NO.: S082674
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SIMON FRASER STUDENT SOCIETY

PETITIONER

AND:

CANADIAN FEDERATION OF STUDENTS
CANADIAN FEDERATION OF STUDENTS – SERVICES
CANADIAN FEDERATION OF STUDENTS - BRITISH COLUMBIA COMPONENT

RESPONDENTS

NO. S090331
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN FEDERATION OF STUDENTS –
BRITISH COLUMBIA COMPONENT

PLAINTIFF

AND:

SIMON FRASER STUDENT SOCIETY

DEFENDANT

NO. S089144
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN FEDERATION OF STUDENTS and
CANADIAN FEDERATION OF STUDENTS – SERVICES

PLAINTIFFS

AND:

SIMON FRASER STUDENT SOCIETY

DEFENDANT

ARGUMENT OF THE CANADIAN FEDERATION OF STUDENTS -- BRITISH COLUMBIA COMPONENT

A. Introduction and Overview

1. These proceedings are principally concerned with the legal validity of a referendum vote conducted on March 18-20, 2008 (the "Referendum Vote") respecting the continued membership of the Simon Fraser Students Society ("SFSS") in the Canadian Federation of Students ("CFS"), the Canadian Federation of Students-Services ("CFS-S") and the Canadian Federation of Students - British Columbia Component ("CFS-BC") (collectively, the "CFS Entities").

2. At the outset of the hearing in January, the SFSS took the position before the Court that this case essentially "comes down to" the interpretation of the CFS bylaws. Its 145 page argument, however, appears to tell a very different story. It reveals that the SFSS' theory of the case, as it was first articulated in the petition, continues to turn largely on allegations of bad faith made against the CFS Entities in respect of the Referendum Oversight Committee ("ROC") process. We submit that the SFSS ultimately seeks to use the allegations of bad faith to somehow justify or "cure" its unilateral decision to abandon the ROC process, thereby breaching the bylaws of the CFS Entities. However, in oral argument, the SFSS did not press the issue of bad faith (despite its detailed written argument), presumably because of the inherent difficulties, addressed more fully below, with a Court attempting to address such an allegation in a summary hearing.

3. In fact, it is ultimately the decision of the SFSS to abandon the ROC process, taken on February 25, 2008, which lies at the heart of this case. In the words of Mr. Justice McEwan in *Canadian Federation of Students v. Kwantlen University College Student Association*, the SFSS, like its political ally the Kwantlen Student Association before it, came to a "fork in the road" in February of 2008, and, to its prejudice in these proceedings, chose the wrong path. Rather than coming to this Court to seek directions on how to conduct the referendum in a manner consistent with the bylaws of the CFS Entities, the SFSS took "matters into its own hands" and put itself "offside" the bylaws by choosing to run the referendum under its own Independent Electoral

Commission ("IEC") rather than the ROC. Accordingly, the referendum vote on March 18-20, 2008 had no "legal sanction" and is "irregular per se".

4. The SFSS appears to advance three technical arguments to suggest that there has in fact been no breach of the bylaws. First, it argues that the applicable bylaws are invalid. The CFS has fully answered the charge that its bylaws are invalid, and the CFS-BC adopts those submissions in their entirety. Moreover, no allegation of invalidity is even advanced against the applicable bylaws of the CFS-BC (one unparticularized allegation is raised in the SFSS' Statement of Defence (but not advanced in written or oral argument) in respect of the provision in the bylaws which requires a student society to remit CFS-BC fees to the end of the year in which a successful defederation referendum is held). This Court must therefore treat the bylaws of the CFS-BC as binding on the SFSS.

5. Second, the SFSS, in a relatively cursory fashion, raises two "interpretation" arguments to support the proposition that their February 25th decision did not amount to a breach of the bylaws. It first suggests that the bylaws are merely "directory", not "mandatory", and, second, that the IEC and ROC have "concurrent" jurisdiction in respect of CFS membership referenda. With respect, the principle of interpretation that distinguishes between public duties that are directory or mandatory has no application to a private society's bylaws, and both arguments are in any event entirely inconsistent with the plain language of the bylaws which this and other Courts have consistently confirmed apply to CFS membership referenda.

6. There is, therefore, little doubt that the bylaws were breached when the referendum vote was conducted without oversight by the ROC. That leaves the SFSS to rest on its allegations of bad faith on the part of the CFS Entities in connection with the ROC process. However, the CFS-BC respectfully submits that those allegations, even if they could be properly adjudicated in this summary hearing (which, for the reasons set out below, they cannot), are of little or no assistance to the SFSS in these proceedings. The SFSS has either abandoned or not seriously argued the original oppression and *Society Act* (s. 85) remedies which formed the basis of its

original petition. Similarly, it has not advanced any argument pertaining to the pleading in its respective Statements of Defence respecting breaches ("anticipatory" or otherwise) of express or implied contractual terms of good faith. Consequently, there is simply no legal basis upon which this Court can "cure" or otherwise ignore the breach of the bylaws by the SFSS on the basis of an allegation of bad faith, which leaves the Referendum Vote irregular and without legal sanction.

7. Simply put, had the SFSS come to this Court **before** the Referendum Vote with its allegations of bad faith, then it is at least possible that this Court could have provided a remedy to the SFSS in the form of directions on the proper conduct of the Referendum Vote. Now, however, having come to the Court after its unilateral decision to conduct the Referendum Vote in breach of the bylaws, there is, we submit, no remedy available to the SFSS.

8. In the final result, this Court should therefore declare that the Referendum Vote was unlawful and is not binding on the CFS Entities. The Petition should be dismissed and judgment granted in favour of the CFS Entities in the two actions, with damages to be assessed. A new vote will need to be held under the oversight of the ROC, and the CFS-BC respectfully requests that the Court remain seized of this matter, such that the parties can return to seek directions on the conduct of that vote if it is necessary to do so.

B. The SFSS Cannot Succeed in a Summary Hearing

9. As set out above, at the conclusion of this hearing, it is open to this Court to dismiss the petition and grant judgment in favour of the CFS Entities in the two actions on the basis of a finding that the Referendum Vote was conducted in contravention of the bylaws of the CFS Entities, and is therefore unlawful and not binding on the CFS Entities.

10. The facts underlying the alleged breach of the bylaws are not seriously in dispute, and the

arguments advanced by the SFSS to say that the bylaws were not breached (bylaw invalidity and interpretation) are relatively straightforward. Further, it is unnecessary to consider the allegations of bad faith raised by the SFSS (or the allegations of bad faith and an unfair vote raised by the CFS Entities) to dispose of these proceedings in favour of the CFS Entities.

11. If, however, this Court disagrees with the CFS Entities, and determines that the SFSS' allegations of bad faith, if proven, can allow this Court to legally sanction the Referendum Vote, then it becomes necessary to consider not only the allegations of bad faith advanced by the SFSS, but also the competing allegations of bad faith put forward by the CFS Entities, and the allegations that the Referendum Vote was not conducted in accordance with the principles of natural justice. For the reasons set out below, all of those allegations are unsuitable for disposition in a summary hearing.

1. The Matter is Not Appropriate to be heard by Petition Under Rule 10

12. The SFSS has now all but abandoned its original petition, in which it sought remedies under the oppression and unfair prejudice provisions of the *Company Act* (now the *Business Corporations Act*) and section 85 of the *Society Act*. In large part, that is because those remedies are simply unavailable against the CFS and CFS-S, both of whom are federal corporations. Given that the Referendum Vote was conducted under two sets of bylaws (those of the CFS/CFS-S and those of the CFS-BC), even if this Court were inclined to grant such remedies as against the CFS-BC, it still could not ultimately sanction the Referendum Vote because of the unavailability of relief against the CFS and CFS-S.

13. Nonetheless, out of an abundance of caution, we will briefly address the inappropriateness of dealing with the allegations raised by the SFSS by way of petition.

14. Pursuant to Rule 8(1) of the *Supreme Court Rules*, proceeding by way of writ of

summons is the residual proceeding for purposes of the rules. In contrast, Rule 10(1) sets out limited instances in which an application may be brought by petition. On its face, the Petition is not solely concerned with the construction of an enactment, will, contract or other document. Rather, orders are sought pursuant to sections 200 and 272 of the *Company Act* and section 85 of the *Society Act*.

Snyder v. Snyder, [1992] B.C.J. No. 939 (S.C.)

15. The Courts in this province have been clear that a Rule 10 petition is not appropriate where (a) serious questions of fact or law are raised; (b) a decision will not end the matter; and (c) the application involves not the interpretation but the enforcement of a contract. If there is a *bona fide* triable issue, then proceeding by way of petition is inappropriate. The burden lies on the petitioner to establish that it is "manifestly clear" that no such issues arise.

Three Star Investment Ltd. v. Narod Developments Ltd., [1981] B.C.J. No. 112 (B.C.S.C.) at paras. 5-12;
Konsap v. Grattan, [2003] B.C.J. No. 2875 (BCSC) at para. 40;
Bank of British Columbia v. Pickering, [1983] B.C.J. No. 2422 at para. 10
Montroyal Estates Ltd. v. DJCA Investments Ltd., [1984] B.C.J. No. 3189 (C.A) at paras. 11-12

16. Insofar as the true subject matter of the petition is the legal validity of the Referendum Vote, that is clearly a matter which gives rise to a number of complex legal and factual issues. At the heart of it is the allegation by the SFSS that the CFS Entities acted in bad faith in respect of the ROC process. In turn, the conduct of the SFSS is also in issue insofar as it wishes to avail itself of "just and equitable" relief under the *Company Act*. The good faith of the parties is also relevant to the granting of an equitable remedy under section 85 of the *Society Act*. These are all clearly *bona fide* triable issues.

17. There is disputed factual evidence on a number of matters, including, *inter alia*, the accuracy of campaign material, polling infractions, the confidentiality of the Oversight Committee process and whether the Kamloops students were afforded an opportunity to participate in the Referendum Vote.

18. A petition is clearly inappropriate to resolve such allegations.

2. The SFSS Cannot Succeed in its 18A Applications

19. As set out above, it is open to this Court to dispose of the SFSS' Rule 18A applications in favour of the CFS Entities on the basis that the Referendum Vote was carried out in a manner contrary to the bylaws and is therefore irregular and invalid. It is unnecessary to consider the various allegations of bad faith and unfairness in the vote, as the SFSS' allegations of bad faith do not give rise to a remedy after its unilateral decision to conduct the vote in a manner contrary to the bylaws.

20. For the SFSS to prevail on the applications, however, it will be necessary for the Court to consider all of the various allegations of bad faith and the allegations that the Referendum Vote was carried out in a manner contrary to the principles of natural justice. For the reasons set out below, it is inappropriate to dispose of such allegations in a summary trial application.

21. Since Chief Justice McEachern's seminal judgment in *Inspiration Management v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003 (C.A.), the courts in the is province have confirmed that there is a reluctance to resolve issues on a Rule 18A application where there are direct conflicts in affidavit evidence, where there may be admissible evidence to be tendered at a subsequent trial that is not admissible on the 18A application, and where there is a large volume of complex material. Mr. Justice Esson made these comments in *Cannaday v. Sun Peaks Resort Corp.*, [1998] B.C.J. No. 85 (B.C.C.A.) which are particularly apposite to the case at bar:

> One point which may properly be taken from this case is that the summary trial procedure is not well suited to factually complex cases. The difficulty, of course, is all the greater where not all parties are competently represented, and perhaps greater again where the application is brought by the defendant.
>
> All too often, proceedings such as these place an inordinate burden on the judge and in the end prove to be a waste of time and effort. In its place, Rule 18A is a useful procedure for permitting speedy and inexpensive resolution of cases, but it is doubtful that its place extends beyond cases which are relatively straightforward on their facts (at para. 53)

See also: *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, [2008] B.C.J. No. 1325 (B.C.S.C.) at paras. 13 and 40

22. The CFS-BC submits that there a number of factors present which should lead this Court to the conclusion that it cannot decide the Rule 18A applications in favour of the SFSS.

Volume of Material/Extensive Time Required

23. Voluminous material can in and of itself result in a determination that a matter is not suitable for disposition under Rule 18A.

Chu v. Chen, [2002] B.C.J. No. 1370 (S.C.); *Great Canadian Oil Change Ltd. v. Dynamic Ventures Corp.*, [2002] B.C.J. No. 2015 (S.C.)

24. There are 26 affidavits filed in the various proceedings, representing approximately 2500 pages of affidavit material. More than half of those affidavits have been filed by the SFSS. The vast majority of that material pertains directly to the allegations of bad faith and an unfair vote. In short, this case is an excellent example of the "masses of paper" described by Goepel J. in *Great Canadian Oil Change, supra.*

25. The outlines, written arguments and authorities already filed are substantial (with more likely to come in reply from the SFSS), and make clear that a host of complex legal and factual issues arise out of the allegations of bad faith and an unfair vote. To determine the matter in the SFSS' favour, the Court will need to review and consider all of the 300 pages of legal argument in its deliberations.

Course of Proceedings/No Discovery

26. This Court has consistently held that a summary trial applicant is unlikely to succeed in

the absence of complying with a demand for discovery of documents. More generally, this Court is reluctant to determine a Rule 18A application until the discovery process is complete.

> *Bank of British Columbia v. Anglo-American Cedar Products Ltd.*, [1984] B.C.J. No. 2690 (S.C.) at para. 10; *EVO Properties Ltd. v. 637934 B.C. Ltd.*, [2004] B.C.J. No. 1880 (S.C) at paras. 33-40; *Phillips Paul, Barristers and Solicitors v. Malak Holdings*, [2002] B.C.J. No. 1869 at paras. 8-10.

27. The SFSS has not complied with demands for discovery of documents in either of the two actions.

28. There is no merit to the suggestion by the SFSS that the CFS-BC was under some kind of obligation to seek discovery in the context of the petition - there is no provision in the rules for such discovery. The SFSS was on notice from the outset that it was the position of the CFS Entities that a petition was not the appropriate procedure to follow, and chose to proceed forward in any event.

29. The CFS and CFS-S have set out a number of areas in their written argument in which they say that document discovery would be of assistance to the parties and the Court in disposing of the allegations of bad faith and an unfair vote, and the CFS-BC adopts those submissions .

30. The SFSS allegations of bad faith focus on the operation of the Oversight Committee, and that it was, in their words, "deadlocked" - either because of the bad faith of the CFS Entities, or alternatively, because of an "honestly held difference of opinion". In any event, it is that "deadlock" which the SFSS uses as their justification for bringing in the IEC in place of the Oversight Committee, thereby breaching the CFS-BC bylaws. It is essential that there be full discovery of internal SFSS communications and other documents so that there can be a full inquiry as to whether there was truly a "deadlock" (which the CFS-BC denies), and what lay behind the SFSS decision to bring in the IEC (which the CFS-BC says was the intention from the start). It is also noteworthy that a similar "deadlock" emerged in the Oversight Committee formed to oversee the Kwantlen College referendum, and it is clear that there are strong

connections between the SFSS and the Kwantlen student association (the Titus Gregory affidavit being but one example), which should be fully explored in discovery.

Delay/Prejudice

31. This is a dispute over the continued membership of the SFSS in the CFS Entities, not over contested election results. There is no urgency in having the matter heard, and the SFSS is in no way prejudiced by any delay occasioned by proceeding to a full trial on its allegations of bad faith.

32. The SFSS has raised the spectre of delay for "ulterior purposes" on the part of the CFS Entities. There is no merit in, or evidentiary support for, such allegations. Rather, had the SFSS not insisted on proceeding forward with its petition, and steadfastly refused to commence a proper action, the discovery process could be well underway (indeed, likely fully complete by now) and an early trial date could have been obtained.

Conflicting Affidavit Evidence/Complex Issues

33. The CFS and CFS-S have identified a number of areas where there is conflicting affidavit evidence, as well as a host of complex legal and factual issues, pertaining to the allegations of bad faith and an unfair vote. The CFS-BC adopts the submissions of the CFS and CFS-S, but wishes to highlight the following.

34. The SFSS' "theory of the case" (as set out at para. 5 of their argument and elsewhere), is that the CFS acted in bad faith in the Oversight Committee as part of a larger strategy to forestall the Referendum Vote from ever taking place. It is that bad faith conduct which the SFSS uses to justify their decision to abandon the Oversight Committee and bring in the IEC, thereby breaching the CFS-BC bylaws. For their part, the CFS Entities say that it was the SFSS that was acting in bad faith, choosing to abandon the ROC rather than risk losing political advantage

in the conduct of the vote (including advantages gained by extensive early campaigning and the use of defamatory campaign materials). Ultimately, there is a fundamental conflict before this Court as to **why** certain actions were taken, and the competing allegations of bad faith mean that credibility will very much be in issue at trial. Moreover, cross-examination at trial may well lead to the evidence at trial substantially departing from that presented in the affidavits now before the Court. Indeed, the very nature of an allegation of bad faith makes it unsuitable for disposition on a Rule 18A application.

Collisimo v. Geraci, 2004 BCSC 636
Iacobucci v. Wic Radio Ltd., [1997] B.C.J. No. 2874 (S.C.) at paras. 17, 25, 31, 39-40

C. Merits of the Petition and CFS-BC Action

1. Facts

35. The CFS-BC adopts the facts as set out in the written argument of the CFS and CFS-S., but adds the following.

36. The CFS-BC is a society incorporated under the *Society Act* R.S.B.C., 1996, c. 44, with its own constitution and bylaws. Its bylaws respecting defederation votes are similar, but not identical, to those of the CFS and CFS-S. It is the position of the CFS-BC that a defederation vote is only binding if the bylaws of the CFS-BC have been complied with. In other words, a binding referendum vote must comply with two sets of bylaws - those of the CFS/CFS-S and those of the CFS-BC.

2. Merits of the Petition

37. Again, it appears that the SFSS has all but abandoned its pursuit of the remedies sought

in its petition. With respect, that is properly so, as those remedies cannot be obtained against the CFS and CFS-S, such that ultimately, they cannot be used to somehow cure or legally sanction the Referendum Vote.

38. Since those remedies are technically available against the CFS-BC, we will briefly address them here.

39. This case has none of the indicia or hallmarks of an oppression case, as described in *Lees v. Lees Benevolent Association of Canada*. There is no allegation that the SFSS has been denied the right to participate in the affairs of the CFS-BC, or that the SFSS has been deprived of a benefit that should have been available to them as a result of membership in the CFS-BC. Rather, the petition is clearly about the legal validity of the Referendum Vote, which is in turn tied up in allegations of bad faith. Such allegations take this matter well beyond the ordinary oppression case, highlighting the SFSS' efforts to invoke the remedy so as to bring this matter by way of petition.

Lees v. Lees Benevolent Association of Canada, [2007] B.C.J. No. 1212 (S.C.)

40. Moreover, the SFSS has not given notice to other members of the CFS-BC, and therefore should not be granted any remedy, let alone the remedy of "winding up".

41. This is not a case like *Canadian Federation of Students v. Mowat*, where the CFS-BC has refused to follow its own rules or bylaws. To the contrary, it is the SFSS, who is seeking the oppression remedy, that made the deliberate decision to abandon the ROC in breach of the CFS-BC bylaws.

42. The application for relief under the *Company Act* should be summarily dismissed.

43. Section 85 of the *Society Act* is not even referenced in the SFSS' written argument.

Accordingly, we will simply note that courts are traditionally reluctant to interfere with the internal affairs of a society or other corporate body. The relationship between a society and its members is contractual, and the members are deemed to have accepted that the constitution and bylaws of the organization are binding upon them, including any future amendments which are properly passed. Courts are properly reluctant to interfere with that private contractual relationship, and this case does not present any justification for departing from that general rule.

> *Garcha v. Khalsa Diwan Society - New Westminster*, [2006] B.C.J. No. 617 (C.A.) at para. 9;
> *Lakeside Colony of Hutterian Brethren v. Hofer* (1992), 97 D.L.R. (4th) 17 (S.C.C.) at paras. 1, 6, 8, 10 and 45
> *Whittal v. Vancouver Lawn Tennis and Badminton Club*, [2005] B.C.J. No. 1923 (C.A.) at paras. 42, 49 and 50

3. Merits of the CFS-BC Action

44. As above, it is the position of the CFS-BC that the legality of the Referendum Vote turns largely on the decision taken by the SFSS to abandon the ROC process in favour of having the vote overseen by its own IEC. That amounted to a clear breach of the bylaws, leaving the Referendum Vote, in the words of McEwan J., "irregular per se" and without "legal sanction".

45. The SFSS advances three technical arguments to avoid the consequences of its unilateral action: (1) that the applicable bylaws are invalid; (2) that the bylaws requiring oversight by the ROC are merely "directory", not "mandatory" and (3) that the IEC and ROC have concurrent jurisdiction to oversee referendum votes. We address each argument in turn below.

(a) Bylaw Invalidity

46. In the case at bar we say there is no question that the SFSS was bound by the CFS-BC bylaws, which include a requirement for all defederation referenda to be administered by a ROC. There is no challenge to bylaw 2.4(e) of the CFS-BC bylaws in the Statement of Defence filed by the SFSS. Given the uncontradicted evidence that the ROC did not administer the Referendum Vote, the CFS-BC bylaws have been clearly breached by the SFSS.

47. The sole bylaw whose validity is challenged in the Statement of Defence is bylaw 2.5(b), which provides that in the event of a successful defederation vote, the departing student society is responsible for remitting dues to the CFS-BC up to the end of the CFS-BC's fiscal year (August 30th). That challenge, however, is unparticularized, and a request for particulars remains outstanding.

48. The spectre of an alleged 1982 agreement is also raised in the Statement of Defence as another basis for the SFSS position that it did not have to comply with the bylaws of the CFS Entities. It is not clear whether that argument is being pursued by the SFSS, but a full answer to it on the part of CFS-BC is that the CFS-BC is not even a signatory to that agreement, but is a signatory to the 1987 agreement which expressly includes the SFSS' agreement that it will be bound by the CFS-BC bylaws.

49. Finally, for the reasons expressed by the CFS and CFS-S at paras. 294-298 of its written argument, the SFSS, to the extent it is pursuing such an argument, cannot imply any term into the bylaws which would allow for the abandonment of the ROC in favour of the IEC. In short, such a term would be plainly inconsistent with the bylaws and therefore cannot be implied.

(b) The "Directory" v. "Mandatory" Interpretation Argument

50. The SFSS argues that the requirement for Oversight Committee administration is merely "directory" as opposed to "mandatory". With respect, those principles have no application whatsoever to a private contract such as this (where there is no public statute or public body).

An interpretation of Bylaw 2.4(e) which would permit the administration of a defederation referendum by an entity other than the ROC contradicts the plain language of the contractual provision, as well as the established practice of the CFS Entities.

(c) "Concurrent Jurisdiction"

51. Similarly, any notion of "concurrent jurisdiction" between the IEC and the Oversight Committee is belied by the plain language of both the CFS-BC and the SFSS bylaws, rules and policies. We have addressed the plain language of the CFS-BC bylaws above, which have been found applicable by this Court in the *Kwantlen* decision and in *Byers v. Cariboo College Students Society*, [2006] B.C.J. No. 852 (B.C.S.C.). The SFSS bylaws, on their face, speak of IEC jurisdiction over internal elections and referenda only, a fact recognized by the IEC on its website, and, moreover, acknowledged by the SFSS itself insofar as a referendum question was on the ballot in March of 2008 to require the SFSS to conduct membership referenda for national or provincial organizations according to its own bylaws.

(d) There is No Remedy to Cure the SFSS Breach of the Bylaws

52. Given that the arguments set out above are either (a) abandoned by the SFSS; (b) not seriously pursued; or (c) without merit, it is respectfully submitted that the SFSS cannot obtain a remedy to cure the irregularity of the Referendum Vote.

53. While the SFSS' theory of its case clearly turns on its allegations of bad faith against the CFS Entities in respect of the ROC process, those allegations do not provide a basis upon which this Court can now ignore or cure the inescapable fact that the Referendum Vote has no legal sanction. Had the SFSS come to this Court prior to the vote, and been able to establish bad faith on evidence put to this Court, then it is conceivable that this Court could have intervened

and provided directions on the conduct of the vote which, in turn, could have ultimately provided a legal foundation for it.

54. Now, having breached the bylaws, the SFSS come to this Court and essentially advances this submission: "we had no choice but to breach the bylaws because the CFS Entities were acting in bad faith, so please now regularize the vote". The reality is, however, that the SFSS had a choice, but simply made the wrong one. They chose not to come to this Court, but rather took matters into their own hands. It is now too late to complain of bad faith - there is no remedy which this Court can provide.

(e) The Competing Allegations of Bad Faith

55. Alternatively, should this Court be of the view that it can grant a remedy to the SFSS after the Referendum Vote on the basis of its allegations of bad faith, we wish to briefly demonstrate that it is simply impossible for this Court, in this summary hearing, to (a) draw the inferences the SFSS puts forward respecting bad faith on the part of the CFS Entities and (b) reject all of the evidence adduced by the CFS Entities suggesting an unfair vote. A full trial is required before the SFSS can prevail.

56. The SFSS allegations centre on the proposition that the CFS Entities, from the very beginning, did not want the Referendum Vote to proceed, and made a concerted effort to prevent it from doing so (and further, that they improperly chose to "ignore" the vote after it occurred, and delayed these proceedings in furtherance of their objectives).

57. In its written argument, the SFSS places considerable emphasis on the CFS Entities' opposition to the date to the date selected by the SFSS for the Referendum Vote.

58. We first submit that the bylaw requiring that a notice include the date of the

referendum is a contractual provision included for the benefit of the CFS. It allows the CFS to adequately prepare for an upcoming referendum, including the perfectly legitimate mobilization of its members to participate in the campaign. That provision cannot be used by the SFSS to preclude the Oversight Committee from considering the issue of the referendum date.

59. The CFS position on the date of the Referendum Vote arose out of a concern about the fact that the election and referendum were to be held on the same day. That had the potential to subsume the referendum question within an extremely heated election. The record is clear that the CFS offered to hold the vote on other dates, but the SFSS refused to consider any other date.

60. The *bona fides* of that refusal are very much open to question. When all of the evidence is reviewed, an inference can be drawn that the SFSS believed it would gain political advantage by having the two votes on the same date. It refused to discuss any other dates for fear of ceding that advantage. That is consistent with other conduct discussed below. There is certainly nothing inherently unfair, unworkable or "absurd" about having a referendum vote on another date (which has clearly happened before in other referenda). Cost could not have been a legitimate concern for the SFSS, as the CFS practise is to pay for the majority of the costs associated with a defederation vote.

61. The concern over the date of the referendum was closely connected to the CFS' entirely legitimate concern with early campaigning. Allowing months of unregulated campaigning outside of an established campaign period can obviously have a potential impact on a fair vote, which is why express prohibitions are included in most student society bylaws, including those of the SFSS itself.

62. The ROC was never able to address that issue, and an inference can be drawn that the SFSS representatives did not want to lose the political advantage the SFSS had gained through the months of "I Want Out" campaigning. It is noteworthy that the IEC did not address the

early campaigning issue, despite the fact that defined campaign periods are provided for in the SFSS bylaws.

63. It is also clear from the evidence that the ROC was functioning before the decision by the SFSS to bring in the IEC. Among other decisions, the Committee had decided how it would regulate campaign materials during the campaign, including enforcement of the CFS bylaw prohibiting false and defamatory campaign materials. While the SFSS wishes the Court to draw the inference that the CFS was being "obstructionist" on the ROC, another, equally plausible inference can be drawn: when the SFSS was not getting its way, and risked ceding political advantage, it abandoned the ROC in favour of the favourably biased IEC. It is telling that the IEC decided it would not regulate any of the campaign materials, and there is evidence that the "no" side continued to publish false and defamatory materials during the campaign. Ultimately, this resulted in yet another political advantage for the SFSS.

64. The ROC had also settled on the referendum question to be put on the ballot. Yet, when it decided to hand over the administration of the vote over to the IEC, the SFSS also decided to add a second question to the ballot, which it is respectfully submitted, could obviously have an impact on the outcome of the vote. It is worth emphasizing that, after receiving legal advice, the independent administrator of the Kwantlen referendum determined that a reference to fees in a ballot question was inappropriate.

65. The ROC did not have an opportunity to address the participation of the graduate students in the vote, or the placement of a polling station at the Kamloops campus.

66. With respect to the graduate students, there is evidence to suggest that they were quite active in the "no" side of the defederation campaign. The IEC permitted the graduate students to vote, despite the establishment of their own society at that time, and, more importantly, a prohibition against same contained in the SFSS bylaws.

67. There is also evidence that the Kamloops students were not in favour of defederation. The IEC did not put a polling station at that campus, and there is evidence before this Court that the students may have been completely disenfranchised (at the least, we do know that no one voted at that campus). The electronic mail message attached to the McCullough affidavit certainly demonstrates that there was a lack of information respecting the CFS referendum vote.

68. The breach of confidentiality by the SFSS representatives on the Oversight Committee is consistent with a pattern of conduct by the SFSS designed to ensure maximum political advantage at the expense of a fair vote.

69. With respect to the bias of the Chief Electoral Officer, Mr. McCullough, it is important to emphasize that he has sworn a (largely inadmissible) affidavit in these proceedings. In that affidavit, he does not deny his anti-CFS bias, or contest the accuracy of the electronic mail message appended to the Marne Jensen affidavit, which greatly enhances the reliability of that evidence.

70. Moreover, there is uncontradicted evidence of other IEC members inappropriately supporting the "no" side, and taking steps to take down campaign materials posted by the "yes" side.

71. With respect to the various polling infractions, complaints were submitted to the IEC in a timely manner (particularly given the substantial confusion over jurisdiction between the ROC and IEC) and the IEC simply chose not to investigate them. There has also been no disclosure as to whether any other complaints were submitted to the IEC which were not investigated.

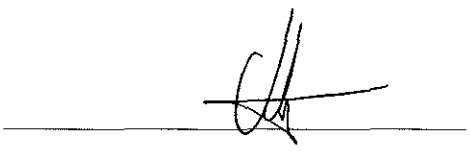
72. In sum, the CFS-BC submits that there is an equally plausible inference to be drawn from the vast amount of evidence before this Court; namely, that it was the SFSS who acted in bad faith in respect of the ROC process, choosing to abandon it when they risking losing the political advantage they had carefully constructed. Further, leaving aside the fact that there is both

unanswered and conflicting evidence, the fact that there has been no proper investigation of the many polling infractions alleged by the CFS Entities, means that this Court simply cannot conclude at the end of this hearing that there was a fair vote. For the SFSS to prevail, the matter must proceed to trial.

D. Conclusion

73. The Referendum Vote is irregular and without legal sanction because it was conducted in a manner contrary to the plain language of the bylaws of the CFS Entities. There is no remedy available to the SFSS to retroactively sanction the vote on the basis of an allegation of bad faith now that it comes to this Court after its unilateral decision to take matters into its own hands and abandon the ROC process. The petition should be dismissed and judgment granted in favour of the CFS Entities in the two actions, with damages to be assessed. If this Court remains seized of the matter, the parties could return for directions on the conduct of a new referendum vote if the need arises.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated this 25th day of May, 2009



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