] CFS did not regard this as a valid notice since it was not accompanied by a petition which reflects the wishes of the individual members. CFS had no information that a petition existed at that time. Ms. Watson described September as a busy time of year for the CFS and she assumed that the petition would be forthcoming. CFS received a further letter from Mr. Mozvik dated September 27, 2007 requesting a response to his earlier letter.

[21] There was a further letter from Mr. Mozvik dated October 1, 2007, sent by way of courier. CFS did not receive it directly but only through its solicitor's office at a later date. That letter enclosed a copy of the petition completed by the CBUSU. It reported that 500 students had signed a petition requesting a referendum and that this was well beyond the 10% required by the section 6(a).

[22] CFS directed its counsel to respond to the August 27 letter on October 12, 2007. He advised that the notice sent to the CFS was deficient as it did not include a petition and that CFS considered it to be void and of no effect.

[23] Mr. Mozvik responded on October 17, 2007 stating that the petition had been sent on October 1, 2007. He enclosed a Purolator receipt as proof. CFS had still not received any form of petition from the CBUSU. The Purolator receipt disclosed that the document has been received by a person by the name of *Amanda at Reception*. CFS was located in the same building as the Red Cross which was on a floor below and where it had a reception desk. CFS had no reception area. Inquiries were made and it was discovered that the person who had signed for the package was not a CFS employee, but another person named Amanda who worked for the Red Cross.

[24] CFS maintained its position that it still had not received the requisite notice. CBUSU claimed otherwise and indicated its intention to proceed with the referendum. Their counsel ultimately provided a copy of the petition, but this was not received by CFS until November 23, 2007.

[25] By way of letter dated January 31, 2008, the CFS confirmed to the CBUSU that the petition, having been received on November 23, 2007, did not entitle the CBUSU to proceed with the referendum scheduled for March 2008. Given the date of the delivery of the petition, CFS maintained that no valid referendum could have been held by the CBUSU until September 2008. The letter concluded by stating that the CFS did not waive any of its rights under the CFS Bylaws.

[26] On February 8, 2008, CFS renewed its offer to schedule a referendum at the earliest possible date of September 15, 2008. CBUSU responded on February 11 that it intended to proceed with the vote in March 2008.

[27] On March 4, 2008, CFS repeated its view that CBUSU was not in compliance with the applicable Bylaws and their counsel restated that CFS did not waive any of its rights under the Bylaws and that CFS would not recognize the results of any referendum held that month.

[28] As of the date of the referendum, all of the fees owing by CBUSU for the 2007-2008 academic term had not yet been remitted as required by section 6(g). CBUSU proceeded with the vote which was held on March 11, 12 and 13, 2008. The Ballot read:

**UCCB
REFERENDUM**

Are you in favour of the membership in the:

- Canadian Federation of Students;
- Canadian Federation of Students-Services; and
- Canadian Federation of Students Nova Scotia?

**YES
NO**

[29] Three hundred and sixty-six (366) students voted in the referendum, 92% indicated that they wished to withdraw from the CFS. CFS did not participate in this referendum and did not recognize the vote.

[30] Ms. Watson said that the CFS continued to provide services to CBUSU students; which included public advocacy services; Travel Cuts program for discounted travel, the International Student Identity Card (ISIC), a Student Saver Discount Card, the Student Work Abroad Program (SWAP), the National Student Health Network, a web service, the bulk purchase of ethically produced materials and a CFS Handbook and Day Planner. Some CBUSU students did apply and received ISIC cards after the referendum as this card required an individual application.

[31] Membership dues were historically remitted by way of installments throughout the academic year. The Bylaws required that outstanding fees must be remitted six weeks in advance of the referendum. Ms. Watson said that the CFS did not waive that requirement at any time.

[32] In cross-examination, she confirmed that earlier Bylaws made no reference to a petition in terms of withdrawal from the CFS. That language first appeared in 1998 with respect to individual members deciding to join the CFS and to defederate. After the vote in issue, the Bylaws were amended again in May 2008. Ms. Watson agreed that CFS-NS was a separate corporate entity although this was not the case for all provincial components. CFS-NS had its own Bylaws and Board of Directors although there was some overlap with CFS.

[33] She was directed to the letter from Mr. Mozvik dated August 27, 2007 purporting to give notice. She agreed that she did not respond nor was there any communication to CBUSU; she assumed the petition would follow. As for Mr. Mozvik's letter of October 1, 2007, she confirmed that CFS did not receive it and that it was actually received from someone at the Red Cross and that this was five and a half months before the scheduled referendum. In any event, she agreed that CFS had the petition by November 23, 2008; some three and a half months before the referendum.

[34] She agreed that CBUSU made requests for CFS to participate. In a letter dated October 10, 2007, Mr. Mozvik repeated that invitation and warned that if CFS did not participate,

CBUSU would take the position that CFS would waive the enforcement of any and all rights under the Bylaws. Ms. Watson maintained that CFS could not recognize the process initiated by CBUSU and would not participate.

[35] As to the payment of fees, CFS took the position that when fees are collected by the institution, they are due and owing. CFS had agreed to the payment on the installment plan in January 2008. She agreed the amounts due to CFS-NS were remitted directly to them and not to CFS.

[36] She repeated her position with respect to the correspondence. CFS knew on August 27, 2007 that CBUSU intended to go ahead with a referendum on March 11, 12 and 13 of 2008. April 10 and April 11 were the last possible dates for a referendum. Ms. Watson conceded that the August 27, 2007 letter was received within the six month period before the vote. She did not accept that as notice since there was no accompanying petition from the individual members requesting a vote. Although she did not let Mr. Mozvik know of CFS' position with regard to the petition, she said that Mr. Mozvik had to know about the need for the petition since he was a lawyer and CBUSU had the Bylaws, and CFS was expecting the petition was to follow.

Evidence of the Defendants

Ian Walker Lindsay

[37] He was President of the CBUSU at the relevant times. He provided an overview of the structure of the CBUSU in 2007-2008. The Executive was comprised of himself as President, Jill McPherson as Vice-President, Brendon Ferguson as Director of Communication and Ryan Dubois as Director of Finance. There was paid staff at CBUSU; the Office Administrator (Don MacDougall), Finance Officer (Debbie Macintyre), and one other full time person. There were part-time employees (including Myles Carter).

[38] He discussed the Students' Representative Council ("SRC") which consisted of 19 members and is the underlying official student body. The CBUSU reports to the SRC which had to approve any actions taken by the Executive.

[39] Financial decisions were made by the finance committee which was comprised of Ms. McIntyre, himself and Ryan Dubois. CBUSU is funded through student union fees collected as part of tuition fees and it also receives government grants and funds from activities on campus.

[40] Mr. Lindsay became union president (2007-08) for a period of one year. During his five years at CBU, CBUSU was a member of CFS. He understood that the individual members of the CFS were the students at the university and that the voting member was the students' union.

[41] He had come to believe that CBUSU should no longer be a member of CFS for three reasons: 1) Ideologically, he believed CFS' tactics were out of date; 2) other and smaller Nova Scotia Universities were not members of CFS; 3) services that CFS provided could be done locally and cheaper. He believed that CBU should be aligned with ANSSA (Alliance of Nova Scotia Students' Association). In his view, the majority of students at CBU were not knowledgeable about the CFS. He considered it his responsibility to look into this further and let the students decide.

[42] The Executive discussed it and decided to go to the CFS Annual General Meeting in May 2007 to get a better understanding. After attending the AGM, the Executive decided that CBUSU should no longer be a member and decided to begin the referendum procedure. Those discussions had commenced early in 2007, before the AGM. An emergency meeting of the SRC meeting was convened on August 10, 2007. He made a presentation and the minutes read that he:

Informed the group that the Executive Committee of the Student's Union had spent the past few months discussing CBU's involvement with CFS. He commented that the Executive feel that there is a need to hold a referendum to let the students decide if they want to be members or defederate from CFS. He presented the group with the power point presentation on CFS which gave the committee an opportunity to see what CFS offers its members. The group viewed the presentation.

[43] A motion was put to the SRC to hold a referendum in March 2008 and the motion was carried. CBUSU sought legal advice as to how to start the defederation process since they learned from another student union that this could end up in court.

[44] At or about this time, CBUSU retained Mr. Mozvik. In September 2007, the Executive began to gather signatures in a petition to defederate from CFS. Mr. Mozvik drafted the language of the petition. The proposed referendum dates were selected so as to not interfere with presidential elections that are held in mid-February. The Executive wanted to comply with their own internal *Elections Act* and not conduct any vote after March 15 due to the exam schedule; giving students the best time to vote. He believed that these dates would comply with the six months' notice. The election dates required approval of the SRC which was obtained at another emergency meeting held on August 24, 2007.

[45] The petition signatures were collected during the first week of school, September 10-15. Students generally arrive on campus during that week. The majority of the signatures were collected by members of the Executive. Although CFS information was available at the registration desk, there was no CFS representative present. Members of the Executive informed students that it would be in their best interests to have a referendum. About 500 signatures were collected.

[46] Mr. Lindsay confirmed that the August 27, 2007 letter from Mr. Mozvik was the first notice from anyone at CBUSU advising that it intended to hold a referendum. He was taken to CFS' offer to hold a referendum in September 2008 and replied that the Executive wanted the referendum to be held during its term.

[47] The referendum proceeded on March 11, 12 and 13, 2008. Since CFS decided not to participate, CBUSU established a yes/no side for the defederation process. Myles Carter was appointed to represent the YES side; (to remain with CFS). Stephen Moore represented the NO side to defederate. They were selected because their positions on this issue were known to the Executive. Aaron Fisher was appointed as the Chief Returning Officer since he occupied that position for the student elections in February and was familiar with the operation of CBU's *Elections Act*. The Yes and No sides ran campaigns. There was a debate in the cafeteria. There was a campaign where representatives went to classrooms to present their case. This took place one week prior to the vote.

[48] Under their *Elections Act*, a 20% quorum was required. At another meeting of the SRC held on November 5, 2007, that quorum was changed to 6%. That motion was made by Mr. Lindsay and Ms. McPherson. Six percent was selected because the CFS Bylaws required 5%, and the Executive wanted to make sure the quorum remained higher than the CFS requirement.

[49] Mr. Lindsay reviewed some of the details of the campaign. Tony Mozvik prepared the ballot question which was approved by SRC. As already noted, 92% of the students voted in favour of leaving CFS. CFS was advised. His term as president of CBUSU ended on April 30, 2008.

[50] In cross-examination, Mr. Lindsay confirmed his awareness of the distinction between individual members and voting members of the CFS. He knew that representatives of CBUSU played an active role in CFS over time and attended meetings. He himself attended annual general meetings.

[51] As president, he would be familiar with the necessity of paying fees, although he trusted the full time staff (Debbie McIntyre) with the payment of these. He was aware of the amounts and how they were allocated and that a portion of these fees went to the provincial component. At the May 2007 Annual General Meeting that he attended, the structure of those fees was continued for the next year. He conceded that as result of membership in CFS, CBUSU was a member of CFS-NS as well. Since 2000, CBUSU was paying one segment of its fees to the national CFS element, and another segment to CFS-NS.

[52] As to the categories of membership, he was aware of responsibilities of voting members. One of these was to support the objectives of the CFS and abide by its Bylaws. He disagreed with the suggestion that moving to defederate was not being supportive of the objectives of the CFS but then changed his answer and stated that so long as CBUSU complied with the Bylaws with respect to defederating, that would be supportive of the CFS' objectives.

[53] He was then taken to Section 3(a) (i) which provides that individual members will have sole authority to make decisions through referendum. He agreed that decisions on membership fall to individual members of CFS and that he was aware of that in May 2007. He agreed that the words "to initiate" means to begin and that initiation of a referendum on defederation is

something left to the individual member as set out in the Bylaws. He agreed that Section 3(b) of the Bylaws granted no such similar rights to the voting member.

[54] He was taken to the Student Representative Council Emergency Meeting of August 10, 2007 where there was only one issue on the agenda, namely the CFS referendum. He was evasive in his explanation for the emergency meeting. He was unclear about the need for a petition. He said that anything he knew about that came from what his lawyer had told him. He knew that SRC approval was required to go ahead.

[55] While the Executive attended the SRC meeting as a voting member, he claimed that the SRC was representing the individual members. The motion was moved by himself and by another member of the Executive (Jill McPherson).

[56] The SRC did not set out any dates for a referendum. He was taken to the requirements of Notice, found in Section 6 of the Bylaws and was asked if he had turned his mind to those provisions when the SRC met on August 10, 2007. He conceded that he did not understand the Bylaws and that is why the Executive sought legal advice. He admitted that the Executive must have missed that part of the Bylaw. The Executive wanted the vote to take place that academic year.

[57] On August 24, 2007, at another emergency SRC meeting, the only item of business was referendum dates so that the CFS could be informed. He maintained that this meeting could not be deferred to September. While he tried to argue that it was his goal to give the students a choice, he ultimately conceded that it was the objective of his presidency to defederate from the CFS and he considered it his legacy.

[58] In his Year End report 2007-08, the CFS is the first item listed and he wrote:

If there was one thing I would like to be remembered for it is the President who got rid of CFS. This took a good majority of my time as you might have noticed in every report I had dealing with the CFS. The referendum took place at the beginning of March and the majority of March was spent on campaigning and on the aftermath. In early September I was able to send the de federating letter in which gave CBU a lot of press and then the referendum we had another media circuit with even MacLean's doing a story on it. Outside of dealing with the

media, had several meetings with the lawyer to ensure we did the process correctly and tried dealing with CFS. CFS eventually ignored me to the point we had to ensure a student did the NO for leaving

In the end I was successful in the executive's goal of defederating from CFS. CFS has claimed that this is only an opinion poll but that is false and CBU at the moment is an independent school. I will most likely be called back in 10 years if CFS ever takes us to court however I have documented every step the union has done and received the legal advice we will have no problems if CFS ever tries to challenge us.

[59] As it turns out, he correctly foresaw that he would be in court one day defending his actions. He refused to concede that he had not been impartial as president of CBUSU. While he was relying on legal advice, he has not produced any documents other than the letters sent by Mr. Mozvik. As for the petition, he conceded that it was members of the Executive who gathered signatures but he denied that this was part of a plan. He claimed that the pros and cons of defederating were put to the students before they signed the petition, although he admits telling students that the fees paid to CFS could be better used elsewhere.

[60] While the petition had been gathered in early September, it was not sent to the CFS until October 1, 2007 because other things were going on and it was a busy time of year. He saw CFS' letter of October 12, 2007 to Tony Mozvik and he was aware that CFS did not accept the notice as being valid. CFS' letter of January 31, 2008 was clear that it would not recognize the results of the referendum and would not waive any of its rights under the Constitution and the Bylaws. CBUSU did not discuss the payment of outstanding fees with Mr. Mozvik and as far he knew, Debbie McIntyre had no contact with Mr. Mozvik.

[61] He acknowledged that CBUSU rejected the CFS offer to schedule a referendum after September 15, 2008, as the Executive wanted to do it during its term. When the prospect of a defederation was first raised, he agreed that CBUSU was operating pursuant to the CFS Bylaws and not the *Elections Act*. He agreed that the referendum questions would put an end to CBUSU's relationship with CFS, CFSS and CFS-NS and that no fees would then be paid to all three of these organizations.

[62] He maintained that CBUSU wanted both sides of the issue to be aired. There was no committee established in accordance with Section 6(f) of the Bylaws. This task was delegated to Mr. Fisher, the Chief Returning Officer. At the SRC meeting of March 3, 2008, the representatives of each side were identified but the minutes disclose that Mr. Lindsay would not be hiding during this referendum. The minutes state:

I stated before someone stated I shouldn't be involved because I'm student president, I feel that is wrong, I will be voicing my concerns throughout this referendum... I will not be hiding during this referendum, I will be going to classes and speaking on this issue.

[63] He said there was a pamphlet for the "NO" side but none could be located. He believed that they had posters and a cake. Myles Carter was the individual responsible for the "YES" side. He conceded that Mr. Carter was employed by CBUSU and that he answered either to himself or to Don McDougall. He agreed that the referendum did not result in any decrease in the amounts that CBUSU was charged for their annual student fees. The money, once allocated to CFS, was now allocated to other purposes.

[64] In answer to my questions, he acknowledged that at none of the meetings of the SRC held on November 5, 2007, December 5, 2007, or the emergency meetings on January 18, 2008, February 25, 2008 and March 3, 2008, did he ever advise SRC that CFS had retained its own counsel and would not recognize the results of the referendum even though he knew this sometime in October 2007. He conceded that he needed the change to the 20% quorum in the *CBU Elections Act* for the upcoming referendum on the defederation. My review of the minutes reveals that he never appears to have informed the SRC at any time of CFS's offer to hold a referendum vote on September 15, 2008.

Deborah McIntyre

[65] She is the Financial Officer of the CBUSU and she reports to the VP of Finance and works closely with the CBUSU Executive. She went through the programs and services offered by the CBUSU and described how these were funded through student fees and profits from the convenience store and the pub on campus.

[66] In 2007-08, the student fees were \$175 for a full time student. The CBUSU sets the fee sometime in March of each year. Students pay these fees when they register at CBU; they are billed at that time and paid to the university. The CBU collects the fees and the CBUSU is entitled to a monthly draw. A final reconciliation is done in January/February of the new calendar year when the full time equivalents are known.

[67] Fees are paid by CBUSU to CFS in accordance with a payment schedule previously agreed to. Each year, she prepared a memo with the proposed payment schedule. This continued until CBUSU held the referendum to leave the CFS. She was never contacted by CFS and told that the fees had to be paid up before the referendum.

[68] She followed the same practice in submitting fees to CFS-NS. CBUSU has continued to receive notices from CFS regarding fees after the referendum and no payments have been made to CFS or to CFSNS.

[69] She claimed that CBUSU did not advertise the Travel Cuts program which had no physical location in Sydney, N.S. She was vaguely familiar with the SWAP program, but was not aware of any students who availed themselves of it after the 2007-08 year. She was not aware of any students using the Student Saver cards after 2007-2008. She said that CBUSU did not receive student handbooks after 2007-08. As for the National Student Health Network, she testified that CBU students were members early on, but as those rates increased, they got into a different health plan prior to the referendum. She was unaware of the CFS ethical purchasing network. CBUSU did not represent itself as a member of CFS after 2007-2008.

[70] As for ISIC cards, she said that once the referendum was over, the equipment was packed up and returned to CFS. CBUSU did not collect any amounts for CFS after the referendum. CBUSU then joined another association, ANSA who has since changed its name to Students Nova Scotia.

[71] In cross-examination, she confirmed that she did not participate in the referendum process in March 2008. She repeated that from 2000-2008, the CBUSU paid its CFS membership fee on an annual basis; both national and provincial components. She authored the document setting out the installment plan for payment of fees proposed by CBUSU and agreed to by CFS.

[72] She was not aware of any communication from CFS that the acceptance of these installment payments amounted to any waiver of rights under the Bylaws. She was taken to her memo of January 14, 2008 where she used the words “amount due and owing” and acknowledged that the total amount for the year was owed at that time. When she made the proposal for payment by installments in January 2008.

[73] She became aware of the referendum in August 2007 when the “notice” letter was sent to CFS. She conceded that she had not read the Bylaws prior to January 2008 or until this litigation was commenced. She was aware of CFS’ letter of January 31, 2008 to Tony Mozvik that stated that it did not waive any rights pursuant to its Bylaws. She was not advised by Mr. Lindsay that there were any issues with the referendum.

[74] She acknowledged receiving continuing notices for outstanding fees from CFS to the CBUSU and that CFS saw CBUSU as a member of its organization. After the referendum was held, when students came up to the counter to seek out particular services that were CFS related, they were told that CBUSU was no longer a member of CFS. Students were not told that CFS still considered them as members.

Aaron Alan Fisher

[75] He was a student at CBU between 2000 and 2008. He became involved with CBUSU by first working the local student newspaper and then later became the Chief Returning Officer (“CRO”). He was appointed at a SRC meeting on January 18, 2008. It was a paid position. He was guided by the *Elections Act*. In performing his duties, two other students joined him in forming an elections committee appointed by the SRC.

[76] He was the CRO for the referendum. There were representatives for each side. He would have reviewed the provisions of the *Elections Act* with them. The CFS was not involved. He discussed the campaign and the debates. He was responsible for approving campaign materials. A “Vote NO” (for defederating) brochure was identified and he approved it.

[77] He was unaware of a brochure for the “YES” side but said that there were definitely posters at the very least. He did not receive any complaints about the campaign. In his personal view, the referendum was as fair as possible and in compliance with the *Elections Act*.

[78] In cross-examination, he was referred to the meeting where he was appointed on January 18, 2008. He had been aware that a referendum would be scheduled for some time since he was active in the CBUSU.

[79] He was taken to the preamble of the *Elections Act* that provides that it shall not override the Bylaws of the CBUSU. Under the *Act*, all elections were to be scheduled by the Elections Committee and he acknowledged that the referendum was not scheduled by the Elections Committee but by the Executive of the CBUSU. He made no inquiries as to whether the provisions of the CFS Bylaws or the *Elections Act* governed the referendum. He assumed the *Elections Act* governed. He did not review the Bylaws of the CFS. As for the *Elections Act*, this required that a letter of intent be presented before a referendum but no such letter has been produced.

[80] He knew that Myles Carter, the representative of the “NO” side, was an employee of the CBUSU and that he reported to management and to the president of the CBUSU. Even though he knew the president had declared himself to be in favour of defederating, he did not have any concerns as he saw no overt pressure on Mr. Carter. He had a “general feeling” that without Mr. Carter, there would have been no representative from the “NO” side.

[81] He was taken to the CFS Bylaws which provided for no less than a two week campaign prior to a referendum and he conceded that he did not consider that. He could only identify one piece of campaign literature that had been produced; he was unsure what the other side might have produced.

[82] When he was running this referendum, the CBUSU did not advise him that the legitimacy of the referendum was in issue, although he was aware that CFS did not sanction it. He did not know that the CFS had reserved all of its rights under the Bylaws. Even though he knew there was a controversy between CFS and CBUSU, he did not preserve any materials and he ordered the destruction of the ballots.

Position of the Plaintiff

[83] The Plaintiff relies on the Bylaws that governed the efforts of the CBUSU to defederate and emphasizes the two categories of membership; the individual members and the voting members, being the local student association.

[84] CFS argues that the rights to control membership in the CFS are exclusive to the individual members. This was confirmed by Mr. Lindsay in his cross-examination. The CFS maintains that four considerations are critical to the Court's analysis:

- (1) The power to initiate a defederating referendum rests solely with the individual members and not with the voting members who have a positive obligation to support the CFS and abide by its Bylaws;
- (2) Section 3 (a) (iii) uses the word "to initiate" in connection with the sole authority granted to the individual members. CFS relies on the dictionary meaning of the word "initiate" to claim that these words are plain and unambiguous and mean "to begin". The petition has to be the starting point in the defederating process. It would not make practical sense to make the Notice the starting point if there was no petition in existence and wish of the individual members was not yet known;
- (3) The Bylaw does not simply contemplate the gathering of a petition; it must be submitted to the CFS as part of the initiation of the defederation process;
- (4) Section 3 (a) (iii) refers to section 7(section 6) which provides that it individual members must signal their interest in defederating through the mechanism of a petition. It is a necessary pre-condition to the subsequent aspects of the referendum process.

[85] Section 6 (a) requires a petition signed by no less than 10% of the students and sent to the CFS. It indicates that the petition initiates the defederation process. CFS maintains that Mr. Mozvik's letter of August 27, 2007 put "the cart before the horse."

[86] CFS submits that the evidence makes it clear that the Executive of the CBUSU had decided early in the summer of 2007 to defederate from CFS and that Mr. Lindsay's statements that he simply wanted to let the students decide are not believable. The Executive also intended to have the defederation process completed within the scope of its term. As a result, the CFS maintains that CBUSU disregarded the CFS Bylaws and rejected CFS' offer to have a referendum in September 2008.

[87] Mr Lindsay knew of the need for a petition once the notice was given, but even then, he delayed sending it for two weeks because September is a busy time (the same reason advanced by Ms. Watson for not immediately responding to Mr. Mozvik's first letter). By September 14, CBUSU did collect the signatures on the petition, but it was then out of time in order to give 6 months' notice of the March 11, 12 and 13 dates for the referendum.

[88] CFS refers to the Bylaws and to case law where it has been held that the Constitution and Bylaws create binding contractual obligations between the CFS and CBUSU; a fact that was admitted. While the Defendants suggested in opening remarks that the Court has an ability to intervene even if there has been a violation of the Bylaws, CFS submits that the courts can only do so in very limited circumstances. CFS maintains that while the CBUSU may have not been enamored with the Bylaws of the CFS, they were bound to them.

[89] CFS submits that the court must uphold the Constitution and Bylaws as a matter of good governance. The Bylaws and their amendments come from voting members across Canada; a failure to enforce them would disregard and diminish the importance of that process.

[90] The CFS claims it acted in good faith and offered the CBUSU alternatives that were rejected. There was no evidence that the CFS was avoiding the situation; that it was playing games, or dodging and weaving as was suggested in one of the letters sent by Mr. Mozvik. If there is evidence of any bad faith, CFS argues that it rests with the Executive of the CBUSU which was determined to proceed with its plan. More particularly, the Executive failed to report the concerns of CFS to the SRC or inform it about the considerable correspondence with the CBUSU and its counsel. That failure had an impact on the decisions made by the SRC.

[91] CFS further argues the conduct of the actual referendum campaign was circumspect. The Executive was biased. It hired an employee of the CBUSU who reported to Mr. Lindsay as representative of the "YES" side. Campaign materials were destroyed notwithstanding the issues surrounding the vote. There was no examination or any understanding by the CRO of the requirements of the CFS Bylaws and a single week of campaigning instead of the two as required by Section 6 (c).

[92] Furthermore, CFS maintains that outstanding fees had to be paid in full prior to the referendum as required by section 6 (g). CFS acknowledges the various memoranda that set out the payment of fees by installments and but counters that the total amounts were considered “due and owing” by the CBUSU.

[93] Bylaw 1, section 2 (a) (iv) refers to a binding contract to collect and remit full membership fees. Ms. Watson testified that payment by installment was an arrangement that was generally acceptable by the CFS when there were no other issues. There was no evidence that the CBUSU sought to be excused from the effects of section 6 or that CFs waived that requirement.

[94] CFS cites case law and maintains that it did not waive its rights under section 6 (g) and that its correspondence made that clear. CBUSU did not review the Bylaws to determine how the conduct of a referendum might impact the payment of membership fees until after this litigation had been commenced.

[95] Since CBUSU made reference to estoppel in its opening remarks, CFS argues that there are two forms of estoppel; estoppel by convention and estoppel by representation. CFS maintains that neither of these scenarios applies in this case.

[96] As for the damages chart, (Exhibit 4 & 4A) and CBUSU’s argument that CFS can only collect the amounts payable to CFS only and not CFS-S and CFS-NS, the Plaintiff says that the full amount is owing for the following seven reasons:

1. Bylaw 1, section 2 (a) (vi) provides that “Notwithstanding Section 2 (a) (vii), the fees for full member local associations shall be”: ... made up of three components, the CFS element, the CFS-S element and the provincial component. This was duly and properly acknowledged by both Mr. Lindsay and Ms. McIntyre.
2. In 2000, the ballot to join the CFS asked the individual members whether they wished to be a member of the CFS, the CFSS and provincial component.
3. The Bylaws establish automatic membership in the provincial component as becoming a member of the CFS.

4. Section 2 (a) (ii) provides that a written application for full membership submitted by an eligible local student association will be considered as a binding contract to accept the rights and responsibilities of full membership in the CFS, the CFS-S and the provincial component. The CFS maintains that this shows the integrated structure of the membership.
5. In the period 2000 to 2008, the CBUSU paid CFS membership fees comprised of three components without objection or complaint.
6. As Mr. Lindsay indicated in his evidence, that in contemplating the referendum, it was not his intention that the students of CBUSU would continue to pay fees to CFS-S and CFS-NS even if those students terminated their relationship with CFS. CFS says this demonstrates how the membership fee for CFS is calculated.
7. CFS relies on the evidence relating to what services that continued to be available to individual students but who were deprived from accessing these because CBUSU did not inform the student population that these services were available.

[97] Further, CFS relies on the group of companies' doctrine to say that CBUSU cannot avoid liability for the losses suffered by CFS-S and CFS-NS.

Position of the Defendant

[98] CBUSU maintains it complied with the Bylaws. These require a notice and a petition and Section 6 does not state when the petition must be sent.

[99] The notice must meet several requirements as set out in section 6 (b) and these do not state that the petition must be included with the notice. If this were necessary, the Bylaw should and could have stated this. The Bylaw is also silent on the timeline for the delivery of the petition even though it spells out timelines for other matters relating to the defederation process.

[100] CBUSU submits that on a plain reading of section 6, since there is no timeline for the petition and only with respect to the notice, the notice can be the first step in the defederation process and the petition can follow. The word "initiate" does not change that interpretation.

[101] While section 3(a) (iii) does speak about the rights of individual members, and that the petition is a step that can only be taken by the students, CBUSU argues that the notice step can be taken by the voting member as it was in this case. There is nothing in section 6 that spells this

out. CBUSU submits that the petition and the notice are separate steps. The first step taken by the individual members by petition seeking a referendum and that the voting member can still provide the notice.

[102] CBUSU argues that the word “initiate” must be examined in the context of when an organization seeks to join the CFS. First, it joins as a prospective member pursuant to section 2(b) (i). The first step is a motion taken by the directors of a student association and not the individual students. CBUSU had to acknowledge that situation is different when defederation process begins since the local association has by then acquired the status of a voting member.

[103] CBUSU argues that it was necessary to have the referendum in the same academic year, and cites an endorsement of Justice Snowie in *University of Guelph Central Student Association v. CFS and CFS-Ontario*, Court File No. 109/10 where the Court commented about the risk of non-compensable prejudice if the vote did not occur in that academic year. If students sign the petition, CBUSU argues that they will also want to vote within that same academic year. When the blackout periods of the Bylaws are taken into consideration, if there were a requirement to send the petition along with the notice, then the last date that those documents could be provided would have been September 15th. This would only allow five to seven days to collect the signatures; yet CBUSU managed to do just that in this case. I also note that the blackout period specified in the Bylaw is April 15 and this would have allowed sufficient time for a referendum at a later date in March or in early April.

[104] CBUSU maintains that it is unreasonable to have the petition proceed or accompany the notice as it provides a very narrow window for students to collect the signatures. Nevertheless, these Bylaws were developed by the member student associations and there is no requirement that the referendum has to be held in the same academic year as the petition.

[105] CBUSU still submits that the petition can follow the notice and that CFS’ own interpretation is consistent with CBUSU’s interpretation. It cites CFS’ correspondence of October 12 stating that the notice was deficient since there was no petition. On February 5, 2008, CFS acknowledged receiving that petition for the first time, and stated that it will schedule

a referendum without having a new notice. Ms. Watson acknowledged that a petition could follow; and accordingly, CBUSU argues that the notice could initiate the process.

[106] CBUSU also drew attention to the Bylaws that came in effect the following year, where section 6 was amended. The notice requirement was removed and there is now a specific timeline tied to the petition. CBUSU says the Court can consider that change. Since that specific change was not put to Ms. Watson in cross-examination, I decline to draw any conclusions from that change.

[107] CBUSU denies it was acting in bad faith and that it was the other way around. CBUSU refers to the preamble to the Bylaws of the CFS, particularly the preamble where it refers to organizing students “on a cooperative basis.” The Statement of purpose speaks of promoting and supporting “the interests and activities of democratic student organisations.” CBUSU cites Ms. Watson’s six week delay in responding to Mr. Mozvik’s letter of August 27. CFS knew CBUSU intended to have a vote in March yet CFS did not communicate with CBUSU until October 12, when it was too late to have a referendum on the planned dates.

[108] As for the requirement of payment of fees before the vote, CBUSU says that no fees were outstanding since CFS had agreed to payment by installments. CBUSU cites the *Lakeside Colony of Hutterian Brethren v. Hofer* [1992] 3 S.C.R. 165 which discusses the significance of custom in the interpretation of a contract. CBUSU submits that its practice of paying its fees must be considered an implied term of the contract and that the fees were not outstanding at the relevant time. Given that the final reconciliation could not take place until February 29, no one could know what the final amounts would be outstanding six weeks before the vote. If this was not acceptable, then CFS should have put CBUSU on notice that the fees were due. CFS never let CBUSU know that there was a problem with the fees until the litigation commenced.

[109] CBUSU’s position is that it did comply with the petition requirements and the fee requirements set out in the Bylaws, and even if it did not, this was not fatal to the process and the Court can recognize the democratic will expressed by the students in the vote and the importance

of that vote. It cites *University of Victoria Students' Society v. Canadian Federation of Students*, 2011 BCSC 122; 2011 CarswellBC 133.¹

[110] CBUSU maintains that its referendum was fair. There was a petition signed by 500 students. The petition had a very clear question. The Ballot had a clear question. The required quorum for the referendum as set out in CFS Bylaws was met. People had the opportunity to vote. The results were clear - CFS refused to participate.

Analysis and Conclusion

[111] I am satisfied on all of the evidence before me that the referendum held by CBUSU was invalid in that it did not comply with the then prevailing Bylaws and that the vote on defederation cannot be recognized on any other basis. Only the individual members of the CBUSU could initiate the process of defederation by way of petition. In this case, it is clear that the process was initiated by the voting member, the Executive of the CBUSU.

[112] The CFS is a Canadian corporation without share capital, incorporated under Part II of the *Canada Corporations Act*. As the Divisional Court held in *Chu v. Scarborough Hospital Corporation*, 2007 CanLII 33757 (ON SCDC) at para 22:

The courts do not generally interfere with determinations made by a non-share capital corporation provided the corporation does not demonstrate bad faith or act contrary to the rules of natural justice.

[113] Courts in Ontario and elsewhere have consistently treated the federating and defederating rules of the CFS and the membership rules about the student associations as enforceable against members of the organizations when members seek to circumvent the membership rules.²

¹ I find that the Decision is not that helpful in that the process for defederation in that case was in fact initiated by a petition from a student; the issue in that case was the validity of a second petition.

² *Canadian Federation of Students (Ontario) v Students Federation of the University of Ottawa*, [1995] O.J. No. 4774 (Ont. Ct (Gen. Div)) at paras 42-46; *Association of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students Union and Erindale Part-Time undergraduate Students Association*, 2008 CanLII 43054 (ON SC) at paras 16-18; *Byers v. Cariboo College Student Society*, 2006 BCSC 603; 147 A.C.W.S. (3d) 1000 at para 10.

[114] Specifically, Ontario courts have found that when a dispute arises with respect to local student association's membership in the CFS, the Bylaws govern the dispute and determine the terms under which any referendum may be held or termination of membership granted.³

[115] The CFS and its voting member, the CBUSU were regulated by the Bylaws in force at that time. The courts have consistently characterized the relationship between a corporation without share capital and its members as contractual in nature.⁴ As admitted in this case, the Bylaws explicitly incorporate the understanding of the contractual relationship into Bylaw 1 which provides:

A written application for full membership submitted by an eligible local student association will be considered as a binding contract to accept the rights and responsibility of full membership in the Canadian Federation of Students, the Canadian Federation of Student-Services, and the applicable provincial component.

[116] Modern principles of contractual interpretation require the contracts be interpreted in a “practical common sense” way and that particular words and provisions must be read in the context of the whole contract, its purposes, and in harmony with the commercial context. In *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53; 2014 2 S.C.R. 633 at paras. 47 and 48, the Supreme Court of Canada has placed primary importance on the contextual interpretation of contracts, explaining “that” the key principle that individual words and provisions of the contract must not be read in isolation but should be considered in harmony with the rest of the contract and in the light of its purposes and commercial context.” Ontario courts similarly hold that the interpretation of the CFS Bylaws must have regard to the total context of each provision of the Bylaws.⁵

[117] Section 3(a) (i) of the Bylaws grants sole decision-making authority to the individual members of the Federation belonging to a member local association regarding all questions of

³ *Association of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students Union and Erindale Part-Time undergraduates Students Association* 2008 CanLII 43054 (ON SC) at paras 16-18 citing *Canadian Federation of Students (Ontario) v. Students Federation of the University of Ottawa*

⁴ *London Humane Society (Re)*, 2010 ONSC 5775; 194 A.C.W.S. (3d) 1042 at para 16.

⁵ *Canadian Federation of Students (Ontario) v. Students Federation of the University of Ottawa*, [1995] O.J. No. 4774 (Ont Ct (Gen Div)) at paras 42-46.

membership in the CFS. This sole authority is exercised through the conduct of referenda among individual members. The Bylaws and Constitution of the CFS clearly separates and identifies the rights and responsibilities of two classes of members.

[118] Section 3(a) (iii) stipulates that this sole authority to initiate a referendum to defederate with the CFS is given to the individual members by means of the submission of a petition to the CFS National Executive signed by not less than 10% of the individual members of the CFS in the member local association calling for the referendum. (emphasis mine)

[119] When CBUSU purported to give notice on August 27, 2007, that process was initiated by the voting member and was not accompanied by a petition signed by at least 10% of the individual members supporting the defederation referendum as required by sections 3(a) (iii) and 6(a) of Bylaw 1; the process of collecting the names for petition had not yet occurred. Section 6(a) refers to the petition as the first step and it precedes section 6 (b) which deals with notice.

[120] Sections 3 and 6 must be read as a whole within the context and purpose of the Bylaw. The existence of a valid petition *initiating* a vote to defederate under section 3(a) (iii) is a precondition to the scheduling of and the notice of a vote on defederating under section 6. The notice triggers the organizational response of the CFS so it can help organize the campaign and administer the vote. The notice, in and of itself, is of no value without the petition. The CFS must be informed that the individual members want the issue of continued membership put to the students of the local association. The petition serves that purpose. No valid petition existed at the time the notice was provided rendering this notice invalid. At that time, the CBUSU had not even begun gathering signatures for petition to validly initiate a vote on defederating. The fact that the receipt of the petition could follow the receipt of notice as was admitted by Ms. Watson, does not change the fact that the petition initiates the process and the six month period can only be calculated from the date of the petition.

[121] The late delivery of the petition allegedly sent on October 1, 2007 precluded a referendum in March, 2008. A notice, including a petition, had to be delivered by registered mail to the head office of the CFS no less than six months prior to the vote as required by section 6 (b) of Bylaw 1.

[122] The evidence demonstrates that the defederating process was initiated and orchestrated by Mr. Lindsay and other members of the Executive of the CBUSU who decided in early 2007 on the course of action they wished to follow. His insistence that he simply wanted the students to vote and that he would be happy with any result is contradicted by the record before me. The members of the Executive triggered the emergency meetings of the SRC in the summer of 2007 to commence the process. They hired counsel as they correctly anticipated conflict with the CFS. More than once, Mr. Lindsay hid behind the shield of legal advice without ever producing that advice for trial. Once the members of the Executive acknowledged the importance of the petition, they hurriedly organized one for the very first week of classes. At this point in time, new students would have known very little about the issues and members of the Executive were largely responsible for collecting the signatures. In collecting those signatures, Mr. Lindsay did not hide his position that money sent to the CFS was better spent elsewhere.

[123] Once the petition was in place, the Executive of the CBUSU attended a meeting of the SRC and sought the change in the *Elections Act* to reduce the quorum from 20% to 6%. I conclude that the CBUSU knew that it could not comply with the CFS By-Laws and attempted to legitimize its vote by relying on the *CBU Elections Act*. That presented a dilemma in that the quorum of 20% under the *Elections Act* would have defeated its chances of success. I do not accept Mr. Lindsay's explanation that the quorum was changed in order to realign its self with the CFS bylaws or that there were past difficulties with the 20% quorum for the student elections.

[124] Even though the CBUSU purported to comply with their internal elections procedures, it was clear from the evidence of Mr. Fisher, that important sections of the *Elections Act* were ignored. All elections were to be scheduled by the Elections Committee and that the referendum was scheduled by the Executive of the CBUSU. The *Act* required that a letter of intent be presented before a referendum but no such letter has been produced.

[125] An employee of the CBUSU was appointed by the Executive to represent the "yes" side. Knowing that there were issues about the vote, the CRO destroyed all of the ballots and failed to retain any of the campaign materials that would have demonstrated any fairness to the process.

Only one “Yes” pamphlet was preserved. Fewer students voted in the referendum than signed the petition.

[126] I reject CBUSU’s alternative argument that the vote fairly reflected the wishes of the students at CBU even if it didn’t comply with the CFS Bylaws. CBUSU cites the case of *Mowat v. University of Saskatchewan Student’s Union*, 2006 SKQB 5621; 287 Sask.R. 166 at para. 45 where Justice Smith referred to case law that courts should hesitate to intervene with the will of an electorate. Smith, J. concludes that comment with this proviso: “unless an application shows, on its face, that con-compliance with election rules affected the ultimate result.” Here there was almost no compliance with the CFS’s Bylaws with respect to the campaign except for quorum and imperfect compliance with the *Elections Act*.

[127] Any doubts as to the Executive’s intention are removed by Mr. Lindsay’ year-end report. That candid document clearly reveals the Executive’s intention and its considerable efforts in organizing CBUSU’s departure from the CFS. Although he reassures everyone that he has obtained legal advice, he correctly anticipated this litigation.

The Outstanding Fees

[128] CBUSU failed to remit all applicable outstanding CFS fees before the referendum therefore not complying with section 6 (g) of Bylaw 1. CBUSU took the position that because CFS did not expressly notify it of the requirement to remit outstanding membership fees not less than six weeks prior to the referendum, that CFS had waived its rights.

[129] Waiver of a right under a contract occurs when one party takes steps which amount to foregoing reliance on some known right or defect of the other party. Waiver will only be found where the evidence demonstrates the party waiving the right had full knowledge of the rights and an unequivocal and conscious intention to abandon them.⁶ Even where waiver has been inferred from conduct, that conduct must give evidence of an unequivocal intention to abandon rights known to the party waiving the right. At no time did the CFS way any requirement that the outstanding fees be remitted prior to the referendum in accordance with the Bylaws. In fact, on

⁶ *Gu v. Tai Fong International Ltd.*, 2003 CanLII 20380 (Ont.C.A.) at para. 41

more than one occasion, the CFS expressed in writing that it did not waive any of its rights under the Bylaws. CBUSU cannot rely on custom or an implied term of the contract in this case as there never was any issue of a referendum on defederation in the past.

[130] Similarly, it cannot be said that there is any form of estoppel that might apply in this case. The CFS consistently insisted on the observance of the Bylaws and communicated this to the CBUSU and its correspondence. The CBUSU witnesses admitted to either having an unclear understanding the Bylaws or to having not read them even though they were aware that CFS was refusing to recognize the legitimacy of the referendum.

[131] There is no bad faith on the part of CFS. It relied on the contractual obligations set out in the Bylaws that govern the relationship between the parties. CBUSU's allegation that the CFS acted in bad faith because it did not respond to Mr. Mozvik's letter until it was too late to hold the referendum on their preferred dates is not credible. Even though the CBUSU had completed its petition by September 15, 2007, it did not send the petition to the CFS until October 1, 2007 since that was a busy time of year. Ironically, this is the same reason advanced by Ms. Watson for the CFS' failure to immediately respond to Mr. Mozvik's letter of August 27, 2007. Ms. Watson added that she expected the petition to follow.

[132] Furthermore, Ontario Courts have rejected the proposition that an alleged duty of good faith in the performance of the contract can be used to alter the express terms of the contract. If anything, the duty of good faith is employed by the courts to ensure that that the objectives of an agreement have been realized.⁷ Most recently, in *Bhasin v. Hrynew*, 2014 SCC 71 at para 33, the Supreme Court of Canada has held that "good faith contractual performance is a general organizing principle of the common law contract." This manifests itself in the duty to act honestly on the performance of contractual obligations.

[133] In this case, if there is any bad faith, it is one the part of the CBUSU's Executive that had a positive responsibility, as a Voting Member, to support the objectives of the Federation and to abide by all the provisions of the Bylaws. At no time did Mr. Lindsay tell the SRC that the CFS

⁷ *Transamerica Life Canada Inc. v. ING Canada Inc.*, 2003CanLII 9923 (Ont. CA) at para. 53

was contesting the validity of the referendum. Moreover, it appears from a review of the minutes that at no time did Mr. Lindsay inform the members of the SRC that the CFS would recognize a referendum vote if it took place in September 2008 without triggering any additional fees for the students of CBU. This was all part of a plan by the Executive to defederate from the CFS during its term of office. There was no evidence that this Executive was elected on a platform to defederate from the CFS nor was there any evidence of prejudice to the students if the vote were delayed to September except for a possible loss of publicity for Mr. Lindsay. This costly litigation could have been avoided by delaying a vote by a few months.

[134] Given that the March 2008 vote was invalid, the CBUSU continues to be a full member of the CFS to this date.

Damages

[135] When a local student association becomes a voting member of the CFS, section 2a states that the voting member must collect and remit full membership fees to the CFS on specific terms. Those fees included a component for the CFS, the CFS-S and the CFS-NS.

[136] On January 29, 2007, the CFS sent a notice to the CBUSU setting out the membership fees due for the academic year 2007 – 2008. Pursuant to the bylaws, each academic year since 2007 – 2008, the CFS fees have been increased by the Consumer Price Index rate. Those calculations, as set out in the damages chart, are not disputed.

[137] The ballot question to the students of CBU when it joined the CFS specifically asked whether they wish to join the CFS, the CFS – S and the CFS – NS. Similarly, the March 2008 referendum question referred to the CFS, the CFS-S and the CFS-NS and treated the answers to those questions as non-severable. Mr. Lindsay admitted that he did not expect the CBUSU to continue to remit fees to CFS-NS once there was a decision to defederate from the CFS.

[138] The parties to the contract are the local association and the “Federation”. The definitions section of the CFS Constitution and Bylaws in 2007 defined the “Federation” as” the Canadian Federation of Students/Fédération canadienne des étudiantes et étudiants.” That section also

defined the “provincial component” as “an organization within the Canadian Federation of students comprised of all member local associations within a particular province”.

[139] The CFS – S exists as an affiliate of the CFS and membership in the CFS – S is also automatic upon membership in the CFS. The CBUSU’s membership in the provincial component CFS – NS within the CFS also arose automatically by virtue of Bylaw VII which states: “a member local association automatically belongs to the particular provincial component corresponding to the province in which the said member is located.”

[140] Section 2 (a) (vi) required the CBUSU to collect and remit to the CFS all three elements of the membership fees and it did until 2008. As argued by the Plaintiff, even if the CFS-S and the CFS-NA can be said to be distinct, those fees are still claimable pursuant to the common law exception for commercial affairs of a group of companies and subject to an accounting in favour of the CFS-S and the CFS-NS. If the CFS is found not to have the right to claim in contract for all the fees owed under the Bylaws, then CBUSU will avoid liability for the loss suffered by the CFS-S and the CFS-NS: such claims would fall into a “black hole” if the contracting party were unable to recover damages on behalf of all parties.⁸

[141] The Alberta Court of Queen’s Bench has also identified the applicability of this exception in circumstances where the parties to the contract knew and intended that third parties benefit from the contract between them.⁹ CBUSU knew that in this case and did not treated the CFS, CFS-S- and CFS-NS as unseverable in it its ballot question,

[142] For these reasons, I award damages to the CFS for unpaid membership fees in the amount of \$293,159.13. I recognize that this award of damages reflects the passage of time from the date these proceedings were commenced to the date of trial. I am assured by counsel that this is not the result of any failure on the part of this court’s case management system. I am also aware that a further referendum will be required if this matter is not otherwise resolved.

⁸ *Dologonos v. Scotia Capital Inc.*, 2008 CanLII 30311 (Ont Sup.Ct) aff’d 2008 CarswellOnt 5417 (Div. CT.) at paras 26-32

⁹ *Polar Developments Ltd. v. Metropolitan Trust Company of Canada*, 2004 ABQB 721, at para. 229

[143] I adopt the comments of Justice Grauer in *Canadian Federation of Students v. Simon Fraser Student Society*, 2010 BCSC 1816 where he cites the remarks of by Justice Blair of that Court in a related proceeding at para 59:

Before leaving this matter, I feel obliged to adopt, with respect, the words of my brother Blair set out at paragraph 42 of his judgment:

The cost of this litigation, no matter which party or parties are successful, will be borne by post-secondary students enrolled at SFU, as well as by students at those institutions which are members of the CFS. Tuition, books, accommodation and meals already impose a significant burden on post-secondary students without requiring them to contribute further to the costs of resolving the parties' dispute. I would anticipate that the student fees paid to the SFSS and the CFS can be used more productively for programs directly benefiting those students rather than being consumed in more litigation.

[144] With that in mind, I ask the parties to make their brief submissions with respect to costs as follows. The successful Plaintiff will make cost submissions within 30 days of release of this decision; the Defendant shall have a further 30 days to respond.

Mr. Justice Robert N. Beaudoin

Released: July 10, 2015

CITATION: *Canadian Federation of Students/Fédération canadienne des étudiant(e)s v. Cape Breton University Students' Union*, 2015 ONSC 4093

COURT FILE NO.: 09-47252

DATE: 2015/07/10

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Canadian Federation of Students/Fédération canadienne
des étudiant(e)s

Plaintiff

– and –

Cape Breton University Students' Union

Defendant

DECISION

Beaudoin J.

Released: July 10, 2015