

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 and  
CANADIAN FEDERATION OF STUDENT – BRITISH COLUMBIA COMPONENT**

**RESPONDENTS**

**- and -**

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**

**WRITTEN ARGUMENT OF THE RESPONDENTS, CANADIAN FEDERATION OF  
STUDENTS AND CANADIAN FEDERATION OF STUDENTS – SERVICES**

## SUMMARY OF POSITION

1. The Respondents, Canadian Federation of Students ("CFS") and the Canadian Federation of Students – Services ("CFS-S") say:

- (a) the petition (the "Petition") of the Simon Fraser Student Society ("SFSS") filed April 16, 2008 should be dismissed; and
- (b) this matter is not suitable to be dealt with pursuant to a summary trial/Rule 18A and, as a result, the application of the SFSS for dismissal of action no. S089144 should be dismissed.

2. Alternatively, should this Court decide that it is appropriate to deal with this matter in whole or in part pursuant to Rule 18A, this Court ought to decide in favour of the Plaintiffs and declare that the SFSS remains a voting member of both the CFS and CFS-S.

3. The claims of the CFS/CFS-S for judgment against the SFSS for Unremitted Fees, relief in relation to breach of trust and for damages in relation to breach of the 1987 Fee Agreement and the CFS Bylaws would require further investigation and adjudication.

4. Generally, the CFS and CFS-S say that:

- (a) although there was a vote (the "Vote") of Simon Fraser University ("SFU") students which took place on March 18 – 20, 2008 in relation to continuing membership in the CFS, the Vote was not binding on the CFS or the CFS-S and was legally ineffective to defederate the SFSS from these national associations.

5. The CFS and CFS-S say that:

- (a) the Vote was not conducted in accordance with the bylaws (the "CFS Bylaws") of the CFS or the CFS-S; and

- (b) in addition, the Vote was not conducted in a fair manner or in accordance with the principles of natural justice. The SFSS acted in bad faith.

## FACTS

### Background

6. The CFS and the CFS-S are Canadian non-profit corporations incorporated under Part 2 of the *Canada Corporations Act* (Canada). The CFS and CFS-S, together with member local associations, are national associations of local student associations and students.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 3.

7. The SFSS was incorporated on March 3, 1967 pursuant to the *Society Act* (British Columbia).

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 5, Exhibit "B".

8. The SFSS was a founding member of the CFS and CFS-S as of October 1981. The student members of the SFSS approved by referendum full membership in 1982. The SFSS has been a voting member ever since.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 6.

9. The current membership fees received by the CFS and CFS-S (inclusive of fees to the Canadian Federation of Students – British Columbia Component ("CFS – BC"), a separate and distinct British Columbia society associated with the CFS) as a result of the continued membership of the SFSS is approximately \$470,000 per annum.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 12.

10. The CFS would suffer significant harm should the SFSS leave. Not only would the departure of the SFSS mean a loss of membership fees but also the withdrawal of the SFSS would weaken the CFS in British Columbia and across Canada and could have adverse consequences with respect to the continued participation of other British Columbia student associations.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 87.

11. As of December 1982, the Canadian Federation of Students was a new organisation and its constitution and bylaws did not contain a process for holding referenda. Thus, the practice was for member local associations to conduct referenda which related to the Canadian Federation of Students in accordance with that local organisation's rules and procedures. However, once the CFS Bylaws were amended to include a mandatory referenda process as on May 1995, the clear and invariable practice became and has been since for local associations to conduct such referenda in accordance with the CFS Bylaws under the authority and jurisdiction of an Oversight Committee, as described below. Local association practices are no longer followed. The further practise of the Canadian Federation of Students and its members is that in order for a referendum to be valid, effective and binding, it must be conducted in accordance with the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 9.

12. On July 20, 1987, the CFS, CFS-S, CFS-BC and the SFSS entered into an agreement (the "Fee Agreement").

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 10, Exhibit "D".

13. The July 20, 1987 Fee Agreement incorporates the CFS Bylaws' referenda rules and procedures pursuant to paragraph 6:

"6. In all other matters the Member Local Association agrees to be bound by the by-laws of the Federations as duly amended from time to time."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 11.

14. If there was an earlier agreement of December 22, 1982, which is denied, such agreement was rescinded and superseded by changes to the CFS Bylaws (in May, 1995) and the July 20, 1987 Fee Agreement.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 8-11.

15. In March 1997, the SFSS polled its members with respect to whether the members wished to stay in the CFS. The CFS records indicate that the unofficial results were 1,859 students voting to continue with 1,176 voting against. At the time of the 1997 vote, the CFS took the position that had a majority of SFU students voted in favour of withdrawing, in order to depart the SFSS would have had to then deliver a petition and hold a referendum in accordance with the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 13.

16. In August 2007, pursuant to the CFS Bylaws, a petition (the "Referendum Petition") of members of the SFSS was delivered to the National Executive of the CFS requisitioning a defederation referendum pursuant to the CFS Bylaws. No date for the referendum was set out in this petition.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 15, Exhibit "H".

### **This Action**

17. As a voting member of the CFS and the CFS – S, the SFSS is bound by the bylaws (the "CFS Bylaws") and practice of the CFS and the CFS – S. The bylaws of those national associations are substantively identical.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 5.

18. As stated, as of July 20, 1987 the CFS, the CFS – S and the SFSS entered into the Fee Agreement which remains in force.

Affidavit #1 of L. Watson sworn December 30, 2008 at paras. 4, 6 and Exhibit "A".

19. Pursuant to the *College and Institute Act* (British Columbia), CFS Bylaws and the Fee Agreement, the CFS and the CFS – S submit that the SFSS is currently obliged to collect and remit to the CFS and CFS – S membership fees (the "Fees") from SFU students as follows:

- (a) per full-time student per semester - \$3.90;

- (b) per part-time and continuous intake students per semester - \$3.90 (pro-rated in accordance with the practice of the SFSS with respect to the pro-rating of its own membership fee).

*College and Institute Act* R.S.B.C. 1996, c. 52, s. 21;  
Affidavit #1 of L. Watson sworn December 30, 2008 at para. 6.

20. From 1982 until the SFU 2008 summer session, SFU collected Fees from SFU students and remitted such Fees to the SFSS and the SFSS had, in turn, remitted such Fees to the CFS and CFS – S, all in accordance with the CFS Bylaws, the Fee Agreement and the *College and Institute Act* (British Columbia). Most recently, Fees paid to the CFS and the CFS – S, collectively, have been approximately \$215,000 per annum, depending on enrolment.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 7.

21. In breach of the CFS Bylaws and the Fee Agreement, and despite demands, the SFSS has not remitted Fees to the CFS or the CFS – S with respect to the SFU 2008 summer or fall sessions.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 8.

22. The unremitted Fees for 2008 (the "Unremitted Fees") have always been and remain trust funds, held in trust by the SFSS for the benefit of the CFS and the CFS – S.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 12.

23. The Action was commenced on December 19, 2008.

Writ and Statement of Claim filed December 19, 2008.

24. Particulars of the CFS/CFS – S position with respect to the Vote are set out in paragraph 18 of the Statement of Claim, herein, which reads:

"18. The Vote was not effective to remove the SFSS from the Canadian Federation of Students or from the Canadian Federation of Students – Services because the Vote was not held in accordance with the Bylaws and, in any event,

was carried out in an unfair manner, contrary to the rules and principles of natural justice. Particulars of the foregoing include:

- (a) pursuant to section 6.f of Bylaw I of the Bylaws, an Oversight Committee is to have full jurisdiction and authority over a defederation referendum. Despite recognizing and acknowledging the jurisdiction and authority of a validly constituted Oversight Committee, the SFSS nevertheless then engaged the SFSS's independent electoral commission (the "IEC") to run the Vote, usurping the jurisdiction of the Oversight Committee;
- (b) the SFSS commenced a campaign to withdraw from the Canadian Federation of Students and the Canadian Federation of Students – Services in August, 2007 without authority or approval from the Oversight Committee and contrary to the Bylaws. The early campaigning by the SFSS resulted in an unfair Vote;
- (c) the SFSS produced inaccurate and defamatory campaign materials and widely distributed such materials again without any authority or approval of the Oversight Committee and contrary to the Bylaws. The use of inaccurate and defamatory campaign materials by the SFSS resulted in an unfair Vote.
- (d) the SFSS insisted that the Vote be held March 18 – 20, 2008, the same date as the SFSS's general elections, again without the authority or approval of the Oversight Committee and contrary to the Bylaws. The holding of the Vote on the same date as the SFSS's general elections resulted in an unfair Vote;
- (e) in addition to a question being put to SFU students about Canadian Federation of Students membership, a second question was put to SFU students about what to do with the "former CFS semesterly membership fee". The addition of this second question was without approval or authority and, in fact, in breach of a decision reached by the Oversight Committee and was, again, contrary to the Bylaws. The second question resulted in a biased and unfair Vote;
- (f) contrary to an agreement and ruling by the Oversight Committee that discussions and deliberations of the Oversight Committee were to remain confidential, the SFSS representatives on the Oversight Committee did not maintain confidentiality and this breach of confidentiality resulted in an unfair Vote;
- (g) at the time of the Vote, the Chief Returning Officer of the IEC, Mr. J.J. McCullough, held an anti-CFS bias which resulted in a biased and unfair Vote or, in the alternative, gave the appearance of a biased and unfair Vote;

- (h) at the time of the Vote, there were approximately 4,200 graduate students at SFU. Despite the fact that a separate society for graduate students at SFU was incorporated July 26, 2007 and was up and running from that date, the graduate students participated in the Vote. This was contrary to the Bylaws and resulted in an unfair Vote;
- (i) although SFU has a facility and students attending this facility in Kamloops, British Columbia, no polling station was set up in Kamloops, the Kamloops students at SFU were not made aware of the Vote, no steps were taken to enable such students to vote and no Kamloops students participated in the Vote. This resulted in an unfair Vote; and
- (j) the process by which the Vote was held by the IEC was contrary to the Bylaws and the practice of the CFS and CFS - S as well as the rules and principles of fairness and natural justice because there were many voting and polling violations including:
  - (i) poll clerks and others who ran the Vote took direction regarding process and procedure from the SFSS, one of the proponents;
  - (ii) there was extensive campaigning against the Canadian Federation of Students within the "no-campaigning zone" at polling stations as well as other efforts to influence voters at polling stations and poll clerks and others running the Vote did nothing to attempt to prevent or end such campaigning;
  - (iii) SFSS scrutineers and poll clerks campaigned against the Canadian Federation of Students and attempted to influence voters at polling stations and the poll clerks or others running the Vote did nothing to attempt to prevent or end such campaigning;
  - (iv) IEC representatives campaigned against the Canadian Federation of Students and attempted to influence voters at polling stations and the poll clerks or others running the Vote did nothing to attempt to prevent or end such campaigning;
  - (v) polling stations and areas had individuals loitering in such areas and the poll clerks or others running the Vote did nothing to attempt to have such individuals leave the polling stations;



- (vi) copies of ballots were openly displayed at polling stations and, in several cases, taken outside of polling areas, completed outside of polling areas and then returned;
  - (vii) there was improper and unsupervised sealing, transportation, storage and disposal of ballots and ballot boxes;
  - (viii) there were many incidences of failure to have the requisite two poll clerks at polling stations during voting hours. Further, polling stations closed or ran out of ballots during voting hours;
  - (ix) SFU students were turned away although presenting valid student identification;
  - (x) there was not a privacy screen at all polling stations at all times so as to ensure secrecy of voting and, further, where there was a privacy screen, not all voters used the privacy screen. In addition, where voters were using a privacy screen on several instances poll clerks, scrutineers or other persons went behind the voting screen with the voters as they were voting. In other cases, more than one voter went behind a privacy screen at one time; and
  - (xi) despite complaints of the above matters by SFSS members the IEC did not act on the complaints and provided no investigation or explanation for the failure to act;
- (k) pursuant to section 7 of Bylaw I of the Bylaws, in order for a member local association to withdraw from the Canadian Federation of Students or the Canadian Federation of Students – Services the National Executive must receive a letter from the member local association with notice of withdrawal after a valid referendum has been held in accordance with the Bylaws in which a majority of the students voting have voted for withdrawal from the Canadian Federation of Students. The National Executive must then examine the notification to determine whether it is in order and make a recommendation to the voting members of the Canadian Federation of Students. At the opening plenary of the next general meeting of the Canadian Federation of Students ratification of the withdrawal is to be put to a vote and the withdrawal will only take effect on June 30 following a ratification of the withdrawal. The foregoing has not occurred with respect to the purported SFSS withdrawal;

- (l) such further and other particulars which the CFS and the CFS – S may discover and put before the Court.”

25. In addition to seeking payment of student fees, the CFS and CFS-S seek the following relief:

“(a) a declaration that the Vote does not constitute a “referendum” pursuant to the Bylaws or was otherwise invalid and ineffective to cause the SFSS to defederate and that the SFSS remains a voting member of both the Canadian Federation of Students and the Canadian Federation of Students – Services;”

### **The CFS Bylaws**

26. The CFS Bylaws read in part as follows:

#### **“Bylaw I – Membership**

##### **1. Types of Memberships**

General Description: There are two types of members of the Federation, individual members and voting members. Students, or individual members, are represented through the local student association to which they belong. Local student associations representing individual members are called voting members.

- a. Local student associations are eligible to receive the status of voting members in the Federation as provided for in Bylaw I, Section 2, and 3;
- b. Individual members of the Federation will be all students in local student associations that are voting members.

##### **2. Types of Voting Membership Status**

###### **a. Full Membership**

General Description: Full membership is the standard form of membership in the Federation.

- i. A local association is eligible to apply for full membership in the Federation if its members have approved by referendum membership in the Canadian Federation of Students, the Canadian Federation of Students-Services, and the applicable

provincial component as described in Bylaw VII - Provincial Components;

- 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.

...

- 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 full membership fees for the duration of the membership.

...

### 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.

...

#### c. Responsibilities of Voting Members

Although Federation staff and executive members will handle many day-to-day operations, the structures of the Federation can only function if there is full cooperation among Federation voting members. The achievement of the work and goals of the Federation depends on the active participation of students and student associations.

- i. Each voting member of the Federation is responsible for supporting the objectives of the Federation and will abide by all provisions of these By-laws.

### 6. Vote on Defederating

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

a. Petition

As per Bylaw I, 3.1.a.iii a petition calling for a referendum shall be signed by no less than ten percent (10%) of the individual members of the association and sent to the National Executive of the Federation.

b. Notice

- i. No vote on de-federating 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 for 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 to the individual members;
- v. Failure to adhere to the notice provisions in Articles A, 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 local associations, 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 a mailout 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 in the meeting.

...

f. Administering the Campaign and Voting

Within three (3) months of receipt of notice, a 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:

deciding the manner of voting, be that by referendum, general meeting or mailout ballot.

deciding the number and location of polling stations;

approving all materials to be distributed during the campaign;

deciding the ballot question;

overseeing the voting;

counting ballots;

adjudicating all appeals; and

establishing all other rules and regulations for the vote.

7. Procedure for Application for Withdrawal

- a. Within 90 days of the receipt of a letter from a member local association, notifying the Federation of its withdrawal from the Federation, the National Executive will examine the notification to determine whether it is in order, and will make a recommendation to the voting members of the Federation concerning the application.
- b. At the opening plenary of the next general meeting of the Federation, ratification of the withdrawal shall be put to a vote.
- c. The withdrawal shall take effect on June 30, following the ratification of the withdrawal."

[emphasis added]

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "A".

27. In order for a member local association to defederate, therefore, there must be:

- (a) a petition calling for a referendum on membership signed by no less than 10% of the individual members of the association delivered to the National Executive of the Canadian Federation of Students;
- (b) a referendum held in accordance with the CFS Bylaws wherein a majority of the individual members of the association who vote vote for defederation;
- (c) notification of withdrawal in writing from the member local association to the National Executive of the Canadian Federation of Students. On receipt of this notice, the National Executive of the Canadian Federation of Students will examine the notification to determine whether it is in order and will make a recommendation to the voting members of the Canadian Federation of Students at the next general meeting of the Canadian Federation of Students; and
- (d) ratification of the withdrawal at the opening plenary at the next general meeting of the Canadian Federation of Students. The withdrawal will take effect on June 30 following such ratification.

28. The practice of the Canadian Federation of Students has never been to have alternative processes for defederation as suggested in paragraphs 12 – 14 to Mr. Harder's Affidavit #2.

Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 6-8  
Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "A"  
CFS Bylaws, Bylaw I, Section 6-7;  
Affidavit #2 of D. Harder sworn December 14, 2008 at paras. 12-14.

29. In addition, under Bylaw I, section 4., Vote to Federate, there is the following on "campaign materials":

"e. Campaign Materials

- i. Campaign materials shall include all materials developed specifically for the referendum campaign.
- ii. Materials produced by Federation that promote campaigns and services of the Federation shall not be considered as campaign materials unless they include specific content about the referendum.
- iii. The Federation website shall not be considered a campaign material unless it includes specific content about the referendum.
- iv. The Federation's annual report, financial statements, research and submissions to government shall not be considered a campaign material.
- v. Campaign materials shall not be misleading, potentially libellous or false."

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "A".

**The Oversight Committee**

30. As required by the CFS Bylaws, after the receipt of the Referendum Petition by the CFS, an oversight committee (the "Oversight Committee") was established pursuant to the CFS Bylaws to take responsibility for and authority over the referendum. The Oversight Committee consists of:

- (a) Kyall Glennie, SFSS representative;
- (b) Michael Letourneau, SFSS representative;
- (c) Ben Lewis, CFS representative; and
- (d) Lucy Watson, as a CFS representative.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 19.

31. At its fall meeting the CFS National Executive selected Ben Lewis and Lucy Watson as the CFS's representatives for the Oversight Committee. As of December 3, 2007, the CFS was waiting for the SFSS to select its representatives for the Oversight Committee. The CFS was eventually told of the identity of the SFSS representatives by way of correspondence on January 22, 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 20, Exhibit "L".

32. After the letter from the SFSS to the CFS dated November 5, 2007 and the CFS's response of December 3, 2007, the SFSS and its representatives appeared to accept and acted as though the referendum was to be conducted in accordance with the CFS Bylaws and, in particular, that the Oversight Committee had responsibility for and authority over the referendum, until the involvement of the SFSS's Independent Electoral Commission ("IEC"), which began February 25, 2008, described below.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 21, Exhibits "F", "K" and "L".

### **Referendum Date**

33. Because the Referendum Petition did not specify a date for the referendum, in accordance with the CFS Bylaws and the longstanding practice and custom of the CFS, finalizing the date for the referendum is a matter for the Oversight Committee. Where the Referendum Petition does not specify a date, although the notice to the National Executive is to nevertheless include a date, that date is provisional and is to be confirmed or changed by the Oversight Committee.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 22.

34. The foregoing is consistent with the principle found in the CFS Bylaws that, on the one hand, it is the individual members of student associations, the students, who are to make the substantive decisions through referenda on all questions of membership in the CFS, while, on the other hand, it is the oversight committee which is to make all decisions with respect to the procedure for carrying out such referenda. Members of the executive of the CFS or of the member local association, here the



SFSS, have no particular authority or role with respect to such a referendum, including setting the date.

35. CFS Bylaw I.3.a. reads:

"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.

...

iii. The individual members of the Federation collectively belonging to a member local association will have sole authority to initiate a de-federation referendum, as described in article 7 of this Bylaw by submitting to the National Executive of the Federation a petition, signed by not less than ten percent (10%) of the individual members of the association, calling for the referendum."

[emphasis added]

Affidavit #1 of Lucy Watson sworn May 26, 2008, Exhibit "A".

36. The SFSS proposed that the referendum take place on March 18-20, 2008. This is the same date that the general elections for the SFSS took place. The practice of the Canadian Federation of Students is to not hold a membership referendum on the same day as general elections for a local association. At Oversight Committee meetings, the CFS representatives took the position that the referendum and the SFSS's general elections could not take place on the same dates. The reason for this was that the issue of the CFS membership was to and did play a significant role in the SFSS elections and the campaign leading up to such elections. As a result, having the elections and the referendum on the same day undoubtedly confused the two issues such that the question of membership in the CFS became caught up with the question of who the members of the SFSS wished to elect for 2008-2009. Also, attempting to hold a referendum pursuant to the CFS Bylaws and an SFSS general

election at the same time led to confusion over who was in charge – the Oversight Committee or the IEC which runs SFSS general elections.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 23;  
Affidavit #2 of L. Watson sworn December 15, 2008 at para. 5.

37. The Oversight Committee CFS representatives offered to hold the referendum on any other dates other than March 18-20, 2008 but the SFSS refused to change its position regarding the dates.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 24.

38. With respect to any additional cost of holding a membership referendum on dates other than the dates for a general election, the CFS does pay 50-100% of the cost of a membership referendum, depending on the arrangement agreed to.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 5.

39. As set out in Affidavit #1 of Derrick Harder, the SFSS and the IEC held the Vote of SFU students on March 18-20, 2008 regarding membership in the CFS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 25;  
Affidavit #1 of D. Harder sworn April 14, 2008 at paras. 12 and 15.

### **Oversight Committee Meetings**

40. The Oversight Committee held ten meetings: February 4, 2008, February 11, 2008, February 19, 2008, February 25, 2008, February 28, 2008, March 3, 2008, March 11, 2008, March 12, 2008, March 17, 2008, and March 28, 2008. There are minutes for these meetings. As well, there are transcripts of these meetings, other than the March 11, 2008, meeting before the Court.

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "M";  
Affidavit #1 of M. Letourneau sworn September 2, 2008 at paras. 14 and 15 and Exhibit "D";  
Affidavit #2 of L. Watson sworn December 15, 2008 at para. 21 and Exhibits "B" – "J".

41. At the time the IEC, at the direction of the SFSS, stepped in and took over the Vote (February 25, 2008) there remained a number of unresolved issues at the Oversight Committee with respect to the referendum, including:

- (a) the date that the referendum was to be held;
- (b) how polling was to be conducted, including polling station locations; and
- (c) what to do about early campaigning by the SFSS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 26.

42. Having said that, the Oversight Committee was clearly functional and did make many decisions regarding the referendum including:

- (a) decisions as to how the Oversight Committee would conduct itself, including with respect to having meetings and creating and approving minutes (February 3, 2008);
- (b) a decision as to quorum for the referendum and how results would be determined (February 11, 2008);
- (c) a decision that the Oversight Committee was to approve all campaign material prior to its distribution. It was decided that materials that are defamatory, libellous or a factually incorrect would not be approved. It was decided that materials that had not received approval could not be distributed. Decisions were made as to how campaign material review was to occur (February 11, 2008);
- (d) it was decided that in order to participate in the referendum, individuals and campaign teams were to register with the Oversight Committee (February 11, 2008);

- (e) a decision was made regarding inviting non-committee members to attend Oversight Committee meetings with respect to certain issues (February 19, 2008);
- (f) a decision was made regarding the question for the referendum (February 19, 2008);
- (g) decisions were made with respect to posting campaign materials and banners (February 19, 2008);
- (h) a decision was made that campaign materials would include electronic materials and that such materials had to be registered with the Oversight Committee (February 28, 2008);
- (i) a decision was made that if campaign materials which are not approved were being used, the Oversight Committee would order such materials to be immediately withdrawn or removed (February 28, 2008);
- (j) decisions were made with respect to where campaigning could occur and the process for registering campaigns with the Oversight Committee (February 28, 2008 and March 3, 2008);
- (k) decisions were made with respect to ballot boxes (March 3, 2008);
- (l) a decision was made regarding penalties for non-approved campaigning (March 11, 2008);
- (m) a good deal of campaign material was reviewed and either approved or not approved by the Oversight Committee (March 3, 2008, March 11, 2008, March 12, 2008 and March 17, 2008);
- (n) a decision was made as to the process for dealing with alleged violations of referendum rules (March 17, 2008).

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "M";  
Affidavit #1 of M. Letourneau sworn September 22, 2008, Exhibit "D".

43. The minutes for the February 3, 2008 Oversight Committee meeting read in part:

"2. Other Business:

Watson registered serious concern about the pre-campaigning in which the Simon Fraser Student Society had been engaged since the early fall. It was agreed that the Committee would first establish the criteria for campaign materials before discussing the issue of pre-campaigning."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 28 and Exhibit "M".

44. Some of the decisions with respect to campaign materials which were agreed upon by the Oversight Committee are set out in the Oversight Committee minutes dated February 11, 2008, which read in part/as follows:

"Decisions – Campaign Materials:

The Committee shall approve all campaign-specific materials prior to distribution.

The Committee will not approve materials that are defamatory, libellous or factually incorrect. The onus is on the author of the proposed campaign materials to demonstrate the contents are correct in the event they are challenged or questioned. The Committee shall not engage in fact checking unless requested to do so. Campaigners may challenge the facts on campaign materials should they believe them to be incorrect, and may submit complaints to that effect to the Committee.

Materials that have not received Committee approval cannot be distributed.

...

Campaigns and/or campaigners shall provide an electronic copy of all versions of proposed campaign materials. The Committee shall provide in confidence a written approval or refusal of proposed campaign materials, and shall respond by 5 p.m. the next business day.

...

Decisions – Campaign (General)

"In order to participate in the referendum, individuals and campaign teams must register with the Oversight Committee."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 30.

45. The minutes for the February 19, 2008 Oversight Committee meeting read, in part:

"Question – Decision:

The referendum question shall read:

'Are you in favour of maintaining membership in the Canadian Federation of Students?

Yes or No"

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 31.

46. The minutes for the February 28, 2008 Oversight Committee meeting read, in part:

"Campaign Materials – Decisions:

...

Where the Oversight Committee determines that campaign materials which have not been approved by the Committee are being distributed, displayed or used by a campaign, then the Committee shall order the materials immediately withdrawn or removed.

Campaigning – Decision:

...

In order to participate in the referendum, individuals or campaign sides must register with the Oversight Committee. A registration form shall be available from the Referendum Oversight Committee."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 32.

47. The minutes for the March 11, 2008 Oversight Committee meeting read, in part:

"Materials – Decisions:

The Committee may assign an additional penalty, which may include destruction of the material or a restriction on campaigning provided that the penalty is

balanced against the volume of the materials distributed or its effect, and that no destruction shall take place until the appeal period has expired."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 33.

48. The custom and practice of the CFS is that all discussions and deliberations of oversight committees are to be confidential. This was agreed to by all representatives of the Oversight Committee at the first meeting of the Oversight Committee. The transcripts of Oversight Committee meetings confirms this. However, the SFSS representatives did not maintain that confidentiality.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 34;  
Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 23-24.

49. Positions being taken by the CFS representatives during in camera Oversight Committee meetings were reported in the SFU student newspaper, The Peak.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 35 and Exhibit "N".

50. Open SFSS board meetings occurred where, again, the positions of CFS Oversight Committee representatives were reported to the public.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 37.

### **Early Campaigning**

51. One of the objectives of the CFS Bylaws which deals with defederation procedure is to provide for a fair and balanced campaign of an agreed-upon duration preceding a referendum. Oversight committees are to govern such campaigns to ensure that such campaigns are conducted in accordance with the rules by all participants. It is the long standing practice and custom of the Canadian Federation of Students to not allow early campaigning for membership referenda.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 38;  
Affidavit #2 of L. Watson sworn December 15, 2008 at para. 36.

52. Unfortunately, since at least August 2007, the SFSS actively campaigned to convince SFU students to vote against continued membership in the CFS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 39.

53. The SFSS produced inaccurate materials denouncing the CFS and widely distributed such materials online and at SFU campuses.

~~Affidavit #1 of L. Watson sworn May 26, 2008 at para. 40.~~

54. As of February 26, 2008, the SFSS webpage contained the link entitled:

"We Want Out! Learn more about the SFSS campaign to cease membership in the Canadian Federation of Students (CFS)".

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 41, Exhibit "O".

55. ~~Clicking on that link led one to the "We Want Out" SFSS page which in turn led by links to other materials which denounce the CFS.~~

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 42 and Exhibit "O".

56. The campaign of the SFSS prior to March 2008 included "I Want Out" posters which were put up at SFU campuses. These "messages" are from the SFSS itself.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 44, Exhibit "P".

57. Further "We Want Out" posters were put up at SFU campuses prior to March 2008 by the SFSS. These posters contain pictures of then current officers and directors of the board of the SFSS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 45, Exhibit "Q".

58. Other SFSS campaign posters were put up at SFU campuses prior to March 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 46, Exhibit "R".



59. The "I Want Out" campaign was also publicized by use of handbills distributed at SFU campuses prior to March 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 47, Exhibit "S" and para. 48, Exhibit "T".

60. A one-half page ad was placed in The Peak student newspaper in the February 18, 2008 edition.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 49, Exhibit "U".

61. Signs were affixed to CFS posters unrelated to the referendum located at the SFU campuses prior to March 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 50, Exhibit "V".

62. As well, SFSS executive officers and directors set up and participated in internet Facebook groups which had as a theme of defederation from the CFS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 51, Exhibit "W".

63. There are many concerns with the materials produced and distributed by the SFSS prior to March 2008. Some examples are as follows:

- (a) with respect to the poster entitled "I Want Out of the CFS Because it is Unaccountable", the CFS does not avoid or obfuscate accountability as suggested in the poster and, further, correspondence sent by SFSS representatives to the CFS has been replied to;
- (b) with respect to the poster entitled "I Want Out of the CFS Because it is Anti-Democratic", contrary to what is suggested, the CFS does not involve itself in the affairs of member local associations, including elections;
- (c) with respect to the poster entitled "The CFS: SFU's Bad Room-mate", the statements "cult-like atmosphere", "string of scandals" and "cloudy budgets" are false and defamatory. The CFS has an unblemished financial record having always received unqualified audits. Further, CFS

budgets are established and reviewed by members at twice-yearly general meetings. The statement "collective resources used to interfere in local elections" is also false as the CFS does not involve itself in the affairs of local member associations, including elections. As well, the statement "dodgy promotions and hiring" is false and defamatory as all hirings are conducted pursuant to collective agreements negotiated by the employer and the union. Further, the CFS workplace is non-hierarchical in that all positions are considered equal and are paid the same. Individuals employed by the CFS who wish to secure a different position within the organisation are obliged to apply for the position internally and are evaluated by a hiring committee;

- (d) with respect to the poster entitled "\$430,000.", neither the CFS nor the CFS-S gave "unauthorized loans to organizations with disastrous financial problems (like Douglas SU)". What did happen was after the Douglas Students' Union failed to pay certain bills, CFS-S was informed by a health insurance company that, without immediate payment, all health and dental claims by Douglas College students would be rejected. To avoid students being left without coverage, CFS-S paid the insurer the bulk of the money owed to ensure that coverage was maintained for CFS-S members attending Douglas College. All such monies have now been repaid to the CFS and the CFS-S. With respect to "influence the outcomes of elections and hirings at independent student unions", the CFS does not involve itself in the affairs of individual member local associations, including elections;
- (e) with respect to the reference to "CFS = posters (and not much else)", this is misleading as the CFS offers various money-saving services to both individual students and student unions and, as well, undertakes comprehensive campaigns and advocacy work; and
- (f) with respect to the "The Peak" ad, this ad states that student members are kept "at arm's length from its [CFS] spending decisions" which is false.

The members of the CFS establish and review the budgets of the organisation at twice-yearly meetings. Further, representatives of member local associations develop the campaigns and other activities of the CFS.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 52 and 100 and Exhibits "P", "R", "V" and "U".

64. The examples given in the Affidavit #1 of Lucy Watson sworn May 26, 2008 of early defederation campaigning by the SFSS and the inaccuracies contained in the material produced are not intended to be exhaustive. There may well be other material which was produced and distributed by the SFSS through its officers and directors.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 53.

65. As can be seen by the CFS Bylaws and the decisions by the Oversight Committee referred to above regarding campaigning, the objective is that all campaign material be reviewed by the Oversight Committee and approved prior to distribution in an effort to make sure that standards of fairness and accuracy are met with respect to such material. This did not occur with respect to any of the SFSS early campaigning material.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 54.

66. The fact that the SFSS campaigned for defederation since August 2007 using the materials described above made it impossible to have a balanced and fair Vote on March 18-20, 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 55.

67. The issues of the date of the Vote and the early campaigning by the SFSS with respect to the Vote are linked. The CFS representatives on the Oversight Committee stated that they were concerned with the early negative campaigning by the SFSS, particularly that which was defamatory and inaccurate. This concern was exacerbated because the candidates for the SFSS executive position became so identified with an anti-Canadian Federation of Students stance, the Canadian

Federation of Students membership referendum, in effect, turned into a general election issue. The position of the CFS was that, in accordance with the general practice of the Canadian Federation of Students, there had to be separation between the general election of the SFSS and the Canadian Federation of Student membership referendum.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 32.

68. It is noteworthy, that the SFSS Constitution and Bylaws, Administrative Policy 19 (Elections) and the SFSS Electoral Handbook appear to prohibit early campaigning of the type carried out by the SFSS with respect to the Vote.

69. SFSS Bylaw 14 – Elections, reads in part:

“13. b. Campaign literature shall not be libellous, inflammatory, in bad taste or discriminatory on the basis of Bylaw 20.”

70. Bylaw 17 – Referenda, reads in part:

“5. The referendum shall be conducted by the independent electoral commission in accordance with Bylaw 14.”

Affidavit #1 of D. Harder sworn April 14, 2008, Exhibit A.

1. Administrative Policy 19 reads in part:

“9. Any elections-related material presenting any combination of name, face, slogan, or other distinguishing characteristic of a nominated candidate (including such items bearing sufficient similarity to these that it would be expected that a reasonable person would associate the material with the candidate) will be considered campaign material and is subject to the restrictions outlined in this policy and any relevant bylaws.

10. For the purposes of the restrictions and limitations outlined in this Policy and in Bylaw 14, “election-related material” refers collectively to all material produced by, or under the direction of, a candidate to promote their election to any position for which they are running, ...”

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit C.

72. The 2008 SFSS Electoral Handbook reads in part as follows:

“Q: When does the campaign period begin and end?

A: The official campaign period begins at 10 a.m. on February 27<sup>th</sup> and ends on the last day of voting, March 20<sup>th</sup>.

Q: What counts as campaigning?

A: The election law allowed defines campaigning as “anything you do to try and get students to vote for you.” This includes handing out leaflets, putting up posters, speaking to classrooms, or any other creative scheme you can think up.

Q: But I’m ready to go now! Can I campaign before February 27<sup>th</sup>?

A: It is permissible to publicly discuss your plans and intentions to run for office (either online or in person) before February 27<sup>th</sup>, but you are not allowed to put up any posters or otherwise distribute campaign material on campus before that day.

...

Q: Anything else I should know about campaign materials?

A: Anything hanging around campus that prominently displays your name, image or slogans will be considered part of your campaign, and thus expected to conform with the rules of this guide.”

...

Q: What are the rules about posters?

A: The first and most important rule is that all poster designs must be formally approved by the IEC before you can get them mass printed. Simply email your proposed poster design to the IEC ([elections@sfss.ca](mailto:elections@sfss.ca)) and wait for us to respond with a message of approval or rejection.

Note: The IEC also has to approve anything else you may wish to post or distribute on campus, such as large banners or hand-out flyers.

...

Q: Can I make a campaign website?

A: Certainly. However the IEC must be made aware of the site once it is launched. Email the URL to elections@sfss.ca for approval before going public with the address."

Affidavit #2 of L. Watson sworn February 15, 2008 at para. 33.

*The "I am CFS" Campaign*

73. The SFSS takes the position that the "I am CFS" materials which were present at SFU campuses constitute early campaign materials for the referendum and therefore, in effect, balance out the early campaigning done by the SFSS. It is submitted that that is not so. The "I am CFS" material was general promotional material or information on the CFS. It did not refer in any way to a referendum. Pursuant to the CFS Bylaws, the "I am CFS" materials would not constitute campaign materials. It is submitted that such materials would also not constitute campaign materials pursuant to the SFSS rules and procedures, outlined above.

74. The Canadian Federation of Student practice has also always been to draw a distinction between general promotional material, on the one hand, and material which refers specifically to an upcoming referendum and seeks to persuade voters to vote in a certain way, on the other. The practice of the Canadian Federation of Students is that only the latter is campaign material and subject to the rules governing the use of campaign materials in the CFS Bylaws and as decided upon by an oversight committee.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 36.

75. It is not the case that the Canadian Federation of Students "promoted its existence and services" more frequently prior to March 2008 at SFU in order to prepare for a referendum. In 2007, the Canadian Federation of Students – British Columbia was engaged in a province-wide consultation with member local associations and individual students with respect to transit issues. Because of this there were visits to SFU campuses during 2007, but SFU was in no way singled out or received more attention because of the proposed referendum.

76. The "I am CFS" program was in place long before the members of the SFSS petitioned the National Executive of the CFS to conduct a referendum on continued membership with the CFS. This program is meant to raise awareness of the CFS – British Columbia amongst post-secondary students across British Columbia. The materials associated with it are meant to outline what the CFS – British Columbia is, what it does and what services are offered by the CFS – British Columbia to members. The critical difference is that none of this CFS – British Columbia material directly addresses a referendum. On the other hand, the campaign material distributed by the SFSS since August 2007 clearly focused on a referendum.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 96.

77. The "I am CFS" program was not focused on the Lower Mainland. The use of advertising space in Skytrain stations and Skytrain buses was, of course, confined to the Lower Mainland because that is where such locations are.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 95.

78. The CFS is obliged by the members of CFS to keep students of member local associations informed about the CFS and its activities. The communication referred to here is a central part of being a member of the CFS. The CFS is obliged to provide information with respect to services it offers to member students. So for example the posters reproduced as exhibits to Affidavit #1 of Titus Gregory sworn April 11, 2008 (Exhibit "O" to Exhibit "A") describe CFS projects such as environmental sustainability, CFS services that come with membership and CFS lobbying efforts done on behalf of post-secondary students across Canada. Again, none of these materials refer to a referendum.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 97.

### **March 18 – 20, 2008 Vote Carried Out by the IEC**

79. On February 25, 2008, the board of the SFSS held a meeting at which it decided to independently present two linked questions (amongst others) to voters on

March 18-20, 2008 outside of the mandate of the Oversight Committee and the CFS Bylaws:

- (a) "Are you in favour of maintaining membership in the Canadian Federation of Students?"; and
- (b) "If the Simon Fraser Student Society ceases to be a member of the Canadian Federation of Students, do you agree that the former CFS semesterly membership fee would be redirected into a Society Development Fund which will result in no overall fee increase for students?" (the "Second Question")

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 56.

80. This step created three issues:

- (a) first, by usurping the jurisdiction and authority of the Oversight Committee in favour of the SFSS's IEC, the SFSS carried out the Vote outside of the CFS Bylaws and, to the extent the Vote was intended to be a referendum, contrary to the CFS Bylaws;
- (b) second, the use of the Second Question was contrary to a decision by the Oversight Committee and the practice of the Canadian Federation of Students. It created a bias against continued membership with the Canadian Federation of Students; and
- (c) third, the involvement of the IEC led to confusion over who was in charge and resulted in what was, essentially, an "unregulated vote" without control over such things as campaigning, campaign material, registration of participants, consideration as to who would be voting and also resulted in the polling infractions considered below.

81. Letters from counsel for the CFS (Gowlings) to the SFSS dated February 27 and 29, 2008, respectively, set out the CFS's concerns with respect to the proposed Vote. Those letters raised concerns about the role of the Oversight



Committee holding the referendum in conjunction with the SFSS general elections, the referendum question and the use of problematic campaign material by the SFSS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 58, Exhibit "X".

82. Despite the concerns raised by the CFS, the SFSS proceeded with the Vote. The IEC ran the Vote. The Oversight Committee was excluded.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 59.

83. Pursuant to the CFS Bylaws, it is the Oversight Committee which has the exclusive jurisdiction and authority to decide the question for the referendum. By unilaterally adding a question, the SFSS acted contrary to the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 57.

84. Since May 1995, the practice of the Canadian Federation of Students and its member local associations has been that a referendum to join or leave the Canadian Federation of Students will put one question to the members of the affected student association asking whether members are in favour of membership or maintaining membership in the Canadian Federation of Students. The objective is to avoid having a vote on membership confused or biased by a second question, for example here, offering up alternative uses for Canadian Federation of Students' fees. The use of the Second Question was contrary to the decision and agreement reached by the Oversight Committee regarding the question to be put forward, set out above. It is submitted that combining the questions in this way biased the result against continued membership with the CFS.

Affidavit #1 of L. Watson sworn May 20, 2008 at para.57;  
Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 13-14.

85. The "Notice of Referendum for the 2008 SFSS General Election" posted by the SFSS at SFU campuses indicated that the "CFS Membership" question and the "Student Development Fund" question (i.e. the Second Question) were considered consecutively.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 60, Exhibit "Y".

86. In the Spring 2008, there was a Canadian membership referendum with respect to the member local association, Kwantlen University of College Students Association. In legal proceedings regarding that referendum, an affidavit of Fred Schiffner was sworn May 12, 2008. Mr. Schiffner has experience conducting student elections and referenda. Ultimately, after taking legal advice, Mr. Schiffner rejected the following question:

"Do you agree to withdraw your membership in a Canadian Federation of Students (with the current cost of membership being 64¢ per student, per credit, to a maximum of \$7.64 per semester)."

87. It is submitted that the reason that Mr. Schiffner rejected the above question, deciding instead to use a question without the clause in parenthesis, was because referring to membership fees was thought inappropriate as it might improperly bias the result.

Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 15-17.

88. With respect to the idea that the Second Question was necessary to deal with "alternative uses" for Canadian Federation of Students fees, the common practice where a local member association validly defederates is to not collect Canadian Federation of Students fees from individual members from that point on. With respect to the SFSS, fee collection was initiated when the SFSS joined the Canadian Federation of Students by way of a student referendum. If the SFSS were to leave the Canadian Federation of Students by way of a valid student referendum, the natural result would be for such fee collection to stop. There would be no need to "reallocate" such fees.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 18.

89. Because of the involvement of the IEC there was confusion over the jurisdiction and authority of the Oversight Committee.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 61.

90. An excerpt from the website of the IEC as of March 2, 2008 describes the IEC's position on the jurisdiction and authority of the Oversight Committee with respect to the referendum. This excerpt reads in part:

"The referendum on separation from the Canadian Federation of Students is a complex matter that is different than ordinary SFSS referendums because it must be conducted according to the terms of the CFS constitution, rather than simply the SFSS constitution.

...

#### **CFS Referendum Oversight Committee**

The powers of the SFSS independent electoral commission over a CFS referendum are very limited. Instead, most authority rest with a separate group known as the "Oversight Committee".

According to the CFS constitution, the Oversight Committee consists of "two (2) members appointed by the Federation and two (2) members appointed by the member local association."

The current committee, appointed by both the CFS executive and the SFSS Board of Directors is as follows:

<b>Appointed</b>	<b>By</b>	<b>Contact Information</b>
Michael Letourneau	SFSS	mletourn@cs.sfu.ca
Kyall Glennie	SFSS	
Ben Lewis	CFS	
Lucy Watson	CFS	

The Oversight Committee has the following constitutional duties:

- deciding the manner of voting, be that by referendum, general meeting or mailout ballot;
- deciding the number and location of polling stations;
- approving all materials to be distributed during the campaign;
- deciding the ballot question;
- overseeing the voting;
- counting ballots;
- adjudicating all appeals; and
- establishing all other rules and regulations for the vote.

In the coming weeks, the Oversight Committee will be meeting and further clarify how the CFS referendum will be conducted. With their co-operation, the IEC will publish any relevant developments on this website."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 72, Exhibit "GG".

91. Confusion regarding the Vote is demonstrated by an email of April 3, 2008 from an SFU Student sent to the Oversight Committee. The e-mail reads in part:

"Dear members of the Independent Electoral Commission,

After witnessing the referendum campaign on membership in the Canadian Federation of Students over the last two weeks, I am thoroughly confused by the process. My understanding is that a referendum oversight committee is responsible for the administration of the referendum, and yet the question of today's ballot appears to be part of the independent electoral commission of the SFSS only. The IEC states on its website that "The [CFS Referendum] Oversight Committee has the following constitutional duties:

- deciding the manner of voting, be that by referendum, general meeting or mailout ballot;
- deciding the number and location of polling stations;
- approving all materials to be distributed during the campaign;
- deciding the ballot question;
- overseeing the voting;
- counting ballots;
- adjudicating all appeals; and
- establishing all other rules and regulations for the vote.

The polling stations set-up today were the same for the referendum and the elections. Was this a decision of the Oversight Committee? If it was an IEC decision, what other extra-constitutional duties has the IEC taken on from the Oversight Committee.

Additionally, who are complaints brought to? Why are campaigns not being registered by the IEC for the membership, yet being registered for all other SFSS referendums?

In short, has an extra-constitutional patchwork of referendum administration duties being taken on by the IEC or foisted upon it by the SFSS Board? In my mind, this severely muddies the administration of the process, and makes accountability to individual members very suspect. How can I have confidence

that polling has been conducted correctly, and that the referendum is being administered in a fair and open manner?

I wish to receive a written response from the IEC to the above questions and concerns."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 71, Exhibit "FF".

92. On March 8, 2008, Lucy Watson, a CFS representative on the Oversight Committee, sent Kyall Glennie, an SFSS representative on the Oversight Committee, an e-mail which read, in part:

"Hello everyone,

I think we need to meet this weekend in order to review materials submitted by the "yes" side and those submitted by Garth Yule. I am concerned that our failure to meet will unfairly prejudice the "yes" side which is following the referendum rules while the "We Want Out" / "Vote No" campaign is distributing unapproved materials on campus."

Kyall Glennie wrote back saying, in part:

"I hear your concerns Lucy but we have never determined a "pre-campaign" period, nor deemed a campaign period, for any referendum dates that we have proposed. Thus, the referendum rules we have set to date have been in effect followed, in my view."

Lucy Watson's response, in part, was:

"Garth Yule (presumably acting for the as yet unregistered "no" side) has also submitted materials for the Committee to review. However, these materials are in circulation despite not being approved by the Referendum Oversight Committee."

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 62, Exhibit "Z".

93. A string of e-mails were exchanged between Paul Browning, a member of the SFSS, and J.J. McCullough, the Chief Electoral Officer at the IEC responsible for overseeing the Vote. Paul Browning also raised concerns and questions as to how the Vote is being conducted. J.J. McCullough writes back, on March 9, 2008, saying:

"Sometime last month, the Board of Directors voted to suspend AP-27 for the purposes of the CFS referendum. AP-27 is the policy which outlines all normal rules governing referendums at the Society. This means that I am not conducting the CFS referendum according to normal rules, and am instead allowing both sides to campaign fairly freely, without spending limits, etc.

I've never registered formal "sides" either, largely because a) the only real reason to register sides is to impose spending limits, and b) because it's very obvious who the "sides" in this feud already are.

Nevertheless, the board has recently started to submit materials to the IEC for approval anyway. I am not sure of what practical relevance this is, and I doubt the CFS will start doing that for their materials, but I'm not really too concerned either way."

I am somewhat unclear as to what the ROC is or is not doing right now. I wanted to be appointed to that committee, but the Board refused. All anti-CFS materials that my committee has approved have also been also forwarded to the ROC for approval, but I am not sure if they are actually approving or disapproving anything at this point. If they are, I am unaware.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 63, Exhibit "AA".

94. A letter dated March 10, 2008 was sent from CFS's counsel to the SFSS with respect to problems with campaign materials. That letter dealt with the pre-campaign material distributed by the SFSS, the lack of jurisdiction of the IEC and clearly set out the position of the CFS that any referendum must be held in accordance with the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 64, Exhibit "BB".

95. The CFS representatives on the Oversight Committee did object to materials being used by the SFSS in the two weeks prior to the Vote as set out in Gowlings' March 31, 2008 letter but none of the concerns raised by the CFS representatives were ever addressed. *M. R. A. 17*

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 68.

96. The Vote occurred, in effect, without any of the rules, control or supervision that would normally occur under the CFS Bylaws' Oversight Committee

process or, seemingly, under SFSS procedure. Certainly campaign materials in the two weeks preceding the Vote were not properly reviewed or approved.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 61 and 65.

97. With respect to material which was used by the SFSS in its campaign two weeks prior to the Vote:

- (a) the poster entitled "Compare and Contrast":
  - (i) item 1 which states "Ontario-centered bureaucracy that won't let you leave" is false as the CFS is a national organisation with members in every province and the CFS Bylaws set out a process by which members can and do leave;
  - (ii) item 3 which states "stalls out students' attempts to affect change" is false as member local associations can propose amendments for consideration at twice-yearly general meetings and, in addition, members are encouraged to propose ideas and motions for campaigns, services and policies of the organisation. The campaigns and government relations strategy, official documents and financial documents (including budgets), are established and/or reviewed by the membership at the CFS' general meetings;
  - (iii) item 4 which states "throws lawyers at student journalists, refuses to work with other student groups", is false and defamatory as the CFS does not refuse to work with other student groups and in fact has close working relationships with many such groups such as the Sierra Youth Coalition;
  - (iv) item 5 which states "prefers conformity, obedience and yesmanship" is false and defamatory;
- (b) the cartoon entitled "Vote: March 18, 19 & 20" is defamatory;

- (c) the "CFS 'Advocacy' Flowcharts" inaccurately portrays decision making within the CFS;
- (d) the poster entitled "The CFS: Strong Words, Weak Actions":
  - (i) the reference to the CFS National Office conveniently "taking credit for work they didn't do themselves" is false as the CFS is the only national student organisation that lobbied for a national system of grants (and has done so since its inception in 1981) and, in addition, four political parties did not support a national system of grants;
  - (ii) the statement that the CFS Bylaws "are intentionally designed to make it very difficult to leave" is false. The CFS Bylaws provide a transparent process for student members to decide to join or leave the CFS by way of a referendum. The CFS Bylaws were proposed and adopted by the member local associations, including the SFSS;
  - (iii) the reference to the CFS treating "non-member schools like hostile enemies" is false as the CFS enjoys a good working relationship with many student unions and schools that are not members;
  - (iv) the statement that "loyal CFS staff members shut down dissenting student voices" is false as the CFS staff does not have the ability to "shut down voices". CFS staff do not exercise a vote at meetings of the CFS and are the lowest in priority in the speaking-list hierarchy;
  - (v) the reference to the "unauthorized secret loans to the Douglas Students' Union" is false as explained above;
- (e) the cartoon entitled "The CFS: Wasting Our Money" is misleading. It is the membership of the CFS (which includes the SFSS) which makes budgetary decisions and sets priorities. As well, the CFS provides various money-saving services to both individual student members and member



local associations as well as undertaking comprehensive campaigns and advocacy work, contrary to the suggestion in the cartoon;

- (f) the poster entitled "I Want Out of the CFS Because There's a Better Way" states that "it's too bad the CFS won't work with anyone that criticizes them" which is false. The CFS works with many individuals and groups and does not avoid doing so because such persons have levelled criticism at the organisation;
- (g) the poster entitled "I Want Out of the CFS Because Something Smells Bad" is defamatory; and
- (h) the cartoon entitled "CFS Lemons" is defamatory.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 69 and 70 and Exhibit "EE".

### **Polling Infractions**

98. During and following the Vote, a number of written complaints were made by SFSS members of voting and polling infractions (the "Infractions") to the IEC. These complaints include:

- (a) poll clerks and others who ran the Vote taking direction from SFSS representatives;
- (b) SFSS representatives campaigning within the 15-foot "no-campaigning zone" at polling stations and influencing the electoral process and voting at polling stations;
- (c) SFSS scrutineers campaigning and influencing the electoral process and voting at polling stations;
- (d) SFSS poll clerks campaigning and influencing the electoral process and voting at polling stations;

- (e) IEC officers campaigning and influencing the electoral process voting at polling stations;
- (f) individuals loitering at or at polling stations with no effort made by poll clerks or others running the vote to attempt to have such individuals leave the polling stations;
- (g) copies of ballots openly displayed at polling stations;
- (h) unsupervised ballots taken outside of the polling area and completed outside of the polling area;
- (i) improper, unsupervised sealing, transportation and disposal of ballots and ballot boxes;
- (j) lack of the requisite two poll clerks at polling stations during voting;
- (k) SFSS members being turned away although presenting the requisite valid student numbers and identification;
- (l) tampering with completed ballots by poll clerks;
- (m) closure of polling stations during voting hours;
- (n) polling stations running out of ballots during voting hours;
- (o) no privacy screens at all polling stations at all times to ensure secrecy of voting and, further, where there was a privacy screen, not all voters using the privacy screen. In addition, where voters were using a privacy screen, poll clerks, scrutineers or other persons on several instances went behind the voting screen. In other cases, more than one voter went behind a privacy screen at one time.

(the "Infractions")

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 73.

99. On March 20, 2008, Andrew Ferguson, an SFSS member, sent an e-mail to the IEC setting out the Infractions and calling for steps to be taken.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 74, Exhibit "HH".

100. On March 28, 2008, Andrew Ferguson sent a further e-mail to J.J. McCullough with respect to the IEC's decision to do nothing about the Infractions. It is apparent that complaints regarding Infractions were either dismissed out of hand or ignored, with no investigation or explanation.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 75, Exhibit "II".

101. J.J. McCullough, the Chief Electoral Officer at the IEC responsible for overseeing the Vote, apparently holds an anti-CFS bias, made clear by certain correspondence from J.J. McCullough.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 76, Exhibit "JJ".

102. Evidence of the Infractions is set out below.

*Improper Communication/Contact with Poll Clerks*

103. On March 18, 2008, at approximately 9:30 a.m. at the polling station in the academic quadrangle at the Burnaby campus of SFU (the "AQ Polling Station"), a female poll clerk who was taking part in the Vote approached SFSS representatives Garth Yule and Mike Letourneau and spent two minutes conferring with Mr. Yule and Mr. Letourneau. It appeared that Mr. Yule was providing directions to the poll clerk, who nodded and returned to her polling station.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 3 and Affidavit #1 of J. Salter sworn July 9, 2008 at para. 3.

104. On March 18, 2008, between 7:40 p.m. and 8:00 p.m., SFSS Out On Campus coordinator Samonte Cruz transported IEC balloting material with respect to the Vote, including marked and unmarked ballots ("Ballot Material"), accompanied by two poll clerks. Those materials were transported from the mezzanine floor of the AQ

Polling Station to one of the floors below. Samonte Cruz is not a member of the IEC and approximately one week prior to the incident, Samonte Cruz was observed removing CFS campaign material.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 6.

105. At approximately 3:00 p.m., on March 19, 2008, Kwantlen Student Association staff person Titus Gregory, an individual again well-known for his anti-CFS views, was inside the AQ Polling Station boundary speaking with the poll clerks. At approximately 3:15 p.m., on March 19, 2008, Titus Gregory returned and spent several minutes there speaking with J.J. McCullough, the IEC Chief Returning Officer.

Affidavit #1 of J. Salter sworn July 9, 2008 at paras. 14 and 15.

#### *Poll Clerk Conflict of Interest*

106. Throughout the afternoon and evening on March 18, 2008, the son of SFSS staff member and shop steward for CUPE 5396, Hattie Aitken, acted as poll clerk for the Vote at the Burnaby campus of SFU.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 7.

#### *Campaigning Within Polling Boundaries*

107. At approximately 10:45 a.m. on March 18, 2008, two clearly marked unidentified "No" campaigners (that is, anti-CFS campaigners) who had previously been handing out "No" campaign materials, were within the boundary of the lobby polling station at the Surrey campus (the "Surrey Polling Station"). The two individuals remained there for at least 15 minutes and, during that time, directed students towards the Surrey Polling Station.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 6.

108. On March 18, 2008, an individual wearing a name tag "Independent Kyle S" ("Kyle") spent most of the day within the Surrey Polling Station boundary and at one point was standing by the ballot boxes. At that time he asked an IEC Officer (the

"IEO") a number of questions about Ballot Material. An unidentified male who had just voted also walked over to Kyle to discuss Ballot Material. The male then described how he had just voted. That conversation continued for about five minutes.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 15.

109. For most of the morning on March 18, 2008, at the Surrey Polling Station, the IEO was soliciting individuals to vote. The majority of the individuals solicited were vocal supporters of the "No" side (i.e. anti-CFS) campaign. These individuals had been canvassing people to vote "No" earlier in the campaign.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 8.

110. At approximately 1:40 p.m. on March 18, 2008, an unidentified male was standing within the Surrey Polling Station boundary with a "We Want Out" button on his hat. He stood there for at least 15 minutes and walked around talking to other individuals within the Surrey Polling Station boundary. During that time, at least two individuals who were carrying "Yes" campaign (i.e. pro-CFS) flyers were asked to leave the boundary. Those individuals immediately left the Surrey Polling Station boundary, where they were approached by the IEO who spoke with them for approximately 10 minutes before they left the area. Those individuals were not observed voting.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 9.

111. At approximately 3:00 p.m. on March 18, 2008, friends of Vote candidates Ada Nadison ("Nadison") and Brian Ottho ("Ottho") were standing inside the Surrey Polling Station boundary. Nadison had made her anti-CFS views publicly known during the period leading up to the Vote. Several unidentified males clearly marked as "No" campaigners (i.e. anti-CFS) were within the Surrey Polling Station boundary and were approaching individuals as they entered the boundary to vote.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 10.

112. At approximately 4:45 p.m. on March 18, 2008, an unidentified male clearly marked as a "No" campaigner (i.e. anti-CFS) was actively engaging in

conversation individuals who were entering the Surrey Polling Station to vote. On several occasions the "No" campaigner was conversing with individuals voting behind screens at the Surrey Polling Station. During that time the IEO was conversing with individuals lined up with their Ballot Material.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 11.

113. At approximately 4:45 p.m. on March 18, 2008, several unidentified males and females were distributing a newsletter to individuals with Ballot Material inside the Surrey Polling Station boundary. The newsletter featured Nadison on the front page, and one of the individuals distributing that document was observed earlier in the day campaigning against continued membership in the CFS.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 12.

114. At approximately 5:47 p.m. on March 18, 2008, Kyle and a candidate in the Vote were loitering within the Surrey Polling Station boundary and talking to individuals that were lined up to vote and pointing to Ballot Material on display.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 16.

115. On March 18, 2008, between 6:50 p.m. and 7:15 p.m., "No" campaigner Andrea Sandau was loitering within eight feet of a polling station for the Vote located at the Burnaby campus of SFU and speaking within earshot of the polling station to an unidentified male. At that time, Ms. Sandau was heard referring to the referendum on one occasion. At approximately 7:00 p.m., "No" campaigner Brian Jones joined the discussion between Ms. Sandau and the unidentified male. A "No" campaigner is a person who had actively campaigned against continued membership for the SFSS in the CFS leading up to the Vote. Ms. Sandau's picture appeared on many "No" campaign posters around the Burnaby campus and therefore she would be easily recognized as a "No" side campaigner.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 8.

116. During most of the day on March 19, 2008, an individual who appeared to be a scrutineer (the "Scrutineer") actively campaigned for the "No" side (i.e. anti-CFS) and for Ottho within the Surrey Polling Station boundary. The Scrutineer was wearing a nametag and circulated within the boundary for much of the day. At 9:50 a.m., the Scrutineer was actively soliciting individuals he appeared to know to vote. Specifically, he was calling out to them as they walked by or actively pulling students towards the Surrey Polling Station while, at the same time, urging the students to vote against continued membership in the CFS. The Scrutineer was within the Surrey Polling Station boundary at the time.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 31 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

117. From 10:15 a.m. to 12:15 p.m., on March 19, 2008, Jason Tockman, a member of the "No" or anti-CFS campaign, regularly entered the AQ Polling Station and actively campaigned for the "No" side. During that period, Mr. Tockman also stood at the ropes, inside the AQ Polling Station boundary, where students lined up to vote and told the students to "vote no". Mr. Tockman would also engage students who were walking through the AQ Polling Station boundary and would then walk the students to the line to vote. The poll clerks at the AQ Polling Station did not ask him to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 6.

118. At approximately 10:40 a.m. on March 19, 2008, the Scrutineer was talking with three other people who appeared to be his friends, within the Surrey Polling Station boundary, while those individuals were voting. One of the individuals he was conversing with was wearing a "We Want Out" button. The Scrutineer and his three friends loitered at the Surrey Polling Station for at least 15 minutes.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 32 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

119. At approximately 11:35 a.m. on March 19, 2008, at least two individuals in addition to Mr. Tockman, were actively campaigning for the "No" or anti-CFS side of the referendum inside the AQ Polling Station boundary. Those individuals wore "no"

campaign buttons and communicated verbally with students suggesting to the students that they should "vote no" to continued membership in the CFS. The poll clerks at the AQ Polling Station did not ask them to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 7.

120. At approximately 12:50 p.m. on March 19, 2008, Joe Paling's girlfriend, Rachel (last name unknown), a well-known "No" or anti-CFS campaigner, who is not a member of the SFSS or of the CFS, was inside the AQ Polling Station boundary. She bore no markings identifying her as scrutineer, and continuously engaged individuals, who were eligible to vote, in discussion. The poll clerks at the AQ Polling Station did not ask her to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 8.

121. At approximately 1:07 p.m. on March 19, 2008, while at the Surrey Polling Station, Nadison was within the Surrey Polling Station boundary talking to individuals that were eligible to vote.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 33 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

122. At approximately 1:14 p.m. on March 19, 2008, Nadison was standing next to several individuals at the Surrey Polling Station who were completing their Ballot Material. Around the same time, one of the poll clerks left the polling station to speak to an unidentified female that Nadison had previously been conversing with. The unidentified female and the poll clerk then walked together to the polling station. Nadison then approached the female who was now conversing with the IEO and engaged them in conversation. Nadison proceeded to leave and re-enter the Surrey Polling Station boundary several times before the individual voted. While within the Surrey Polling Station boundary, she was talking to the IEO and several other individuals who were students at SFU.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 34 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.



123. At approximately 1:30 p.m., on March 19, 2008, an Asian male was inside the AQ Polling Station boundary discussing the Vote with other unidentified individuals. The poll clerks at the AQ Polling Station did not ask him to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 9.

124. At approximately 2:45 p.m. on March 19, 2008, a group of four or five individuals at the AQ Polling Station were telling individuals to "vote no" to continued membership in the CFS. The poll clerks at the AQ Polling Station did not ask them to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 10.

125. At approximately 4:45 p.m., on March 19, 2008, SFSS President Derrick Harder was inside the AQ Polling Station boundary with a large sign affixed to his back. That sign was approximately one foot wide and three feet high and had the words "vote no" written on it in large letters.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 11.

126. At approximately 6:00 p.m., on March 19, 2008, an unidentified female at the AQ Polling Station was telling individuals how to vote. The poll clerks at the AQ Polling Station did not ask her to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 12.

127. From 3:30 p.m. to 7:30 p.m., on March 19, 2008, music associated with the "No" or anti-CFS campaign could be clearly heard by anyone at the AQ Polling Station. The music was being played directly behind the AQ Polling Station, while "No" campaigners waved large signs that could be seen from the AQ Polling Station. Those signs encouraged students to "vote no" to continued membership in the CFS.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 13

128. At approximately 9:50 a.m., on March 20, 2008, a male student was inside the AQ Polling Station boundary telling other voters to "vote no" to continued

membership in the CFS. He was not asked to leave by poll clerks at the AQ Polling Station.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 18.

129. At approximately 12:30 p.m., on March 20, 2008, "No" or anti-CFS campaigners were inside the AQ Polling Station boundary actively campaigning and encouraging students to "vote no" to continued membership in the CFS. The poll clerks at the AQ Polling Station did not ask them to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 19.

130. At approximately 1:35 p.m., on March 20, 2008, "No" or anti-CFS campaigner Mr. Paling was in front of the AQ Polling Station with a large sign that was clearly visible from the AQ Polling Station and to voters behind the voting screens inside the AQ Polling Station boundaries. The sign encouraged students to vote "no" to continued membership in the CFS.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 20.

131. At approximately 1:50 p.m., on March 20, 2008, a bald male was loitering inside the AQ Polling Station boundary talking to students in the line to vote.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 21.

132. At approximately 2:10 p.m., on March 20, 2008, an unidentified male standing in the line to vote at the AQ Polling Station was telling students in the line around him how they should vote no to continued membership in the CFS. The poll clerks at the AQ Polling Station did not ask him to stop.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 22.

133. At approximately 3:45 p.m., on March 20, 2008, numerous unidentified individuals were loitering at the AQ Polling Station talking to students as they voted, and to students in the line to vote. The poll clerks at the AQ Polling Station did not ask them to leave.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 23.

134. At approximately 3:50 p.m., on March 20, 2008, three "no" campaigners were standing on the AQ Polling Station boundary line with large signs that were easily visible from the voters in the boundary and to voters behind the voting screens. Those signs encouraged students to "vote no" to continued membership in the CFS.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 24.

135. Between approximately 4:15 p.m. until approximately 5:15 p.m., "No" campaigner Andy Shen was inside the AQ Polling Station boundary, stopping students of Asian descent that had been approached outside of that boundary by members of the "Yes" or pro-CFS campaign. Mr. Shen was telling students to "vote no" and Mr. Shen directed many of the students to the voting line-up and then stood with them until they had voted.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 25

136. At approximately 5:15 p.m., on March 20, 2008, numerous individuals were loitering at the AQ Polling Station telling students how to "vote no" to continued membership in the CFS. The poll clerks at the AQ Polling Station did not ask them to leave.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 26.

137. At approximately 7:25 p.m., on March 20, 2008, a poll clerk at the AQ Polling Station asked a student to leave the AQ Polling Station boundary because he held a "Yes" or pro-CFS side flyer that had been given to him by a "Yes" campaigner. However, poll clerks did not ask voters holding "No" side campaign materials to leave the AQ Polling Station boundary at anytime throughout the day.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 27.

138. On March 20, 2008, at the Surrey Polling Station, a scrutineer was actively campaigning for the "no" or anti-CFS side as well as the candidacy of Ottho. This individual's actions persisted for much of the day with no intervention by the poll clerks.

Affidavit #1 of M. Olson sworn September 8, 2008 at para. 6.

139. On March 20, 2008, at the Harbour Centre Polling Station, a male graduate student who identified himself as being part of the "no" or anti-CFS campaign was inside the polling station boundaries talking to an individual in the act of voting.

Affidavit #1 of A. Bratton sworn December 12, 2008 at para. 11.

*Insufficient Ballot Material at Polling Stations*

140. At approximately 11:50 a.m., on March 19, 2008, the Surrey Polling Station ran out of Ballot Material. A sign was posted on top of the "Vote Here" sign, saying that the Surrey Polling Station would re-open at 1:30 p.m. The Surrey Polling Station re-opened at approximately 12:45 p.m. The noon hour is one of the busiest periods at the Surrey campus of SFU because students are generally not in classes.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 40 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

141. At approximately 3:05 p.m., on March 19, 2008, several students advised that they had been turned away from the AQ Polling Station because that station was out of Ballot Material.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 16.

142. Between approximately 5:50 p.m. and 6:00 p.m., on March 19, 2008, the AQ Polling Station was again out of Ballot Material.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 17.

143. At approximately 2:30 p.m., on March 20, 2008, the polling station located in a thoroughfare at the West Mall on the Burnaby campus (the "WMX Polling Station") ran out of Ballot Material for several minutes. This happened on at least one other occasion that day.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 42.

*Ballot Material Removed from the Polling Stations*

144. On March 18, 2008, at approximately 9:45 a.m., an unidentified male left the 15-foot demarcated polling station boundary of the Surrey Polling Station with his Ballot Material. The male took his Ballot Material to one of the Surrey campus student computer labs where he stayed for at least five minutes before returning to the Surrey Polling Station area and placing his Ballot Material in a ballot box.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 3.

145. At approximately 11:00 a.m. on March 18, 2008, a line of at least 10 unidentified males and females was stretching outside of the Surrey Polling Station boundary. All of those individuals were holding their Ballot Material and several of the individuals were talking with the IEO, and with an unidentified staff person for the SFSS. The unidentified males and females with their Ballot Material were also being canvassed by Ottho while standing in line. Ottho had made his anti-CFS views publicly known during the period leading up to the Vote.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 7.

146. At 2:05 p.m. on March 18, 2008, an unidentified female in a white jacket was leaning over a table at least 30 feet outside of the boundary at the Surrey Polling Station. The female had her Ballot Material spread out on the table and appeared to be completing her Ballot Material while she was talking on a cellular telephone. After a few minutes the unidentified female return to the Surrey Polling Station area and placed her Ballot Material in the ballot box.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 4.

147. At 5:15 p.m. on March 18, 2008, an unidentified male voter walked outside of the Surrey Polling Station boundary with his Ballot Material.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 5.

148. At approximately 2:30 p.m. on March 20, 2008, an unidentified female left the WMX Polling Station boundary with her Ballot Material. The poll clerks did not attempt to retrieve the Ballot Material.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 43.

*Improper Conduct of Election Officials*

149. At approximately 5:30 p.m. on March 18, 2008, an unidentified male left the Surrey Polling Station boundary with his Ballot Material. The unidentified male approached the IEO and asked for help completing his Ballot Material. The IEO directed the unidentified male back inside Surrey Polling Station boundary where he engaged the male in conversation, and the IEO pointed to the "no" box on the Ballot Material. The unidentified male then moved behind a voting screen with his Ballot Material. While there he called out to the IEO and the two of them conversed at a distance of approximately 10 feet. During that time, another individual behind a voting screen was completing her Ballot Material.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 13.

150. At approximately 6:08 p.m. on March 18, 2008, the IEO was observed talking with an unidentified male and female who were going to vote at the Surrey Polling Station. The two individuals took their Ballot Material behind a voting screen and while there the IEO continued to engage them in conversation. The male then walked with his Ballot Material in hand towards the IEO, who was standing at the other end of the Surrey Polling Station boundary. The IEO met the male half way and began discussing the Ballot Material with the male. The female student left the voting screen, leaving her Ballot Material behind, and the male student then broke off his conversation with the IEO and went behind the voting screen where the female student had left her Ballot Material. The female student did not return and the poll clerk went over to the voting screen to remove her Ballot Material.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 14.

151. At approximately 1:05 p.m. on March 19, 2008, the poll clerks at the Surrey Polling Station were relieved by two new poll clerks. The new poll clerks, rather than using the IEC computers for their duties, brought their own laptops and set them up at the Surrey Polling Station.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 24 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

152. At approximately 1:10 p.m. on March 19, 2008, at the Surrey Polling Station, the IEO was speaking to an unidentified male and it appeared that the IEO was providing direction and/or instruction to that individual with respect to the completion of his Ballot Material. The individual then filled out his Ballot Material between two voting screens that were both occupied by other individuals.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 27 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

153. At approximately 1:16 p.m. on March 19, 2008, at the Surrey Polling Station, the IEO engaged several individuals in conversation as they looked over their Ballot Material. The IEO then stood there, observing those individuals while they read through their Ballot Material. A short time later the IEO engaged another student in conversation in close proximity to other individuals who were completing their Ballot Material. That student had just dropped his completed Ballot Material in a ballot box.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 25 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

154. At approximately 1:40 p.m. on March 19, 2008, a woman who appeared to work for the administration of SFU and the IEO was talking to individuals, who were holding their Ballot Material while standing in line to vote at the Surrey Polling Station.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 38 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

155. At approximately 1:47 p.m. on March 19, 2008, the IEO held a group meeting, on the floor, beside the Surrey Polling Station. There were at least four unidentified individuals sitting cross-legged in a circle.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 26 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

156. At approximately 1:57 p.m., on March 19, 2008, the poll clerks at the Surrey Polling Station were talking to individuals who were asking how to vote. One of the poll clerks held up the Ballot Material while providing an answer.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 28 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

157. At approximately 6:25 p.m. on March 19, 2008, a poll clerk at the Surrey Polling Station helped an unidentified male fill out his Ballot Material.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 29 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

158. At approximately 9:10 p.m. on March 19, 2008, an unidentified male and female were reading the "CFS is Wasting Our Money" campaign poster on an SFSS board near the library of the Burnaby campus of SFU. Students at SFU passing by the board could overhear the unidentified female laughing and indicating her support of the views expressed by the poster. When approached by a "Yes" campaigner, the unidentified female stated that she completely agreed that the CFS was a waste of money. The unidentified male and female then entered the library of the Burnaby campus and set up and acted as polling clerks at the library polling station at SFU for the majority of the day.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 10.

159. On March 20, 2008 at 10:40 a.m. at the Surrey Polling Station, Steve Anas, a member of the IEC, and Ottho were tearing down campaign material for the "yes" or pro-CFS side as well as unrelated CFS material. When questioned, Steve Anas did not have a reasonable explanation for his actions and he changed his explanation several times.

Affidavit #1 of M. Olson sworn September 8, 2008 at para. 5.



*Poll Clerk Absenteeism*

160. At approximately 10:45 a.m. on March 19, 2008, a female poll clerk left the Surrey Polling Station leaving only one male. The female poll clerk returned approximately 10 minutes later, but promptly left again for another 10 minutes.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 18 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

161. At approximately 11:30 a.m. on March 19, 2008, a female poll clerk again left the Surrey Polling Station. During that time there was only one poll clerk at the Surrey Polling Station for at least 15 minutes.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 19 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

162. At approximately 12:38 p.m. on March 19, 2008, an unidentified female approached the two poll clerks at the Surrey Polling Station and engaged them in conversation. After about five minutes, the unidentified female walked behind the Surrey Polling Station tables and continued to talk to the poll clerks for approximately five minutes, while individuals were voting.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 23 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

163. At approximately 1:16 p.m. on March 19, 2008, a male poll clerk left the Surrey Polling Station boundary. That poll clerk did not return until approximately 1:47 p.m. The Surrey Polling Station had only a single poll clerk in attendance for that period of time.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 20 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

164. At approximately 4:46 p.m. on March 19, 2008, a male poll clerk again left the Surrey Polling Station. He returned at approximately 4:50 p.m.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 21 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

165. At approximately 5:39 p.m. on March 19, 2008, a female poll clerk disappeared under a table at the Surrey Polling Station. She would not have been visible to anyone more than 30 feet away from the Surrey Polling Station. The female poll clerk emerged from under the table at approximately 5:46 p.m. Shortly thereafter, the male poll clerk at the Surrey Polling Station left and the female poll clerk remained at the Surrey Polling Station alone. At approximately 5:59 p.m., the male poll clerk returned. At this point, the female poll clerk slipped back under the Surrey Polling Station table. Again, she would not have been visible by most people who walked by the Surrey Polling Station. At approximately 6:44 p.m., the female poll clerk emerged from under the table. At this point, the male poll clerk left for a second time and he did not return to the Surrey Polling Station until approximately 6:46 p.m.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 22 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

166. On March 19, 2008, at the Harbour Centre Polling Station, for the morning there was only a single polling clerk present. Further, throughout the day, on several occasions there was only one poll clerk present at this polling station.

Affidavit #1 of A. Bratton sworn December 12, 2008 at paras. 5 and 7.

167. On March 20, 2008, at approximately 9:30 a.m. to 10:00 a.m., there was only one polling clerk at the Harbour Centre Polling Station.

Affidavit #1 of A. Bratton sworn December 12, 2008 at para. 8.

### *Compromised Integrity of the Ballot Material and Ballot Boxes*

168. At approximately 4:40 p.m. on March 18, 2008, at the Surrey Polling Station, the IEO posted unmarked Ballot Material in the order of the Vote questions on a divider near the edge of the Surrey Polling Station boundary. This posted Ballot Material then became a focus for discussion by students and SFSS staff with many people stopping and asking questions about the Vote, ballots and questions being voted on.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 17.

169. At approximately 7:30 p.m. on March 18, 2008, the polling stations at the Burnaby campus of SFU were closed. Following the closure and dismantling of the polling stations, approximately three ballot boxes were transported by persons unknown to the Board of Directors' office of the SFSS on the Burnaby campus of SFU. Individuals other than poll clerks were also in that office at approximately 7:40 p.m., shortly before the ballot boxes were brought in. On March 18, 2008, all members of the Board of Directors of the SFSS, including numerous candidates in the SFSS general elections also held March 18-20, 2008, had keys to this office and therefore there are concerns about whether the Board of Directors' office was a secure location suitable for the storage of ballot boxes.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 9.

170. At approximately 9:15 a.m. on March 19, 2008, at the Surrey Polling Station, the IEO placed additional ballot boxes behind the Surrey Polling Station tables that were staffed by the poll clerks. Those ballot boxes were readily accessible to candidates, scrutineers, and other individuals within the Surrey Polling Station boundary.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 35 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

171. At approximately 9:30 a.m. on March 19, 2008, Ballot Material was posted on both sides of screen dividers at the Surrey Polling Station. The Ballot Material was displayed in such a way that it was visible to individuals within the Surrey Polling Station boundary as well as to anyone passing by the Surrey Polling Station. The Ballot Material was left on display for the entire day.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 37 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

172. At approximately 9:45 a.m. on March 19, 2008, at the Surrey Polling Station the IEO constructed the second of two ballot boxes. He received help from a "No" ( i.e. anti-CFS) campaigner to construct that ballot box.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 36 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

173. At approximately 5:05 p.m. on March 19, 2008, a male poll clerk at the Surrey Polling Station sat on the floor with a large pile of Ballot Material in front of him. It appeared that he was sorting or counting the Ballot Material. He proceeded to count the Ballot Material for at least 25 minutes. The other poll clerk attempted to shield what he was doing from other individuals in the area.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 30 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

174. On March 20, 2008 between 9:00 – 9:30 a.m., Ottho, a Vote Candidate was assisting in the setting up of the polling station and was alone with unmarked Ballot Material during that time.

Affidavit #1 of M. Olson sworn September 8, 2008 at para. 3.

175. On March 20, 2008, at the Surrey Campus polling station, unmarked Ballot Material was posted such that it could be easily viewed by students and was left in an unsecured position for the day.

Affidavit #1 of M. Olson sworn September 8, 2008 at para. 3.

#### *Lack of Secret Ballot*

176. Between 9:30 a.m. and 10:00 a.m. on March 19, 2008 there was only one privacy screen for voters at the AQ Polling Station. The AQ Polling Station is the most heavily used, and numerous voters completed their Ballot Material in plain sight of others.

Affidavit #1 of J. Salter sworn July 9, 2008 at para. 5.

177. At approximately 5:39 p.m. on March 19, 2008, an unidentified male completed his Ballot Material approximately 15 feet away from the voting screens at the Surrey Polling Station.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 39 and Affidavit #1 of M. Olson sworn September 8, 2008 at para. 8.

178. On March 20, 2008, at approximately 2:20 p.m., four students were completing their ballots on the windowsill in the library of the Burnaby campus of SFU, with no privacy screens. Students inside and outside of the library would have been able to see voting students marking their Ballot Material. This situation persisted throughout the day as the library polling station was a busy one.

Affidavit #1 of S. Reid sworn June 23, 2008 at para. 11.

179. Throughout the day on March 20, 2008, a number of students were completing their Ballot Material together behind a single voting screen or completing their Ballot Material without the use of a voting screen. This occurred at the WMX Polling Station.

Affidavit #1 of N. Loreto sworn July 10, 2008 at para. 41.

180. On March 19, 2008, at the Harbour Centre Polling Station, for at least one hour there was no privacy screen and numerous students were voting without a privacy screen.

Affidavit #1 of A. Bratton sworn December 12, 2008 at para. 6.

181. On March 20, 2008, no privacy screens again were available at the Harbour Centre Polling Station for approximately 8 hours, until 5:00 p.m.

Affidavit #1 of A. Bratton sworn December 12, 2008 at paras. 9-10.

182. The above Infractions were contrary to the practice of the Canadian Federation of Students when conducting a referendum. In accordance with that practice:

- (a) the Oversight Committee has the authority and jurisdiction over a referendum, and therefore individuals conducting a referendum are to speak to representatives of the Oversight Committee to resolve questions and not to the proponents of either side of a referendum question;

- (b) polling areas are to be neutral, are to be staffed at all times by two polling clerks who have not been involved in any campaigning and, of course, there is to be no campaigning of any sort within a polling station area during voting hours. Further, people are not allowed to loiter in voting areas during voting hours;
- (c) in order to ensure access to voting, there must be sufficient ballots at all times at polling stations and poll clerks must be present at all times;
- (d) both ballots and ballot boxes must be secure and all reasonable steps must be taken to ensure unauthorized copies of ballots are not made. Ballots and ballot boxes are to be handled only by the Oversight Committee. Voters must not leave a polling area with unmarked ballots. After voting is completed, all ballot boxes must be sealed and signed by two poll clerks; and
- (e) in order to ensure secrecy of voting there must be privacy screens at all polling stations and such privacy screens must be used in private by voters.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 45.

183. With respect to the evidence of the Infractions, the SFSS has produced affidavits by Brian Ottho, Michael Letourneau, Titus Gregory, Jason Tockman, Andrea Sandau, Derrick Harder (#2) and Rachel Paling in which some of the evidence regarding Infractions is denied. First, the contradictions between the SFSS affidavits and those put forward by the CFS demonstrate why this is not an appropriate matter to be dealt with by way of affidavit evidence. Second, there are no affidavits by a host of other individuals who are said to have committed polling Infractions, including Garth Yule, Samonte Cruz, Kyle S., Ada Nadison, Joe Paling and Andy Shen. Third, much of the evidence regarding Infractions involve individuals who are unknown to the observers and is not addressed in the material provided by the SFSS. In summary, most of the evidence regarding Infractions has not been answered.

184. John Stefan ("JJ") McCullough, the Chief Electoral Officer of the IEC at the time of the Vote, has sworn an affidavit in this proceeding on November 19, 2008. Mr. McCullough does not deny his anti-CFS bias as outlined above. Neither does Mr. McCullough deny the Infractions. All Mr. McCullough does is express the opinion, at paragraph 23 of his affidavit, that such Infractions were not "material". It is submitted that such evidence is not admissible. It is opinion evidence from an admittedly biased, lay witness who has insufficient qualifications to provide such opinion. It is speculative. In addition, it is an attempt to have a witness provide the answer to a question of law and an important issue before the Court.

**Lack of Participation of Simon Fraser University Kamloops Campus**

185. On March 24, 2008, Michael Letourneau, an SFSS representative on the Oversight Committee, sent an e-mail to Lucy Watson. This e-mail and the attached compilation of votes demonstrates that no SFU students at the Kamloops campus participated in the Vote as there was no polling station at that campus. The location of polling stations was one of the issues outstanding at the Oversight Committee when the SFSS decided to hold the Vote without the Oversight Committee and, instead, engaged the IEC to carry out the Vote.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 77, Exhibit "KK".

186. On May 22, 2008, Yvonne Cote, President of the student council at the SFU Kamloops campus sent an e-mail to the CFS raising concerns about the lack of notification and participation of the Kamloops campus in the Vote.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 78, Exhibit "LL"  
See also Affidavit #1 of Yvonne Cote sworn January 20, 2009.

187. There is no direct evidence that SFU students at Kamloops were ever given any opportunity to participate in the Vote.

188. Mr. McCullough attaches to his affidavit an email which he says would have been sent to "each of the off campus students for whom the University provided contact information". This email dated February 29, 2008 refers to the upcoming

student society election and five referendum questions, but does not set out the questions or otherwise indicate that that membership in the Canadian Federation of Students is at issue. This is a good example of how combining the SFSS general elections with the Vote caused the question of Canadian Federation of Students membership to become, in effect, "lost in the shuffle".

Affidavit #1 of John McCullough sworn November 19, 2008 at para. 21 and Exhibit F, email dated February 29, 2008.

### **Participation of Simon Fraser University Graduate Students**

189. Andrew Ferguson, a student at SFU, raised with the IEC on more than one occasion the issue of the participation of graduate students in the Vote.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 79 and Exhibit "II".

190. Generally, the issue of who is entitled to vote in a Canadian Federation of Students membership referendum is, as a matter of practice, a matter for an Oversight Committee to deal with. Because of the events which occurred prior to the Vote, namely, the position taken by the SFSS that the Vote would be run by the IEC, the question of whether graduate students ought to participate in the Vote was never finalized.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 43.

191. A chronology respecting the formation of the Graduate Student Society at SFU (the "Graduate Society") is as follows:

- (a) at a referendum of SFSS members which took place March 20-22, 2007, the following referenda questions were passed:
  - (i) "Do you agree that a separate and independent graduate student society should be created to represent the interests of the graduate students at SFU?";



- (ii) "If the graduate students' society is created, do you agree that graduate students should no longer be represented by the SFSS?";  
and
  - (iii) "If the graduate students' society is created, do you agree that the unrestricted fee graduate students pay the SFSS should instead be remitted to the graduate students' society once incorporated?"
- (b) The constitution and bylaws of the Graduate Society were put in place and are dated July 11, 2007.
  - (c) The Graduate Society was incorporated July 26, 2007.
  - (d) On October 10, 2007, at an annual general meeting of the SFSS the constitution and bylaws of the SFSS were amended to "reflect a solely undergraduate student society".
  - (e) On October 31, 2007, the Graduate Society held referenda with respect to student fees.
  - (f) Also in October, 2007, referenda were passed by the members of the SFSS to remit student fees collected by the SFSS from graduate students to the new Graduate Society.
  - (g) As of February 6, 2008, the Graduate Society opened a bank account at Scotia Bank and funds were transferred into the account as part of the Benefit Plan Reserve Fund.
  - (h) As of February 7, 2008, the Student Society Designation Regulation pursuant to the *University Act* (British Columbia) with respect to the Graduate Society was enacted.
  - (i) In March 2008, there was an election process for the Graduate Society and, afterwards, the acclaimed representatives assumed positions as of May 1, 2008, taking over from an initial graduate counsel and executive

committee established pursuant to the Graduate Society's constitution and bylaws.

- (j) On February 21, 2008, the inaugural annual general meeting of the Graduate Society was held. As well, an annual report for the Graduate Society of that date was filed.
- (k) On February 26, 2008, the Graduate Society filed a tax return.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 80 and 81.

192. There are approximately 4,200 graduate students at SFU.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 82.

193. The graduate students participated in the Vote.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 83, Exhibits "MM" – "SS".

194. At the time of the Vote, graduate students at SFU could not be affected by and had no direct personal interest whether or not the SFSS continued its membership with the Canadian Federation of Students. According to Canadian Federation of Students practice, the graduate students at SFU should not have participated.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 44.

195. In fact, the participation of the graduate students in a vote on fee issues which concerned only undergraduate students is contrary to the constitution and bylaws of the SFSS, namely, Bylaw 17 – Referenda.

Affidavit #1 of D. Harder sworn April 14, 2008, Exhibit A.

196. SFSS Bylaw 17 – Referendum, reads in part:

"1.a. The members may vote on resolutions concerning activities of the Society by means of a referendum. Referenda regarding fees to be levied only upon undergraduate students or regarding the expense or funds raised through such fees shall be voted on by undergraduate students only; referenda regarding fees

to be levied only upon graduate students or regarding the expenditure of funds raised through such fees shall be voted on by graduate students only."

### **Post Vote**

197. The last Oversight Committee meeting occurred on March 28, 2008. In that meeting Lucy Watson stated the CFS's position that the Vote was not a binding or effective referendum and offered to continue to meet in order to implement a referendum in accordance with the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 86.

### **Oversite Committee Model**

198. Prior to the experience of the Canadian Federation of Students with the SFSS and with Kwantlen University College Student Association in the Spring 2008, the oversight committee model had always succeeded in completing referenda with respect to Canadian Federation of Students' membership even where the CFS was faced with hostile elected student leadership. Although it is true that generally the CFS will campaign in favour of membership, the goal is to have a fair referendum decide the issue. The normal result is that an oversight committee is able to carry out a referendum in accordance with the CFS Bylaws, and it is the student members who decide the question.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 9.

199. A defederation referendum is "internal" to the Canadian Federation of Students in the sense that what it involves is a member of a national association deciding whether or not to leave that association. However, the member local association, here the SFSS, is part of that process and, as provided for by the CFS Bylaws, had equal representation with the CFS on the Oversight Committee. The CFS's practice is that the CFS Bylaws govern the process and a defederation referendum must be held in compliance with the CFS Bylaws to be valid and effective.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 11.

200. In response to paragraph 20 of Exhibit "A" to Affidavit #1 of Titus Gregory sworn April 11, 2008 (Exhibit "A" being an affidavit sworn in an earlier proceeding involving the Kwantlen University College Student Association (the "KSA Gregory Affidavit")), of the 35 referenda referred to in paragraphs 18 and 19 of the KSA Gregory Affidavit, Mr. Gregory only points to two examples of what he calls "significant difficulties" with the referendum oversight committee model. In each of these two cases, what is reported is not that the referendum was disrupted or unable to go ahead but, rather, that a particular student was unhappy. The oversight committee process can and will work, given sufficient time and effort.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 93.

201. There was a defederation referendum with respect to the University of Victoria Graduate Students' Society on March 18-20, 2008. There was an oversight committee for this referendum and Lucy Watson was on that committee. In that situation, although the executive and board of the University of Victoria Graduate Students' Society supported defederation and appointed two representatives to this oversight committee, the oversight committee functioned smoothly and there were no procedural difficulties.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 94.

202. In the case at bar, the Oversight Committee was not dysfunctional. Rather, it became obsolete because the SFSS unilaterally replaced it with the IEC. The Oversight Committee achieved progress and made decisions on important issues as outlined above. The transcripts attached as Exhibits "B"-"J" to Lucy Watson's Affidavit #2 demonstrate that the CFS representatives on the Oversight Committee worked with the SFSS as representatives in a cooperative manner throughout. It is highly probable that the Oversight Committee would have been able to conduct a referendum had the SFSS not elected to use the IEC.

Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 21-22 and Exhibits "B"-"J".

203. Generally, the SFSS wanted the Vote conducted at a certain time and in a certain way, and when the SFSS did not get Oversight Committee agreement, the SFSS engaged the IEC (on February 25, 2008), meaning that, from that point on there was, practically, little scope for further involvement by the Oversight Committee.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 37.

204. Material provided by the SFSS, particularly the Affidavit #1 of the Michael Letourneau sworn September 2, 2008, attempts to paint the CFS representatives on the Oversight Committee as being obstructionist and uncooperative. It is submitted that that is not so.

205. Generally, with the Oversight Committee model, it is inevitable that there will be some disagreement on issues and the representatives on the Oversight Committees will have to work together to reach agreement. However, not agreeing on something at the outset does not indicate either that an Oversight Committee is dysfunctional or that particular representatives on that committee are obstructionist.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 31.

206. With respect to the "draft procedures" proposed by the SFSS representatives on the Oversight Committee, at the first meeting of the Oversight Committee the Oversight Committee agreed that rather than consider at once the whole of the procedures proposed by the SFSS, each of the separate items would be considered, issue by issue. The SFSS representatives did not propose an alternative way to proceed. The normal practice for an Oversight Committee is not to put together competing omnibus draft proposals but, rather, to create an agenda of key issues which are then discussed and decided upon, issue by issue. This is how the Oversight Committee proceeded in this case.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 26.

207. Even after the SFSS Board on February 25, 2008 decided to put its own questions to SFU students using the IEC, the CFS Oversight Committee

representatives carried on with the Oversight Committee process. At the Oversight Committee meeting of March 3, 2008, SFSS representative Michael Letourneau accepted that the CFS was carrying on, on a without prejudice basis, and he said:

"I don't mean by any sense of the imagination to trap you into, achieving that acknowledgement, by participating in the Oversight Committee. It is quite clear here that it's under protest and on a without prejudice basis.

...

I can't see this being a substantial problem. When I spoke to the electoral, the Chief Electoral Commissioner before I sent, I mean obviously the CFS has every right to be upset, and so and he has no intention of you know, trying to shut down, stop the decision that's been made by this group just because it didn't go through the IEC."

Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 27-28.

208. As stated at paragraph 37 of Michael Letourneau Affidavit #1, Lucy Watson (CFS representative) sought information on IEC process, and did not provide a particular response once she received this information. Ms. Watson obtained the IEC information with the purpose of gaining a better understanding of how the SFSS had conducted elections and referenda in the past to assist her in the upcoming deliberations of the Oversight Committee. She did not think that a particular response to the SFSS representatives was necessary or expected.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 29.

209. At paragraph 53 of Michael Letourneau Affidavit #1, a concern is raised with respect to the fact that the CFS representatives did not arrange a tour of SFU with the SFSS representatives in order to consider polling stations. In fact, the CFS representatives did take a tour of SFU to consider polling stations.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 37.

210. Further, although it is true that no agreement was ever reached with respect to polling station locations, that was because the SFSS decided to have the IEC run the vote, and the IEC chose the polling stations for the vote. With respect to hiring

poll clerks, at an Oversight Committee meeting of March 3, 2008, the CFS representatives made a proposal for hiring poll clerks. At that point, there was ample time for the Oversight Committee to reach an agreement and implement the procedure suggested. Neither of the SFSS representatives suggested there was not enough time to hire poll clerks on March 3, 2008. The problem was that the SFSS had already engaged the IEC who had already hired poll clerks.

Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 37-38.

211. With respect to the process to approve campaign materials, the Oversight Committee decided on February 11, 2008 that it would not approve "materials that are defamatory, libellous or factually incorrect". While it was the case that the Oversight Committee was not to engage in fact finding unless requested to do so, this did not mean that the Oversight Committee was not to address whether or not campaign materials were factually correct. If Oversight Committee members were of the view that materials were factually incorrect, such members were not to approve such materials unless their concerns could be overcome. This was not only in accordance with what had been agreed to, it was required by what had been decided by the Oversight Committee. It was further decided that only materials which received Oversight Committee approval could be distributed.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 39.

212. The Oversight Committee did approve some campaign material. Other material was objected to by either CFS representatives or SFSS representatives and was not approved.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 39.

213. At paragraph 60 of Michael Letourneau Affidavit #1, a concern is raised that a CFS representatives did not approve campaign material quickly enough. However, the Oversight Committee had agreed that if a representative on the Oversight Committee had difficulty with campaign material, the discussion and decision with

respect to that campaign material could be deferred to the next Oversight Committee meeting. The CFS representatives acted in accordance with that agreement.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 40.

214. The Michael Letourneau Affidavit #1 at paragraph 68 raises the concern that CFS representatives objected to material without setting out reasons why. However, the Oversight Committee had agreed that in order to expedite the process reasons for campaign material objections would not be discussed at meetings. Rather, reasons for objections were to be provided later by email. Again, this is what the CFS representatives did.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 41.

215. The CFS has at all times agreed that there must be a defederation referendum. In reply to the particular criticisms set out in paragraph 71 of the Michael Letourneau Affidavit #1:

- (a) the CFS representatives on the Oversight Committee were prepared to consider any other dates for the referendum other than the date of the SFSS general elections. The SFSS representatives and its executive were unwilling to compromise. As set out above, the practice of the CFS is that where a referendum petition does not specify a date for the referendum, it is the Oversight Committee which is to finalize the date;
- (b) in accordance with the CFS Bylaws and the practice of the Canadian Federation of Students, only a properly constituted Oversight Committee has jurisdiction and authority over a referendum. As such, only once the Oversight Committee as constituted can issues such a referendum date be dealt with. The CFS representatives on the Oversight Committee raised the issue of the date at the first opportunity, at the first meeting of the Oversight Committee on February 4, 2008. There would have been no difficulty in having a membership referendum for the SFSS at a later date in March 2008;



- (c) the representatives of the CFS on the Oversight Committee proposed the "Two Page Question" complained of by the SFSS on February 11, 2008. At the next Oversight Committee meeting, February 19, 2008, after some discussion and a proposal by the CFS representatives, all of the members of the Oversight Committee agreed on the referendum question proposed by the CFS representatives. The CFS position on the referendum question did not cause delay or hinder the Oversight Committee from fulfilling its duties. The establishment of the referendum question is one of the most fundamental and challenging tasks that an Oversight Committee faces. The fact that it was accomplished in two meetings is supportive of the view that the Oversight Committee in this case was functional;
- (d) the CFS Bylaws require the referendum to be run by an Oversight Committee. The CFS has a good deal of experience with the Oversight Committee model. Although the SFSS did want to involve the IEC, it is submitted that it would be contrary to the CFS Bylaws for the Oversight Committee to agree to have another body, such as the IEC, run a referendum; and
- (e) again, pursuant to the CFS Bylaws and the practice of the Canadian Federation of Students, it is the Oversight Committee which is required to set the procedure for a referendum. There has never been a need for a draft procedure such as that proposed by the SFSS in the past. Delegating decision-making over referendum to a third party, such as an arbitrator, would be contrary to the CFS Bylaws and could provide a ground for a legal challenge to a referendum. The CFS representatives on the Oversight Committee did on March 11, 2008 suggest using a mediator, but the SFSS representatives did not agree to that.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 42.

## ISSUES

- (1) Is the matter appropriate for being heard by Petition pursuant to Rule 10 of the Supreme Court Rules?
- (2) Inapplicability of the *Company Act* (British Columbia).
- (3) Inapplicability of Section 85 of the *Society Act* (British Columbia).
- (4) Are the CFS Bylaws with respect to defederation binding on the SFSS?
- (5) Was the Vote held by the SFSS on March 18-20, 2008 in compliance with the CFS Bylaws?
- (6) Was the Vote carried out in accordance with the principles of fairness and natural justice and in good faith?

## ANALYSIS

- (1) Is the matter appropriate for being heard by Petition pursuant to Rule 10 of the Supreme Court Rules?

216. Rule 8(1) of the Supreme Court Rules reads:

"8(1) Writ of summons – Except where otherwise authorized by an enactment or these rules, every proceeding in the court shall be commenced by filing a writ of summons."

217. The effect of Rule 8 is to make proceeding by way of writ of summons the residual proceeding for the purpose of the rules.

*Snyder v. Snyder*, [1992] B.C.J. No. 939 (BCSC) per Mr. Justice Gow.

218. Rule 10(1) sets out the "limited instances in which an application may be made by an originating application", that is by petition.

British Columbia Supreme Court Rules annotated 2009, Seckel and MacInnis, 2008 Thompson Canada Limited, Ontario, at page 75.

219. The relevant part of Rule 10 is:

"10(1) Originating application – An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where

- (a) an application is authorized to be made to the court,
- (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document,"

220. With respect to Rule 10(1)(b), it is submitted that the sole or principal question at issue in the case at bar cannot be said to be one of construction of a "written contract or other document".

221. This is demonstrated by the Petition itself and the relief sought. The Petition does not seek the construction of a contract. Rather, the Petition seeks an order pursuant to Section 272 of the *Company Act* (British Columbia), an order pursuant to Section 85 of the *Society Act* (British Columbia), an order directing the Respondents to rectify their records deleting the SFSS as a member local association and an order "cancelling the contract between the Respondents and the Petitioner concluded in 1982 by which the Petitioner agreed to collect and pay fees to the Respondents."

222. Similarly, the Outline (December 15, 2008) delivered by the SFSS does not seek a construction of a contract. The relief sought in Part I of the Outline is:

"1. an Order, pursuant to Section 71 of the *Society Act* and Sections 200 and 272 of the *Company Act* that the Respondents, the Canadian Federation of Students, the Canadian Federation of Students – Services and the Canadian Federation of Students – British Columbia Component (collectively, the "CFS") be wound up or, in the alternative, that the CFS rectify their documents by removing Simon Fraser Student Society (the "SFSS") from their membership list and amending their records to reflect that the SFSS is no longer a member of the CFS."

223. What is at issue in this case is the legal effect of the March 18-20, 2008 Vote carried out by the SFSS and the IEC. The SFSS's position is that the vote was a

valid and effective defederation referendum pursuant to the CFS Bylaws. The CFS's position is that the Vote was not.

Outline of the SFSS dated December 15, 2008 at paras. 12 – 20.

224. In *Three Stars Investments Ltd. v. Narod Developments Ltd.*, [1981] B.C.J. No. 112, (B.C.S.C.), Mr. Justice Skipp dismissed a petition which purported to deal with a real estate transaction dispute. His Lordship said:

"5. The issue to be considered is whether the petitioner in this matter has used the appropriate means of commencing the action. On the one hand, the Writ of Summons and its trial as action no. C813733 and, on the other, the petitioner commences as action no. C813887 and seeks an adjudication of the same basic issues.

6. The Supreme Court Rules have been designed to speed up the civil litigation process, provided that a proper adjudication of issues is possible. All proceedings must be commenced by writ of summons, unless otherwise authorized. The authorization for the use of a petition is as a Rule 10 originating application which can be used in a wide variety of manners, including questions of contract, construction and declaring interests in land.

...

10. From the case, it can be concluded that the Rule 10(1)(b) petition is inappropriate where:

1. serious questions of fact or law are raised;
2. a decision will not end the matter, but require further proceedings to be pursued;
3. the application involves not the interpretation but enforcement of a contract.

11. The petitioner has used an inappropriate procedure in its use of a petition. The role of declaratory judgments, as provided for under Rule 10, was commented upon by Dickson, J. in *Solosky v. Government of Canada* (1980) 30 N.R. 380. In that case, he adopted the view which asserted that the declaratory action is discretionary and should not be granted if it will not settle the questions at issue between the parties.

12. In the present case, a declaratory judgment on the construction of the contract will not settle all issues between the parties. They must still proceed to trial to enforce whichever construction is presented. On that ground alone the Rule 10(1) petition is inappropriate."

225. In *MacDonald Dettwiler and Associates Ltd. v. Cymbolic Sciences International Ltd.*, [1992] B.C.J. No. 2503 (B.C.S.C.), the case was about the failure of a respondent to make three final payments pursuant to a promissory note. The respondent alleged misrepresentations. The court held that a petition was not the appropriate procedure, and at page 5, Mr. Justice Brenner said:

"An interpretation of the contract will not end the matter and in my view further proceedings will have to be pursued. Finally, it is clear that the Petitioner is seeking not only an interpretation of the purchase contract but also the enforcement of the promissory note free of any set-off claim. In my view, this does not fall within the purview of Rule 10 and this matter should be pursued by way of writ and statement of claim.

226. In *Konsap v. Grattan*, [2003] B.C.J. No. 2875 (B.C.S.C.), a petitioner sought a declaration that a certain lease and option to purchase made between her former husband as landlord and the respondent, Grattan, as tenant of the property was void as against her. The Court at paragraphs 35 – 50 decided the matter was not appropriate to be heard by petition. At paragraph 40, Mr. Justice Drost said:

"I find, as the Respondent submits, that the Petition must be dismissed because the declaration the Petitioner seeks does not fall within the categories of relief available under Rule 10. The Petitioner responded to that submission by arguing that the relief she seeks raises an issue that falls to be determined upon the construction rather than the enforcement of sections 20 and 29 of the *Land Title Act*. I do not agree. In my view, a decision on the principal issue requires, first, a determination as to the extent of the Petitioner's knowledge and, second, the effect that that knowledge has on the application of sections 20, 29 and 31 of the *Land Title Act*.

See also *Genstar Development Co. v. Vancouver*, [1990] B.C.J. No. 195 (B.C.S.C.), per Chief Justice Esson at page 6;

See also *Wesbild Enterprises Ltd. v. Shular*, [1991] B.C.J. No. 2089 (S.C.) per Mr. Justice Scarth at pages 5 – 7;

See also *Yates v. Air Canada*, [2001] B.C.J. No. 116 (B.C.S.C.), per Mr. Justice Bauman at paragraphs 32 – 48.

227. In *Clark v. Teamsters, Local 464*, [1998] B.C.J. No. 697 (B.C.C.A.), five unsuccessful candidates in an election of union officers brought on a petition challenging the results in those contests. The trial judge held that the election was invalid because there was an apprehension that the balloting had not been secret. A

majority at the Court of Appeal allowed the appeal because of the failure of the petitioners to join all interested parties. Madam Justice Southin, for the majority, also criticized the use of a petition and said, starting at paragraph 12:

"12. The learned judge did not address, although counsel informed us that the point was raised, the threshold question of whether this proceeding was ever properly constituted. It was brought by petition, but the relief sought does not fall within Rule 1(13) or Rule 10 of the Supreme Court Rules as a proceeding authorized to be brought by originating application.

13. By Rule 5(22):

No proceeding shall be open to objection on the ground that only a declaratory order is sought and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

14. But neither this rule, nor the new Rule 65, expands the issues which can be dealt with by originating application rather than by an action commenced by writ."

228. In addition, proceeding in the case at bar by way of petition is not appropriate because disputed questions of fact and law are raised in the materials and there are bona fide triable issues. There ought to be a trial.

Rule 52(11)(d), Supreme Court Rules.

229. In *Bank of British Columbia v. Pickering*, [1983] B.C.J. No. 2422 (B.C.C.A.), the court at paragraph 10 set out the test as to whether or not a matter is appropriate to be dealt with by way of petition in the face of disputes of fact or law as follows:

"The question has been stated in a number of ways: Is there no real substantive question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue?"

230. The onus of establishing that there is not such an issue rests upon the Petitioner and it must be carried to the point of making it "manifestly clear" or "beyond a

reasonable doubt". If the judge hearing the application is left in doubt as to whether there is a triable issue, the relief should not be granted.

*Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, [1984] B.C.J. No. 3189 (B.C.C.A.) at paragraph 11 – 12;  
See also *MacDonald Dettwiler and Associates Ltd. v. Symbolic Sciences International Ltd.*, *supra*, at page 4.

231. In the case at bar, the issues raised as to the validity and legal effectiveness of the Vote to support defederation are set out in paragraph 18 of the Statement of Claim. It is submitted that there are several substantive questions to be tried. In addition, there is a good deal of disputed factual evidence regarding these issues, particularly with respect to:

- (a) the appropriateness, including accuracy, of the campaign material used by the SFSS;
- (b) whether or not there was an agreement that Oversight Committee discussions and deliberations were to remain confidential and whether that agreement was breached;
- (c) whether or not the CFS and the SFSS acted in accordance with decisions made and agreements reached by the Oversight Committee and whether bona fides efforts were made by both sides with respect to putting in place a referendum in compliance with the CFS Bylaws;
- (d) viability of the Oversight Committee model;
- (e) whether or not the Kamloops students at SFU were provided with an opportunity to participate; and
- (f) whether or not there were polling infractions, seriousness of such polling infractions and the degree the SFSS and its IEC adequately dealt with or investigated complaints of such infractions.

(2) Inapplicability of the *Company Act* (British Columbia)

232. The SFSS seeks to support its petition by framing this proceeding as relief pursuant to the oppression and unfair prejudice provisions of the *Company Act* (British Columbia) (now the *Business Corporations Act*). It is submitted that this legislation can have no application to the CFS or the CFS-S, both of which are federal corporations incorporated pursuant to Part II of the *Canada Corporation Act* (Canada).

233. It is submitted that British Columbia company legislation with respect to winding up, oppression and unfair prejudice are intended to apply only to companies incorporated pursuant to that legislation.

234. In *Fraser and Stewart, Company Law of Canada*, Harry Sutherland, 6<sup>th</sup> ed. 1993, Carswell-Thomson, Ontario, at page 638, the author wrote:

"As a corporation's corporate existence is dependent upon the jurisdiction which brought it into being, a corporation can be dissolved only by the jurisdiction which created it. See *Lazar Brothers and Co. v. Midland Bank*, [1933] A.C. 289 (H.L.); *Russian and English Bank v. Baring Brothers and Co.*, [1936] A.C. 405 (H.L.); *Shoolbread v. Clarke* (1980), 17 S.C.R. 265; *National Trust Co. v. Ebro Irrigation and Power Co.*, [1954] O.R. 4<sup>th</sup> 63 at 477 (H.C.)."

235. In *Paz v. Hardoun*, [1992] B.C.J. No. 2816, minority shareholders of a Mexican company sought to bring a derivative action. A derivative action with respect to a British Columbia company must be brought pursuant to section 232 of the *Business Corporations Act* (British Columbia). On page 2 of this decision, Madame Justice Saunders said:

"As the corporations are all Mexican corporations, the action of the minority shareholders *Industrias and Frontinort* is based solely on the common law."

In other words, a derivative action could be brought but only at common law.

236. This result follows as well from the definition of "company" in British Columbia corporate legislation. "Company" as defined in the *Company Act* means "a



company incorporated or continued under this Act, and includes an existing company and an amalgamated company”.

*Company Act* (British Columbia), section 1;  
See *British Columbia Corporation Manual*, 2<sup>nd</sup>, Borden Ladner Gervais LLP, looseleaf edition, Thompson-Carswell, Ontario at page 1-9 – 1-10;  
See also *Shareholder Remedies in Canada*, Dennis H. Peterson, Lexis Nexis, looseleaf edition, at page 18.15.3.

237. Part 9 of the *Company Act* (British Columbia), Dissolution and Restoration, sections 256 - 296, dealt with cancellations from the register (Division 1), restoration to the register (Division 2), as well as the winding up of a “company” (Division 3).

*Company Act* (British Columbia), Part 9.

238. With respect to Divisions 1 and 2 of Part 9, several sections refer to both “companies” and “extraprovincial companies” and the Registrar’s and Court’s powers to cancel and restore the registration of companies and extraprovincial companies.

239. However, Division 3, winding up, is restricted in application to British Columbia companies.

240. This is consistent with the principle that a company can only be terminated pursuant to the legislation pursuant to which it was incorporated.

241. The key section for the Petitioner’s case is Section 272 which reads:

“Powers of Court

272. When an application for an order to wind up a company is made by a member on the ground that it is just and equitable that the company should be wound up, the court may, if it is of the opinion that the applicant is entitled to relief either by winding up the company or under section 224, either may make an order for winding up or make an order under section 224 as it considers appropriate.”

242. As stated, it is clear from the definition of “company” referred to above that this section would have no application to extraprovincial companies.

243. Part II of the *Canada Corporations Act*, ss. 153-157.1, is called "Corporations Without Share Capital". Section 157 of this legislation makes applicable to Part II companies several sections in the now defunct Part 1 of the *Canada Corporations Act*. (Part 1 of the *Canada Corporations Act* was replaced with the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended). Section 157.1 of the *Canada Corporations Act* makes applicable to Part II companies several sections of the new *Canada Business Corporations Act*. Certain of these provisions do deal with the winding up of a non-profit or Part II company (for example, Section 5.6 of the *Canada Corporations Act*, Section 133(11) of the *Canada Corporations Act* and Section 150 of the *Canada Corporations Act*). None of these provisions, however, are comparable to Section 272 of the *Company Act* (British Columbia). Section 214 of the *Canada Business Corporations Act*, which is comparable to Section 272 of the *Company Act* (British Columbia), was specifically not made applicable to federal non-profit companies. Similarly, the oppression and unfair prejudice provision in the *Canada Business Corporations Act* (Section 241) was likewise not made applicable to non-profit federal companies.

See *Canada Corporations Law Reporter*, CCH Canadian Limited, looseleaf edition, Ontario, at pages 5737 and 5959.

244. It is submitted, therefore, that the SFSS cannot rely on the winding up or oppression/unfair prejudice provisions to support the notion that a petition is appropriate in the case at bar.

245. Aside from applicability, it is submitted that this case is not about whether the Canadian Federation of Students should be wound up or oppression or unfair prejudice.

246. There is no basis or grounds for the application to wind up the CFS and CFS-S, which are national organisations with many member local associations across the country. None of these other student associations have been given notice. "Winding up" is not sought (or even mentioned) in the petition. There are no grounds alleged that winding up would be "just and equitable". It is submitted that winding up is

only now raised in an effort to access the oppression remedy so as to support the use of a petition.

Affidavit of K. Kirkpatrick #1 sworn December 15, 2008, Exhibit "A";  
Shareholder Remedies in Canada, supra, at pp. 20.17-20.27.

247. Further, this case has none of the hallmarks of an oppression or unfair prejudice case, as set out at paragraph 16 in *Lee v. Lee's Benevolent Association of Canada*, [2007] B.C.J. No. 1212 (B.C.S.C.). There is no suggestion, for example, that the SFSS is being denied rights to participate in the affairs of the CFS or the CFS-S or that the actions of the CFS are preventing the SFSS from realizing some benefit which it hoped to realize in being part of the CFS or the CFS-S.

(3) Inapplicability of Section 85 of the Society Act (British Columbia)

248. Section 85 of the *Society Act* can have no application to the CFS or the CFS-S.

249. Section 1 of the *Society Act* defines 'society' as:

"'Society' means a society incorporated under this Act, and includes an existing society."

250. "Existing society" means a society to which the former Act (i.e. former British Columbia society legislation) applied and was in existence on January 5, 1978.

251. Neither the CFS nor the CFS-S fit the definition of "society".

252. Section 85 of the *Society Act* begins:

"85(1) Despite anything in this Act, if an omission, defect, error or irregularity occurs in the conduct of the affairs of a society..."

Section 85 was never intended to apply to federal non-profit companies.

253. A Court is reluctant to interfere with the internal affairs of any corporate body, particularly a non-profit corporation. In the case at bar, the National Executive of

the CFS has decided, based on the issues and evidence set out above, that the Vote is not a legally effective referendum pursuant to the CFS Bylaws. What the SFSS is effectively asking the Court to do by this Petition is to interfere and overturn that decision.

254. In *Garcha v. Khalsa Diwan Society – New Westminster*, [2006] B.C.J. No. 617 (B.C.C.A.), Mr. Justice Hall, speaking for the Court, at paragraph 9 said:

"After referring to the submissions of the parties and citing the *Khangwa* case, in which Goldie, J.A. commented on the approach to be taken by the court under s. 85 of the Act, the section invoked in this case, Sigurdson, J. said this, adopting these comments from the judgment of Low, J. (as he then was) in *Sargit Singh Gill v. Khalsa Diwan Society* (3 December 1999), Vancouver Registry, A993150 (B.C.S.C.):

"This court must find irregularities or errors before it has jurisdiction under Section 85. In my opinion, there must be some connection between any irregularity proven and the relief sought. The authority under the section is to correct the problem and make necessary ancillary or consequential directions. The scope of the section is not very broad and of course discretion is not unfettered.

The court is always reluctant to interfere in the internal affairs of any corporate body. The respondent society should be left to govern itself in a democratic fashion and make its own decisions, including what may be seen by some of its members to be mistakes. The court should not presume that those in executive charge of the society will conduct themselves contrary to the interest of the society or that they will breach the rules of natural justice to the extent those rules apply to the business at hand."

See also *Atwal v. Shoker*, [2005] B.C.J. No. 1471 (BCSC) per Morrison, J. at paragraph 27;

See also *Lakeside Colony of Hutterian Brethren v. Hofer* (1992), 97 D.L.R. (4<sup>th</sup>) 17 (SCC) per Gonthier, J. at paragraph 6;

(4) Are the Bylaws with respect to defederation binding on the SFSS?

255. The SFSS is a member of the CFS and the CFS-S.

256. As such, having joined such associations, the SFSS is contractually bound by the CFS Bylaws, as amended from time to time, and, in particular, the CFS Bylaws applicable to withdrawal or departure.

257. The CFS Bylaws themselves indicate that they are intended to be contractual in nature.

258. The Fee Agreement executed by the SFSS on July 20, 1987 also obligates the SFSS to comply generally with the CFS Bylaws.

259. In *Lakeside Colony of Hutterian Brethren v. Hofer*, the Supreme Court of Canada dealt with a proceeding brought by an association for a declaration that certain individuals were no longer members of the association (i.e. the colony) and were bound to leave. The Court decided that in dealing with membership and departure from an association, the association was contractually bound to act in accordance with its bylaws and rules as well as principles of natural justice. The requirement to act "fairly" is also contractual in nature.

*Lakeside Colony of Hutterian Brethren v. Hofer* (1992), 97 D.L.R. (4<sup>th</sup>) 17 (S.C.C.);  
See also *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555 (S.C.C.) per Beetz, J. for the Court, at p. 8.

260. In reaching this conclusion in *Lakeside Colony et al v. Hofer*, supra, Mr. Justice Gonthier, speaking for the majority, said:

"1. The issue in this case is whether the Court should assist the respondent (plaintiff) Hutterite colony in enforcing its expulsion of the defendants from the colony. In order to determine this question, the Court must decide whether the expulsion was carried out according to the applicable rules and the principles of natural justice.

...

8. From the point of view of the members of the colony, these rights to remain are contractual in nature, rather than property rights. However, while contractual, the rights in question are of great importance to all concerned, and are susceptible of enforcement by the courts. As Lord Denning said in *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.) at p. 1180, a contractual right which permits a person to earn his livelihood is on the same footing as a property right in the context of jurisdiction over voluntary associations:

'If a member is expelled by a committee in breach of this contract, the court will grant a declaration that their action is ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his, or to protect him and his right to earn his livelihood . . .'

...

10. In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without mala fides. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch D. 661 [at p. 670]:

'The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to bona fide.'

...

45. From the point of view of the church Constitution, the Articles of Association are rules contemplated by Article 2(f) of the Constitution, and are therefore valid only in so far as they are consistent with the Constitution. While the members of the association have contracted amongst themselves with respect to the Articles, they have also contracted amongst themselves and with other colonies with respect to the Constitution. Both the Articles and the Constitution are therefore the source of legal obligation between the members of the local colony. The same reasoning applies to other organizations with local associations that are themselves associated, as Blair J.A. observed in *Organization of Veterans of Polish Second Corps of Eighth Army v. Army, Navy & Air Force Veterans in Canada* (1978), 87 D.L.R. (3d) 449 at p. 469, 20 O.R. (2d) 321 (C.A.):

'The relationship between national organizations and their incorporated local units is contractual. By adherence to the national organization, the members of the local association are taken to have accepted its constitution as a contract binding on them and all the members both of the local and national organization: see Carrothers, Collective Bargaining Law In Canada (1965), pp. 515-9; Brian G. Hansen, case note 61 Can. Bar Rev. 80 (1978), on *Canadian Union of Public Employees et al. v. Deveau et al.* (1977), 19 N.S.R. (2d) 24.'

[(emphasis added)]

*Lakeside Colony of Hutterian Brethren v. Hofer* (1992), 97 D.L.R. (4<sup>th</sup>) 17 (S.C.C.) at paras. 1, 8, 10 and 45;

See also *Whittall v. Vancouver Lawn Tennis and Badminton Club*, [2005] B.C.J. No. 1923 (B.C.C.A.) at paras. 42, 49 and 50.

261. Further, it is clear that a member of an association governed by bylaws is contractually bound to act in compliance with any amendments to those bylaws. In *Whittall v. Vancouver Lawn, Tennis and Badminton Club*, *supra*, at paragraph 49 Madame Justice Ryan, for the court, said:

"In *Senez*, *supra*, Beetz J. said at 566-67:

'When an individual decides to join a corporation like the *Board*, he accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote, even if he disagrees with such changes. Additionally, he may generally resign, and by remaining he accepts the new by-laws. The corporation may claim from him arrears of the dues fixed by a by-law. Would such a claim not be of a contractual nature? What other basis could it have in these circumstances? In my view, the obligation of the corporation to provide the agreed services and to observe its own by-laws, with respect to the expulsion of a member as in other respects, is similarly of a contractual nature.'

The Respondent submitted that while the modern relationship between a society and its members is contractual, the contract must be given an interpretation which allows for the exercise by the members of their right to govern themselves according to democratic principles. The members have entered into the contractual relationship with one another on the understanding that the relationship will be regulated by the constitution and bylaws as agreed upon from time to time by a majority of the voting members. This understanding is essential for the proper operation of the society. It is, therefore, an overriding term of every contract between a society and its members that the terms of the relationship are subject to amendment in accordance with any future bylaws adopted by the members. In the case at bar, that term was expressly set out in the Club bylaws."

See also *Lee v. Lee's Benevolent Association of Canada*, [2007] B.C.J. No. 1212 (B.C.S.C.) as per Blair, J. at paragraphs 18-22 and 43-47;  
See also *Benson v. Shaughnessy Golf and Country Club*, [2002] B.C.J. No. 2720 (B.C.S.C.) per B.M. Davies, J. at paras. 30 - 31.

262. An established tradition or custom may be considered an implied term in the contract making up the articles of a voluntary association.

*Lakeside Colony of Hutterian Brethren v. Hofer* (1992), 97 D.L.R. (4<sup>th</sup>) 17 (S.C.C.) at paras. 64-65;  
See also *Canadian Temple Cathedral of the Universal Christian Apostolic*, [1971] B.C.J. No. 114 (B.C.S.C.) per Hinkson, J. at paras. 11 - 13.

263. With respect to the CFS and CFS-S, there is uncontradicted evidence of CFS practice on a number of points before the Court. It is submitted that this practice by the CFS ought to be considered to be part of the contract between the parties. The practices in question are:

- (a) A defederation referendum is to be run solely in accordance with the CFS Bylaws (not the bylaws of a local student association).
- (b) The Oversight Committee has sole authority over the procedural aspects of a referendum.
- (c) With respect to defederation, it is the students who make the substantive decisions. The Oversight Committee makes the procedural decisions. There is no role for the executive of either the CFS or the student association.
- (d) There is only one process for defederation, i.e. a petition, a referendum and then confirmation by the voting members at an annual general meeting. There are not two alternative processes.
- (e) Oversight Committee deliberations are to be kept confidential.
- (f) If there is no date for a referendum in a student members' petition, the date is dealt with by the Oversight Committee.
- (g) There is to be a discreet campaign period for the referenda and there is not to be early campaigning.
- (h) There is a distinction between "campaign material", on the one hand, and "general promotional material", on the other. Campaign materials are those which refer to a referendum vote. This is confirmed in the CFS Bylaws.
- (i) Membership referenda are not held on the same date as general elections for the student association.



- (j) For a CFS referendum, students are to be asked only one question which addresses membership in the CFS.
- (k) Certain polling procedures must be followed in a CFS referendum so as to ensure a fair vote.
- (l) The Oversight Committee decides who participates in a referendum and sets the voting list.
- (m) Students who will have no direct interest in the outcome are not to participate in a CFS referenda.

264. In terms of the interpretation of association bylaws and practice, courts do defer to the executive of associations in part because of a reluctance to interfere with the internal management of associations and, in part, based on the experience of the executive.

265. In *North Shore Independent School Society v. B.C. School Sports Society*, [1999] B.C.J. No. 143 (B.C.S.C.), the Court declined to second-guess the executive of an association in its application of a bylaw dealing with student eligibility to participate in athletic events after a transfer. At paragraphs 48 – 56, Mr. Justice Brenner, as he then was, said:

“48. In the case at bar Collingwood seeks not interlocutory but final relief. It asks me to define the meaning of extraordinary circumstances and to quash the decision of the BCSS for failure to comply with the court’s definition. This is substantively different from *Peerless* [(1988), 157 D.L.R. (4<sup>th</sup>) 345 (B.C.C.A.)] in which the Court of Appeal only decided that there was a fair case to be tried.

49. In the case at bar Collingwood contends that it is not seeking a judicial review. It says it wants the court to “construe” the applicable documents. It wants the court to define the phrase “extraordinary circumstances” which was adopted by the membership of the BCSS in its Policies.

50. In my view to embark upon such a course would be an error. The BCSS is a private, voluntary organization. It has its own Constitution and Bylaws. It has a regular annual meeting of members. Between annual meetings the affairs of the Society are run by representatives elected by the members.

51. The members of the Society have chosen to use the particular phrase "extraordinary circumstances". They have further chosen not to define the meaning of the phrase. While they have approved a list of examples of cases that would constitute extraordinary circumstances, they have also decided to leave the meaning of the phrase open-ended. By so doing I conclude that it is the wish of the membership that the appeal bodies of the BCSS decide on a case by case basis just what it is that will constitute extraordinary circumstances.

52. The members of the Jury of Appeals and the Eligibility Appeals Committee are individuals with considerable experience both in teaching and in athletics. This can be seen in the affidavits of Dean Paravantes, David Bingham, Rodney Vance and Marilyn Payne.

53. Collingwood says I should now mandate the definition of extraordinary circumstances to be applied by these appellant bodies in eligibility appeals. In my respectful view this is not an appropriate function for this court. The persons best qualified to decide this question are the people with the types of training and experience such as those who sit on the appeal bodies of the BCSS.

54. In my view it would not be appropriate for me to substitute my judgment for the judgment of the members of the BCSS tribunals as to the meaning of extraordinary circumstances and the Policies.

55. The court's role in cases of this nature is to focus on process: that is, was the decision made without jurisdiction or in bad faith or contrary to the rules of natural justice? Matters of substance such as the proper interpretation of phrases such as "extraordinary circumstances" clearly within the jurisdiction of domestic tribunals in this case are best left to those tribunals.

56. If the members of the BCSS are not satisfied with the interpretation being applied they can take the steps necessary to amend the Policies. In my view if this is to be done, it ought to be done by the members of the BCSS and not by this court."

266. With respect to association voting decisions, persons involved with such votes must comply with the bylaws of the society or association. For example, in *McGuire v. University of Victoria Students Society*, [1996] B.C.J. No. 2023 (B.C.S.C.), failure by a candidate to follow the bylaws with respect to an election resulted in disqualification. The court did not interfere with that disqualification.

*McGuire v. University of Victoria Students Society*, [1996] B.C.J. No. 2023 (B.C.S.C.) per Clancy, J. at paras. 15 – 18.

267. In *Hong v. Young Kwang Presbyterian Church of Vancouver*, [2007] B.C.J. No. 783, Mr. Justice Smith, having overturned an election for failure to comply with bylaws, said at paragraph 70:

"In comparison, bylaw provisions that include the formalities of the church's government's procedure are clear. Examples of such formalities include the requisite notice for a general meeting and the requirement that election be held by secret ballot. These formalities must be complied with under the Act."

Incorporated societies are required to conduct their affairs in accordance with the Act, the constitution and their bylaws."

268. Where a member of an association wishes to depart that association, that member must, again, comply with the provisions in the bylaws dealing with departure if the departure is to be binding on the association and legally effective.

*Tsimshian Tribal Council v. Metlakatla Indian Band*, [2005] B.C.J. No. 1845 (B.C.S.C.) per R.D. Wilson, J. at paras. 29 – 31;  
*Canadian Federation of Students (Ontario) v. Student Federation of the University of Ottawa*, [1995] O.J. No. 4774 (Ont. Court of Justice) as per Chilcott, J. at paras. 42 – 43 and 46;  
*Assn. Of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students' Union*, [2008] O.J. No. 3344 (Ont. Superior Court of Justice) per B.A. Allen, J. at paras. 16 – 19 and 21.

269. In *Canadian Federation of Students v. Kwantlen University College Student Association*, S.C.B.C. Vancouver Registry, No. S081553 (March 14, 2008), the executive of the student association wished to leave the CFS. Accordingly, a petition had been organized and an Oversight Committee appointed to run a referendum pursuant to the CFS Bylaws. However, part way through the Oversight Committee process, the student association decided to engage an independent consultant, Schiffner Consultants Inc., to run the Vote. The CFS applied for an Order to prevent the Vote going ahead in that manner.

270. At page 100 - 102 of the transcript, in making his ruling, Mr. Justice McEwan said:

"Alright.

I am not going to give reasons for judgment in this matter in the conventional sense just because of the time and the circumstances under which this order is being made.

If there is any question later about what reasoning went into the directions that I'm about to give, they may be found in the transcript in the colloquy between counsel and the court, which I think, without being expressed in terms of reasons, will be of some assistance in underlining what considerations went into what I have to say now.

... Having said that, the Kwantlen Student Association, by taking matters into its own hands, put itself off side of the bylaws in a manner in which it is difficult for the court to ignore once it is brought to the court's attention.

My view of the best way to balance the interests at stake in this matter is to postpone the election to April 8th, 9th and 10<sup>th</sup>; to fix as the date set for the beginning of the campaign the 25<sup>th</sup> of March, 2008; to comply with the bylaw requirement that the campaign be no less than two weeks; and to remit to the Oversight Committee the responsibility to consider the terms under which the campaign will be conducted, including the review and oversight of materials that will be distributed and matters of that nature; and to come back to this court either with a protocol that they have agreed to or with a summary of their differences for the court to settle by Thursday, March 20 at 10:00 a.m."

271. Earlier in the transcript at pages 65 – 90, ~~the Court made the following~~ comments with respect to the student association unilaterally retaining an independent consultant to run the Vote:

"The Court: Because it is not taking place under the authority and direction of the ROC, it's offside already, isn't it?

Mr. Siddall [counsel for the student association]: I wouldn't concede that, My Lord, because the ROC continues to function and continues to meet. The –

The Court: But it has nothing to do with this referendum, it's been –

Mr. Siddall: Yes it does.

The Court: Well what does it have to do with it?

Mr. Siddall: It's been – it's met several times –

The Court: No. But it hasn't set the ground rules for this thing; the ground rules are being set ad hoc under the supervision of the college.

Mr. Siddall: No. The CRO that was – Mr. Schiffner is filling a void. He is –

The Court: But it's still an ad hoc process; it's not a process that's in accordance with the bylaws of the federation.

Mr. Siddall: Well, I'm not sure –

The Court: Is it? I mean –

Mr. Siddall: – what turns on it, but I take the issue with that as well because the bylaws – and I was going to develop this point this afternoon. But the bylaws of the CFS contemplate that the referendum shall be a referendum of the members of the local branch or (indiscernible).

The Court: Does it contemplate that they have control over how it's managed?

Mr. Siddall: No it doesn't. But it's – also it's not – I'm not conceding that it's offside for a CRO to be appointed when the – ROC has abdicated its responsibility and filled a void.

The Court: Allright. But there is no provision specifically for that to happen, so . .

Mr. Siddall: No. That's a fair – I mean, I have to agree with that. There is no specific provision.

The Court: The fork in the road there is do you did it yourselves – which is what happened.

Mr. Siddall: Right.

The Court: Or do you go to court and say, look, this is dysfunctional and we need direction.

Mr. Siddall: Right.

The Court: And they chose the one, not the other.

Mr. Siddall: They chose the one, not the other. And I say there is nothing wrong with that, because you have in all these cases societies going on and doing what they do and then –

The Court: Well, there's nothing wrong that. I mean, the trouble is a – there's no legal sanction for it, and they've taken issue with the fact that there's no legal

sanction for exactly how you've done it. It's a pragmatic solution, but it has no legal sanction; isn't that right?

(Page 65, Ln 25 – Page 66, Ln 32)

...

Mr. Siddall: Right. And what's happened is Mr. Schiffner has stepped into the void and he is – he has – remember that his appointment is subject to any direction of the ROC. He is filling a void. He has been reviewing campaign materials and applying a very measured community standard to –

The Court: Maybe I misunderstand, but was it your client's right to engage him in the process? Or was it – that something – that should have been supervised by the ROC – shouldn't it?

Mr. Siddall: Well, that – at the first meeting of the ROC –

The Court: Yes.

Mr. Siddall: It was discussed; let's appoint Fred Schiffner as CRO –

The Court: That didn't happen. They didn't approve that.

Mr. Siddall: No.

The Court: And so what's happened is one side of the equation has unilaterally decided to keep the process on the rails by appointing someone.

Mr. Siddall: Right. That's exactly what happened here.

The Court: But is that – does that create the conditions that suggest a fair election?

Mr. Siddall: Well, what – I think the onus is on my friend because – I keep getting to use the I word – but it's injunctive relief he's seeking. And what is – where is the breach of natural justice? Where is the – where is the breach – where is the real harm here?

The Court: What are we worried about natural justice if they're just in breach of the bylaws? I mean, if that is not something authorized by the bylaws, it's irregular per se.

Mr. Siddall: That doesn't follow that you have to enjoin the referendum from occurring, though.

The Court: It follows that it's irregular, and if the irregularity is something that's material, I have to consider that.

Mr. Siddall: I agree with that statement. It has been material. I say – maybe that's a better way of phrasing it. I say that there is no – I started my submissions by saying there's no reason this can't go ahead, practical or otherwise. I mean, he – I take it what – my friend is saying there's been a breach of the bylaws.

The Court: Well, he's saying – he'd be stronger than that. I mean, he's basically saying your people have usurped the process by unilaterally acting and engaging someone to run the election when that's not how this is supposed to work."

(Page 70, Ln 37 – Page 71, Ln 41)

...

"Mr. Siddall: But wrapping all that up, we say that this – there's no reason why this referendum can't proceed on the 18<sup>th</sup>.

The Court: Well, but there is – there is a good reason why it can't unless something happens, and that is that it's not in accordance with the bylaws.

(Page 84, Ln 37 – 43)

...

The Court: You absolutely need something to put you back on the rails legally, because legally you are offside right at this minute.

Mr. Siddall: If – if you do not grant any relief today –

The Court: Well, you see, I don't say – I don't

Mr. Siddall: No. I know.

The Court: Yeah. I don't think I could say what I thought you were saying, which is – I couldn't simply say, let it happen, because what's going to happen is not going to be in accordance with the Bylaws."

(Pages 85, Ln 4 – 15)

...  
"The Court: But anyway, having got to the point they did – I return again – it just seems to be unanswerable that your client's position was to come to this place and say that, we need the assistance of the court to give the directions necessary to keep this thing on the rails, instead of going outside the process and creating this situation where now they are in a position to say you aren't playing in accordance with the rules.

Mr. Siddall: Well, I think my response – one of my responses to that, would be it's convenient. I mean, I think it's convenient for the CFS to now be able to say, we were prevented from campaigning, and that's why they can't go ahead on the 18<sup>th</sup>.

The Court: I don't think that's – if they're saying that, that's not right. They weren't prevented from doing anything. They could have weighed their options and decided whether or not this made sense or didn't make sense. I mean, a lot of – there seem to be quite a few strategic things done in this context.

It's just that at this stage my concern looking down the road is, shouldn't any democratic process take place in a completely transparent and fair context? And anything you do at this stage to reconstitute what's happened now, unless you can establish that the breaches are trivial, is tainted, isn't it?

I mean, because in doing what your clients did, they gave them the argument that, well, we knew that wasn't lawful, we knew that wasn't right, and so we dropped tools. We didn't think we had to worry about that. Now, what can – you know, the court doesn't have to believe them, but that – you know, it's an irrefutable suggestion in the sense that how can you – you can't go into the inchoate details of how people might have been behaved if they had taken a different view if you hadn't put them in the position by behaving as you did – that you did."

(Page 89, LI 1 – 41)

272. It is submitted that:

- (a) the CFS Bylaws, as amended, constitute a binding contract between the CFS (and CFS – S) and member local associations, including the SFSS, and all parties are contractually obligated to comply with the CFS Bylaws;
- (b) in particular, if the SFSS wishes to defederate, it must comply with the CFS Bylaws in order for such defederation to be valid and legally effective; and



- (c) any vote or poll of SFSS members on defederation other than in accordance with the CFS Bylaws is not binding on the CFS and cannot constitute a legally effective defederation.

**Alleged 1982 Agreement**

273. The SFSS now seeks to rely upon an alleged December 22, 1982 agreement between the CFS and SFSS as support for the proposition that the SFSS did not have to comply with the CFS Bylaws in holding a defederation referendum. In particular, the SFSS seeks to rely on paragraph 5 which reads:

"5. The Member Institution shall conduct all referenda required by the Bylaws of the Federation in the same manner as any referendum it may conduct."

Affidavit #1 of D. Harder sworn April 14, 2008, Exhibit "C".  
Petition dated April 16, 2008, paragraphs 8 – 10.

274. First, it is submitted that the alleged 1982 agreement was never finalized and is not binding. It is unsigned by the CFS and no record of it can be found by the CFS. Clearly, this agreement could not bind the CFS-S (or the CFS-BC) who are not even listed as parties.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 8.

275. The onus is on the SFSS to prove the alleged 1982 agreement. There must be evidence of a definite offer and acceptance. While it may not be necessary in every case to have a "formal document", in the absence of such a document proof is required of the parties' oral agreement. If that oral agreement cannot clearly be established then there is no agreement.

*Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, [1991] O.J. No. 495 (Ontario C.A.);  
*Beacock v. Wetter*, [2006] B.C.J. No. 1416 (B.C.S.C.), per D.M. Smith, J. at paras. 40 – 43.

276. Once the SFSS had joined the CFS in 1982 there was an agreement in place between the parties, the CFS Bylaws. There is no evidence to prove that the

alleged 1982 agreement, as a subsidiary agreement to the CFS Bylaws, was ever made.

277. The preamble to the 1987 agreement does not refer to the alleged 1982 agreement but instead reads, in part:

"Whereas the Member Local Association became a duly admitted voting member of the Federations on the 19<sup>th</sup> day of January 1982 and thereby agreed to collect and remit Federation membership fees on the full and part-time students it represents at Simon Fraser University;"

[emphasis added]

278. Second, as of December, 1982, the CFS was a new organization and its Bylaws did not contain a process for holding referenda. The practice was therefore for member local associations to conduct referenda which related to the CFS in accordance with the local organization rules and procedures. However, once the CFS Bylaws were amended so as to include a mandatory referenda process as of May, 1995, the clear practice became and has been since for local associations to conduct referenda in accordance with the CFS Bylaws under the authority and jurisdiction of an oversight committee, as described below. Local association referenda practices are no longer utilized.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 9.

279. Paragraph 1 of the alleged 1982 agreement in fact reads:

"1. The Member Institution shall abide by all provisions of the Bylaws of the Federation as amended from time to time."

280. It is submitted that the intent was that the SFSS was to "abide" by amendments to the CFS Bylaws. The 1995 amendments to the CFS Bylaws, when read in conjunction with section 1 of the 1982 agreement, must therefore govern. This amendment would rescind or supersede any alleged requirement that the SFSS conduct a CFS membership referendum in accordance with its own procedure.

281. This result is consistent with the general importance placed on bylaws of a national organization and the requirement for members to comply with bylaws. Bylaws themselves are contractual and, in accordance with normal principals of contract, where parties amend a contract it is the amended contract which prevails between the parties.

*See Whittall v. Vancouver Lawn Tennis and Badminton Club, supra (B.C.C.A.)*

282. Third, as set out above, the CFS/CFS-S and Canadian Federation of Students – British Columbia Component and SFSS entered into an agreement dated July 20, 1987 which dealt with the same subject matter dealt with by the alleged 1982 agreement, namely, the collection of student fees by the SFSS and the payment of such fees to the CFS/CFS-S. This agreement is signed and entered into by all the relevant parties.

283. In *Block Brothers Realty Ltd. v. Monsieurs Estate*, an owner entered into a listing agreement with the realtor and then entered into a second listing agreement for the same property, this time calling for a listing of the property with a multiple listing service. The Court held that the second agreement had effectively rescinded or superseded the first. The Court of Appeal affirmed the decision and Mr. Justice MacFarlane, for the Court, quoted with approval from the trial judge at paragraph 9 as follows:

"I think it is clear with respect to the lot in question in this case that the parties intended to replace the Block Brothers agreement with the MLS agreement. This was done to give the lot wider exposure among Vancouver Island real estate agents and because the Block Brothers listing had proved ineffective. These factors, coupled with the reasons set out above for concluding that the two documents together could not be construed as one agreement, nor could they stand as two separate agreements, leads me to the only logical conclusion: the second agreement, i.e. the MLS agreement, replaced the Block Brothers agreement."

*Block Brothers Realty Ltd. v. Monsieurs Estate*, [1984] B.C.J. No. 1884 (B.C.C.A.), per MacFarlane, J.A. at paragraph 9.

284. It is submitted that the 1987 agreement was intended, by the parties, to set out the relationship between the parties with respect to student fee collection and payment. The 1987 agreement sets out particular rates or fees per student. The

alleged 1982 agreement does not. The 1987 agreement provides for payment of collected fees within 30 days whereas the alleged 1982 agreement refers to fees being forwarded "forthwith upon receipt". The 1987 agreement provides for a different interest rate for unpaid fees (10% per annum) than that in the alleged 1982 agreement ("two percent calculated monthly").

285. The 1987 agreement, by which the SFSS agrees to be bound by the CFS Bylaws, as duly amended from time to time, also does not contain any reference to referenda and, it is submitted, that the 1987 agreement, together with the 1995 amendment to the CFS Bylaws, effectively rescinded or superseded the alleged 1982 agreement, including paragraph 1.

#### **SFSS Constitution and Bylaws**

286. The SFSS also suggests in its Petition that the 1995 CFS Bylaw amendment, which requires a CFS membership referendum to be run under the oversight committee model, conflicts in some manner with the constitution and bylaws of the SFSS regarding referenda.

Petition dated April 16, 2008, paras. 11(d), 11(e), 12(d), 14 and 20(b).

287. It is submitted that there is no merit to this suggestion.

288. The constitution and bylaws of the SFSS do not deal with membership in national associations. Bylaw 17 – Referenda – is permissive and states, in part:

#### **"By-Law – 17 – Referenda**

1.a. The members may vote on resolutions concerning the activities of the Society by means of a referendum."

Affidavit #1 of D. Harder sworn April 14, 2008, Exhibit "A".

289. There is nothing in bylaw 17 which would suggest that this bylaw was intended to restrict the SFSS from agreeing to or complying with the CFS Bylaws referendum process.

290. Certainly, neither the SFSS or the IEC appeared to see any conflict between what was required by the SFSS constitution and bylaws and holding a defederation referendum with respect to the CFS/CFS-S in accordance with the oversight committee model in the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 72 and Exhibit "GG", excerpt from the IEC website as of March 2, 2008.

291. Further, at the same time as the Vote occurred, a proposal for an amendment to the SFSS bylaws adding a new bylaw, bylaw 22: Membership in Provincial and National Student Organizations, was put to the voters. Paragraph 1.d.iii of the proposed new bylaw 22 put forward the proposition that, in the future, a referendum to leave a provincial or national student organizations would require a referendum of SFU students carried out in accordance with SFSS bylaw 17. This strongly suggests that the SFSS was well aware that at the time of the Vote the SFSS bylaws and constitution did not require that a CFS defederation referendum be held pursuant to the SFSS's own procedure.

Affidavit of L. Watson #1 sworn May 26, 2008 at para. 72, Exhibit "GG"

292. Even if there was a conflict between the CFS Bylaws and the SFSS bylaws regarding the process for a defederation referendum, it is submitted that the CFS Bylaws would have to prevail and would be binding on the SFSS.

293. In *Byers v. Cariboo College Students Society*, [2006] B.C.J. No. 852 (B.C.S.C.), Mr. Justice Blair, in finding that it was the rules or bylaws of the Canadian Federation of Students which governed a CFS membership referendum involving Thompson Rivers University Student Union said at paragraphs 8 – 10:

"8. The oversight committee assumed responsibility for preparing the rules for the referendum including the rules of conduct during the referendum campaign to be applied to those either supporting or opposing the Society's affiliation with the Federation. The Federation's bylaws formed the basis upon which the referendum was to be conducted, a provision agreed to by the Society when it applied for and obtained status as a prospective member. The application of the Federation's bylaws is logical in that it is typically the organization in which membership is sought which sets the rules upon which it is prepared to grant

membership. However, within the broad parameters of the Federation's bylaws the Oversight Committee had the capacity to finalize the details of the referendum campaign as found in its Referendum Rules dated January 17, 2006.

9. Although not directly on point, the case of *Canadian Federation of Students (Ontario) v. Student Federation of the University of Ottawa*, [1995] O.J. No. 4774, Ontario Court of Justice (General Division), dealt with a situation in which the defendant University of Ottawa Student Federation; a member of the plaintiff Canadian Federation of Students, conducted a vote to determine whether the Ottawa students wanted to sever the relationship with the plaintiff Canadian Federation. Chilcott, J. held that the vote should be held by the rules of the plaintiff Canadian Federation, not those of the defendant.

10. I conclude that in response to the question raised in the petition before me, that the Society accepted in applying for and obtaining a prospective membership in the Federation, it accepted that the referendum of the Society's members would be conducted pursuant to the Federation's bylaws. There are no grounds advanced that convince me that the Society's bylaws ought to prevail in the conduct of the referendum."

*Canadian Federation of Students (Ontario) v. Student Federation of the University of Ottawa*, [1995] O.J. No. 4774 (Ontario Court of Justice) as per Chilcott, J. at paras. 42 – 43 and 46.

See also *Association of Part-Time Undergraduate Students of the University of Toronto v. The University of Toronto Mississauga Students Union*, [2008] O.J. No. 3344 (Ontario Superior Court of Justice) per B.A. Allen, J. at paras. 16 – 19 and 21.

### **Implied Terms**

294. The SFSS has taken the position that one or more terms should be implied into the "agreement", that is, the CFS Bylaws, the effect of which would be that the SFSS did not have to comply with the oversight committee model and could conduct a defederation referendum on its own with its IEC.

295. In *Neuzen v. Korn*, [1995] 3 S.C.J. No. 79 (S.C.C.) Mr. Justice Sopinka, for the majority, quoted with approval from the "leading case" of *G. Ford Homes Ltd. v. Draft Masonary (York) Co.* (1983), 43 O.R. (2<sup>nd</sup>) 41 (C.A.) at paragraph 81 as follows:

"When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not re-write a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with

its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.”

[emphasis added]

*Neuzen v. Korn*, supra, at paras. 81 - 83

296. In that case, Mr. Justice Sopinka, after again observing that “courts must be very cautious in their approach to implying contractual terms” declined to imply a warranty of fitness into a medical procedure, artificial insemination.

See also *Re: Pine Valley Mining Corp.*, [2008] B.C.J. No. 420 (B.C.S.C.) per Garson, J. at paras. 41 – 49.

297. In the case at bar, the term(s) that the SFSS seeks to imply would be in direct conflict with Bylaw I of the CFS Bylaws. Further, the term would be in conflict with the provision in the 1987 Agreement that the CFS comply, generally, with the CFS Bylaws, as amended. It is submitted that no such term(s) can be implied.

298. In addition, as is clear from the above authorities, it cannot be said that the term(s) the SFSS seeks to imply are necessary for “business efficacy” of the contracts or are a matter of custom or implication by law. There is no patently obvious difficulty with the SFSS having to comply with the CFS Bylaws when seeking to defederate from the CFS.

#### **The Validity of CFS Bylaws I(6) and I(7)**

299. The SFSS alleges that the above bylaws which were created at a May, 1995 general meeting of the CFS and CFS-S and which made mandatory the Oversight Committee model for CFS referenda, are invalid as not having been passed or created at a properly constituted meeting of the CFS.

300. Deponents from both the CFS and the SFSS have sworn that the current CFS Bylaws include Bylaws I(6) and I(7).

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 4;  
Affidavit #1 of D. Harder sworn April 16, 2008 at para. 6.

301. The May, 1995 amendments were passed at a general meeting of the CFS and CFS-S and received ministerial approval from Industry Canada as of May 1, 1998.

~~Affidavit #1 of Titus Gregory sworn April 11, 2008, Exhibit "A", Titus Gregory's Affidavit #1 sworn in *Canadian Federation of Students v. Kwantlen University College Student Association*, S.C.B.C., Vancouver Registry, No. S081553 at para. 14 and Exhibit "G", Letter dated May 1, 1998 from Industry Canada to the CFS.~~

302. As such, there is prima facie evidence before this Court that the particular CFS Bylaws in question are valid.

See section 155(2)(c) of the *Canada Corporations Act*, which requires administrative approval of amendments to bylaws prior to such amendments being enforced or acted upon.

303. It is submitted that there is currently no admissible evidence with respect to what occurred at the May, 1995 CFS/CFS-S meeting in question.

304. All that has been produced is what is called "draft closing plenary minutes of the May 1995 general meeting of the CFS", attached as Exhibit "H" to the Affidavit of Titus Gregory #1 sworn March 10, 2008 in another proceeding, *Canadian Federation of Students v. Kwantlen University College Student Association*, S.C.B.C. Vancouver Registry, No. S081553.

Affidavit of Titus Gregory #1 sworn March 10, 2008 at Exhibit "H".

305. There is no evidence that Titus Gregory attended the May 1995 meeting. Indeed, the draft minutes suggest that there was no one there from Kwantlen College. There is no evidence of who produced the draft minutes or where Titus Gregory obtained the copy that is exhibited in his Affidavit.

306. The CFS and the CFS-S submit that Exhibit "H" is hearsay evidence from an unknown source. Mr. Gregory does not even swear that he believes the draft minutes to be accurate. This evidence is not admissible at a summary trial.

Rule 51(10) of the Supreme Court Rules;  
*Ulrich v. Ulrich*, [2004] B.C.J. No. 286 (B.C.S.C.) per Bouck, J. at paras. 19, 22 – 23, 25 – 26, 32



– 36, 38 – 39, 73 and 83; *American Pyramid Resources Inc. v. Royal Bank* (1986), 2 B.C.L.R. (2nd) 99 (S.C.) per Davies, J. at paras. 15 – 16, affirmed on appeal, [1987] B.C.J. No. 196 (B.C.C.A.); *Sermeno v. Trejo*, [2000] B.C.J. No. 1088 (B.C.S.C.) per Macaulay, J. at paras. 6 – 14.

307. Further, in addition to estoppel, laches and acquiescence, discussed below, it is submitted that the SFSS is statute-barred from challenging the validity of the May, 1995 amendment.

308. As set out above, it is clear that the bylaws of a voluntary association are contractual in nature.

309. In effect, what the SFSS is saying is that in May, 1995, the CFS purported to “wrongly” change the contract between the voting members of the CFS. It is submitted that the right to bring an action based on that breach of contract arose at that point.

310. It is submitted that the applicable limitation period is six years pursuant to section 3(5) of the *Limitation Act* (British Columbia) which reads:

“Limitation Periods

3(5)Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.”

311. The evidence relied on by the SFSS on this point, the “draft closing plenary minutes”, suggests that the representatives of the SFSS attended the meeting in 1995.

312. Although there is apparently no case law on point, it is submitted that section 3(5) of the *Limitation Act* would apply to prevent the SFSS, at this late date, from challenging the validity of the CFS Bylaws in question. The limitation period expired in May 2001.

**Estoppel, Laches and Acquiescence**

313. Where one party to a contract purports to unilaterally change that contract, the other party can either protest and treat the change as a breach or condone the change and continue with the contract under the new terms. Such an election must be made within a reasonable time. It is submitted that the SFSS, by keeping silent about the May, 1995 amendments to the CFS Bylaws for 13 years, cannot, reasonably, now argue such change was wrongful and amounted to a breach of the contract between the parties.

See *McSeveney v. Phone Directories Co.*, [2005] B.C.J. No. 2356 (B.C.S.C.) per Barrow, J. at paras. 50 – 53.

314. It is submitted therefore that the SFSS by its silence condoned the changes made to the contract by the May, 1995 amendment and is bound by such amendment.

315. It is also submitted that from the start of this defederation process, the SFSS and its representatives accepted that the CFS Bylaws were binding on the SFSS with respect to the SFSS's efforts to withdraw or defederate. It is submitted that the SFSS cannot now unilaterally avoid or ignore the requirements of the CFS Bylaws and, in particular, the jurisdiction, responsibility and authority of the Oversight Committee. It is prevented from doing so by estoppel, laches and acquiescence.

*Atwal v. Shoker*, [2005] B.C.J. No. 1471 (B.C.S.C.) per Morrison, J. at para. 30;  
*Re: Canadian Temple Cathedral of the Universal Christian Apostolic Church* (1971), 21 D.L.R. (3<sup>rd</sup>) 193 (B.C.S.C.) per Hinkson, J. at paras. 22 – 30;  
See also *Nagra v. Khalsa Diwan Society of Victoria*, [1997] B.C.J. No. 192 (B.C.S.C.) per Bouck, J. at paras. 21 – 22;  
See also *Lee v. Lee's Benevolent Association of Canada*, [2003] B.C.J. No. 1714 (B.C.S.C.) per Loo, J. at para. 39.

### **Anticipatory Breach**

316. The SFSS takes the position that there was an "anticipatory breach" by the CFS by the assertion in a letter by counsel dated February 29, 2008 that the CFS would not recognize the validity of the proposed Vote.

317. The letter in question read:

"Further to our letter of February 27, 2008, we gather that there was a further Oversight Committee meeting on February 28, 2008 but, unfortunately, none of the key issues between the parties, including the proposed date for a referendum, have been resolved.

We understand that the Society intends to go ahead with its decision, made at a Society board meeting on February 25, 2008, to independently present two questions to voters on March 18 – 20, 2008, as set out in our earlier letter.

The CFS wishes to make it clear that it will not recognize the validity of this proposed poll which is being conducted outside of the procedure set out in the Bylaws.

For all of the reasons set out in our earlier letter, a fair referendum on March 18 – 20, 2008 is not possible and the proposed poll will be fundamentally flawed.

Having said that, the CFS does intend to implement a campaign but will do so under protest on a without prejudice basis to its position that any poll unilaterally conducted by the Student Society on March 18 – 20, 2008 is not a valid or legally effective defederation referendum."

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "X".

318. The CFS (and CFS – S) took the position as of February 29, 2008 that the Vote would be invalid for the reasons set out in the letter. That position is maintained. The issue is whether that position is correct. This does not result in an "anticipatory breach" of any contractual obligation. If the Vote was invalid, the CFS and CFS – S were correct in their position. If not, and the SFSS is correct, then the Vote constitutes a valid defederation referendum pursuant to the CFS Bylaws.

319. In any event, it is clear that the position taken in the February 29, 2008 letter could not be a fundamental breach, constituting a repudiation of the agreements between the parties as a whole, entitling the SFSS to terminate such agreements. A fundamental breach is one which goes to the very root of a contract; where one party fails to perform the very purpose for which the contract is designed so as to deprive the other of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained.

*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, [2007] B.C.J. No. 265 (B.C.C.A.) at paras. 85 – 96.

320. Further, and in any event, the SFSS did not "accept" any "anticipatory breach" but, rather, went ahead with their Vote as planned and then attempted to convince the CFS and CFS-S to accept the validity of the Vote after it had occurred.

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "M", minutes of Oversight Committee meeting March 28, 2008.

321. If a fundamental breach or repudiation is not accepted, both parties remain obligated to perform.

*Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada, supra at paras. 88 and 98. .*

### **Collateral Attack**

322. Paragraph 20 of the Outline (No. S082674) reads in part: "In addition, it is the SFSS's position that unless and until a successful application is brought to set aside the results of the Defederation Referendum, the results of that vote stand and it is not open to the CFS to collaterally attack their legality".

Outline dated December 15, 2008 at para.20.

323. The CFS is the national association in question. As stated, the National Executive of the CFS made the decision that the Vote is not a valid referendum. It is that decision which the SFSS seeks to overturn.

324. If the principles of "collateral attack" have any application to the case at bar, it is the SFSS which is attempting to collaterally attack the decision of the National Executive of the CFS.

325. However, it is submitted that "collateral attack" has no application to this case. There is no order of a Court or other tribunal binding on the CFS/CFS-S which those parties are trying to avoid. It is submitted that a Court has jurisdiction to deal with the validity of a vote such as in the case at bar both in terms of whether the vote was carried out in accordance with the appropriate bylaws and whether the vote was carried out in a manner consistent with principles of natural justice and in good faith.

*Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21 at paras. 71 – 73;  
*Association of Part-Time Undergraduate Students of the University of Toronto v. The University of Toronto Mississauga Students Union*, [2008] O.J. No. 3344 (Ontario Superior Court of Justice) per B.A. Allen, J. at paras. 10 – 14.

(5) Was the Vote held by the SFSS on March 18-20, 2008 contrary to the CFS Bylaws?

326. It is submitted that the Vote was not held in accordance with the CFS Bylaws and that renders the Vote invalid and legally ineffective. Particulars are considered below.

*Role of the Independent Electoral Commission*

327. Under CFS Bylaw I, an oversight committee is to be formed and is to have full jurisdiction and authority over a defederation referendum including setting dates for the campaign, administering the campaign and approving all campaign materials.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 19, Exhibit "A".

328. Pursuant to the CFS Bylaws, the Oversight Committee was formed. The CFS appointed its representatives as of December 3, 2007. The SFSS notified the CFS of its representatives on January 22, 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 20.

329. Between February of 2008 and March of 2008, the Oversight Committee met on ten occasions, as set out above. During that time period, the Oversight Committee:

- (a) agreed to a protocol for meetings and minutes;
- (b) agreed to a quorum and result criteria for the referendum;
- (c) agreed to a specific referendum question.
- (d) agreed to establish the criteria for campaign materials before dealing with the issue of pre-campaigning;

- (e) agreed to criteria for approval of campaign materials;
- (f) agreed to process and certain enforcement measures with respect to breach of rules and campaign materials criteria;
- (g) approved certain campaign material and disapproved of other material;
- (h) required individuals and campaign teams to register with the Oversight Committee;
- (i) agreed on ballot boxes issues; and
- (j) agreed where campaigning could occur.

330. Having acknowledged the jurisdiction and authority of the Oversight Committee, the SFSS nevertheless engaged the SFSS's IEC to run the Vote, in effect, usurping the jurisdiction of the Oversight Committee. This resulted in an independent SFSS Vote, outside of and contrary to the CFS Bylaws.

331. CFS's counsel on March 10, 2008 wrote to the SFSS stating:

"It is our view that the Independent Electoral Commission has no jurisdiction or authority with respect to the Referendum, which has been made clear before, and this committee ought not to be involving itself in the Referendum."

Affidavit #1 of L. Watson sworn May 26, 2008 at Exhibit "BB".

332. Nevertheless, the Vote was in the end administered solely by the IEC to the exclusion of the Oversight Committee. This resulted in an unregulated Vote without supervision or control over much of the campaign.

333. The CFS and CFS-S submit that under the circumstances the Vote cannot constitute a referendum pursuant to the CFS Bylaws and the result is therefore not binding on the CFS or the CFS-S.

*See Canadian Federation of Students v. Kwantlen University College Student Association, supra.*

*Early Campaigning*

334. The CFS Bylaw I, contemplates a discrete campaign period of a minimum of two weeks before a referendum. That campaign period is to be set and administered by the Oversight Committee.

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "A".

335. Contrary to the objectives of the CFS Bylaws and practice of the CFS with respect to campaigning, the SFSS has vigorously engaged in early campaigning since at least August of 2007 without any authority and without the approval of the Oversight Committee.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 39.

336. In furtherance of their objective to defederate, the SFSS produced inaccurate, defamatory materials denouncing the CFS and widely distributed such materials on SFU campuses.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 40-53.

337. The early campaigning conducted by the SFSS was in violation of both the letter and spirit of the CFS Bylaws.

338. In addition, the early campaigning by one side made it impossible to have a fair Vote on March 18-20, 2008. At no time did the SFSS, despite receiving correspondence from counsel for the CFS dated February 27, 2008, take any steps to ameliorate the impact of its wrongful early campaigning.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 58, Exhibit "X".

*Campaign Materials Used by the SFSS During the Two Weeks Prior to the Vote*

339. Much of the "campaign" materials used by the SFSS during the two week period prior to the Vote was, in the opinion of the CFS representatives on the Oversight

Committee, defamatory and inaccurate. These materials were not approved by the Oversight Committee but were used by the SFSS irregardless.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 70,

340. Pursuant to CFS Bylaw I, the Oversight Committee is responsible for approving all campaign material.

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "A".

341. The concerns about the campaign material used by the SFSS two weeks prior to the Vote are particularized at paragraph 70 of Affidavit #1 of Lucy Watson sworn May 26, 2008.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 70

342. The CFS representatives on the Oversight Committee objected to the use of such material. However, these concerns were never addressed.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 70

343. The CFS submits that the use of inaccurate and defamatory campaign material also constituted a breach of the CFS Bylaws.

*Date of the Vote*

344. In August 2007, the Referendum Petition was delivered to the National Executive of the CFS. The Referendum Petition did not specify a date for the referendum. Pursuant to CFS Bylaw I and the practice of the CFS this meant that setting the date for the referendum was a matter to be dealt with by the Oversight Committee.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 15 and 22, Exhibit "A".

345. Despite this, the SFSS insisted that the Vote be held March 18-20, 2008, the same date as the SFSS's general elections. The CFS representatives on the Oversight Committee opposed those dates because the issue of CFS membership



would (and did) play a significant role in the SFSS's general elections and campaigning leading up to such elections and having the election and the referendum on the same date confused the two issues. As a result, the question of membership in the CFS became caught up in the question of who the members of the SFSS wished to elect for 2008-2009 and the integrity of the Vote was compromised. This was exacerbated because of the extensive early campaigning and the clear identification of many of the candidates for the SFSS executive with an anti-CFS stance. As well, this led to the confusion over who had jurisdiction over the Vote, the Oversight Committee or the IEC.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 23.

346. The CFS offered to hold the Referendum on dates other than March 18-20, 2008 but the SFSS refused to consider any other dates. The March 18-20, 2008 dates were not approved by the Oversight Committee and the SFSS instead went ahead unilaterally.

Affidavit of L. Watson sworn May 26, 2008 at para. 24.

*Question(s) Put to the Members of the SFSS*

347. Questions put to the SFSS members by the SFSS executive regarding the CFS and CFS-S at the Vote were:

- "(a) Are you in favour of maintaining membership in the Canadian Federation of Students?; and
- (b) If the Simon Fraser Student Society ceases to be a member of the Canadian Federation of Students, do you agree that the former CFS semesterly membership fee would be redirected into a Society Development Fund which will result in no overall fee increase for students?"

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 56.

348. The addition of the Second Question was contrary to a decision and agreement which had been reached by the Oversight Committee regarding the question

to be put forward at a referendum. The second question was inappropriate because together the questions biased the result against continued membership in the CFS.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 57.

349. Pursuant to the CFS Bylaws the Oversight Committee has exclusive jurisdiction and authority to decide the question for the referendum. The use of the Second Question without the approval of the Oversight Committee was contrary to the CFS Bylaws and the practice of the Canadian Federation of Students.

Affidavit #1 of L. Watson sworn May 26, 2008 at para. 57.

### *Confidentiality*

350. The discussions and deliberation of the Oversight Committee are to be confidential. This was agreed to by the members of the Oversight Committee. The SFSS did not maintain that confidentiality. The positions being taken by CFS representatives during in camera Oversight Committee meetings were reported in the student newspaper, The Peak, and, as well, at open SFSS board meetings.

351. This was a breach of the agreed upon process and CFS practice and, again, made it impossible to hold a fair Vote on March 18-20, 2008.

### *Polling Infractions*

352. The polling Infractions and the evidence supporting such Infractions are set out above.

353. Although the CFS Bylaws do not deal specifically with voting procedure, the practice of the CFS is to conduct referenda voting in accordance with certain rules and principles and it is clear that the Vote did not comply with that practice.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 45.

*Summary*

354. The CFS and CFS-S submit that with respect to the Vote, the CFS Bylaws and CFS practice were not followed because:

- (a) the unilateral decision by the SFSS to have the IEC conduct the Vote;
- (b) the vigorous early campaigning since at least August of 2007 by the SFSS without any authority and without the approval of the Oversight Committee;
- (c) the SFSS's use of inaccurate and defamatory and unapproved campaign material in the two weeks preceding the Vote;
- (d) unilateral decision of the SFSS to proceed with the Vote on March 18-20, 2008;
- (e) the SFSS's use of the Section Question which was different from what was decided on and agreed to by the members of the Oversight Committee;
- (f) the SFSS's Oversight Committee members breach of their duty of confidentiality; and
- (g) polling Infractions.

355. The CFS and CFS-S submit that because the Vote was not in accordance with the CFS Bylaws and practice, the Vote cannot constitute a referendum pursuant to the CFS Bylaws and the result is therefore not binding on the CFS or the CFS - S.

(6) Fairness, Natural Justice and Good Faith

356. The CFS submits that the Vote was not carried out in accordance with principles of fairness and natural justice because:

- (a) there was early campaigning by the SFSS, described above;

- (b) the campaign materials used by the SFSS were inaccurate and defamatory;
- (c) the Vote with respect to CFS membership took place on the same date as the SFSS general elections;
- (d) the campaign and Vote were, in many respects, not regulated;
- (e) the Second Question with respect to alternative uses for student fees, biased the result against continued membership in the CFS;
- (f) the IEC which ran the Vote itself was biased or appears to have been biased against the CFS;
- (g) there was a breach of confidentiality by the SFSS representative on the Oversight Committee;
- (h) of the participation of the graduate students at SFU in the Vote;
- (i) of the lack of any meaningful participation by SFU students at Kamloops; and
- (j) the polling Infractions and the failure of the SFSS/IEC to make any meaningful response to concerns raised about such Infractions.

357. In *Chan v. Chin Wing Chun Tong Society of Canada*, Mr. Justice Shaw adopted the following passage from Madam Justice McLachlin (as she then was) in *Leroux v. Molgat*:

"An election will be set aside only if substantial irregularity, calculated to affect the result, is shown: *Anderson v. Stewart* (1921), 49 N.B.R. 25, 62 D.L.R. 98 (C.A.). If the plaintiff establishes irregularities, the onus shifts to the defendants responsible for the conduct of the election to show that those irregularities were not calculated to affect the result: *Re R. ex rel. Marquette and Skaret* (1981), 119 D.L.R. (3d) 497 (Alta. Q.B.); *R. ex rel. Ivison v. Irwin* (1902), 4 O.L.R. 192; *Gi-esbrecht v. Chilliwack* (1982), 18 M.P.L.R. 27 (B.C.S.C.)."

*Chan v. Chin Wing Chun Tong Society of Canada*, [1999] B.C.J. No. 1472 (B.C.S.C.) per Shaw, J. at para. 33 citing *Leroux v. Molgat*, [1985] B.C.J. No. 45 (B.C.S.C.) at para. 3.

358. In *Chan v. Chin Wing Chun Tong Society of Canada*, the petitioners applied to set aside the election of directors to a society. The petitioners alleged that certain dissident members of the society had embarked on a campaign of confusion with the intent of affecting the election results. In particular, the dissident members changed the candidate numbers on the ballot at the last minute. As well, the respondents' election committee wrongly refused to accept the petitioners' nomination forms. Mr. Justice Shaw held that the respondents had not met the onus of establishing that the irregularities were not calculated to affect the result.

*Chan v. Chin Wing Chun Tong Society of Canada*, [1999] B.C.J. No. 1472 (B.C.S.C.) per Shaw, J. at para. 36.

359. In *Bowering v. International Union of Operating Engineers, Local 882*, several union members applied for summary judgment declaring that their union's election was null and void. The applicants alleged that the mail balloting was conducted improperly, as the election committee did not use correct addresses and wrongly disqualified certain members from voting. In finding for the applicants, Mr. Justice Holmes stated:

"I satisfied the plaintiffs have proven a significant number of election irregularities occurred. The irregularities are substantial in their effect. They have resulted in ballots being provided to several persons not entitled to vote and have disenfranchised members who were entitled to vote. I cannot characterize these major irregularities as mere technicalities. They have impaired the essential fairness and integrity of the democratic election process. The election outcome in respect to several offices may have been different because of low margins of success.

The plaintiffs are entitled to a declaration that the election is null and void and that new election be held for all positions, except that of Recording Secretary.

...

The elections will be conducted in accordance with the Constitution and Bylaws with any necessary variation to reflect that it is a court ordered re-election."

*Bowering v. International Union of Operating Engineers, Local 882*, [2002] B.C.J. No. 1183 (B.C.S.C.), per Holmes, J. at paras. 80-83.

360. In *Leroux v. Molgat*, supra, a candidate in an election of union officials claimed that infractions had occurred in the conduct of the election which justified a declaration that the election was null and void. Madam Justice McLachlin, as she then was, found that three infractions had been established and went on to examine whether the defendants had met the onus of establishing that these infractions did not affect the result of the election. She concluded, generally, that the onus had not been met.

*Leroux v. Molgat*, [1985] B.C.J. No. 45 (B.C.S.C.) at paras. 10 – 11, 18 and 41.

361. One issue was a breach of the requirement for a secret ballot. The election officials had failed to provide sufficient privacy for the voters to mark their ballots in some of the advance polls. Members voted by placing their ballots on open tables or against the wall where their marks could be observed. The response to this complaint was that there was ample opportunity at each polling place for an individual to vote secretly if they were prepared to wait their turn. Many did not take advantage of that opportunity and chose to vote in the public setting. On the requirement for a secret ballot, Madam Justice McLachlin stated:

"10. The plaintiff testified that at a number of advanced polls no partitions were provided and members voted by placing their ballots on open tables or against the wall where their marks could be observed. Mr. Duff admitted that complaint were made in this regard. Mr. Stalker did not deny the lack of partitions; his defence was that there were ample opportunity at each polling place for everyone to vote secretly if they were prepared to wait their turn and many, he agreed, did not take advantage of this opportunity and voted in a public setting.

11. On all the evidence, I am satisfied that the vote was not conducted by secret ballot. Secrecy of ballot is one of the most fundamental principles in elections. Breach of this principle is regarded as more than a mere irregularity; it is always viewed as serious and substantial: [citations omitted]. Moreover, it was required by the local union's constitution, except where there was only one candidate for the office in question. It follows from the fact that it was quite possible for members to observe how other members were voting at a number of the advance polls that members could be identified with their votes contrary to art. 12, s. 6, of the constitution. The contention that they could have voted secretly had they been willing to wait for a private area to be free provides no answer to the actual absence of privacy which occurred in the course of the voting. It was up to the persons in charge of the election to ensure that all votes were cast secretly."

[emphasis added]

*Leroux v. Molgat*, [1985] B.C.J. No. 45 (B.C.S.C.), per McLachlin, J. at paras. 10 - 11.

362. In *Hong v. Young Kwang Presbyterian Church of Vancouver*, [2007] B.C.J. No. 783 (B.C.S.C.) Mr. Justice Smith, after referring to *Leroux v. Molgat*, supra, and the requirement for a secret ballot, said at paragraph 47:

"47. McLachlin J. did not go on to discuss whether this breach of ensuring a secret ballot might have affected the election's outcome. She simply held that it was a serious and substantial irregularity, which would be sufficient to justify a declaration that the election was invalid."

See *Hong v. Young Kwang Presbyterian Church of Vancouver*, [2007] B.C.J. No. 783 (B.C.S.C.) per D.M. Smith, J. at paras. 20 - 21, 23, 54 - 55 and 58 - 59

363. In *Hotra v. H.R.C.E.B. Local 40*, [1987] B.C.J. No. 1774 (B.C.S.C.), the court considered the validity of an election of union officers and board members and held that the failure to ensure secrecy was "fatal to the result". At page 3, Mr. Justice Gibbs said:

"In the result, the President/Administrator was declared elected with 1,007 of the votes cast for that office (45.22%), the Vice-President with 917 (41.89%), and the Secretary-Treasurer with 955 (43.69%). The margins over the next highest number of votes cast for a candidate for the particular office were 501, 237 and 292 respectively. Obviously, if a substantial number of those members who did not vote refrained from doing so because of the secrecy aspect, if there had been compliance with the bylaws the result may well have been different. As pointed out above, the onus is upon the defendants to show that the failure to comply did not effect the result, and they have not discharge that onus.

An observation made by Sargent, J. in *Brodie v. Bevan* (1921), 38 T.L.R. 172, at 176, is particularly apt to the circumstances here. In the course of setting aside a union ballot, he said that the matter for consideration was "the impression produced on the mind of the voter that his vote was capable of identification". That consideration weighs heavily in this case also."

364. Similarly, in *Clark v. Teamsters, Local 464*, [1998] B.C.J. No. 697 (B.C.C.A.), the court was dealing with a challenge to an election of union officials. As set out above, a majority of the Court of Appeal allowed the appeal for procedural reasons (failure to join all interested parties). Mr. Justice Hall, in dissent, upheld part of the trial judge's decision and decided that, again, the failure to ensure secrecy meant the election could not stand. At paragraph 53, His Lordship said:

"53. In my view, the system implemented before the election of officers of Teamsters Local Union No. 464 in 1995 approached secrecy, but failed to measure up because of the considerations I have noted. Even though it had been made known to those attending the nomination and membership meetings, that Price Waterhouse generally controlled the process, the system ultimately adopted did not serve, in my opinion, to make plain that this was truly a secret ballot. As I've observed, in situations where a secret ballot is required to ensure the validity of an election, a perception that the process lacked secrecy is of such great significance that it can serve to invalidate the election."

365. The result arrived at by Mr. Justice Hall was subsequently confirmed by Mr. Justice Williamson in an action commenced by Writ following the appeal.

*Clark v. Teamsters, Local 464*, 1998 CarswellB.C. 2711 (B.C.S.C.), per Williamson, J. at paragraphs 21-22.

366. It is submitted that, in the case at bar, the failure to provide privacy screens and ensure a secret ballot renders the Vote invalid. Several of the other polling infractions would have exacerbated the failure to provide for a secret ballot. The evidence is that the Vote poll clerks were taking directions from the SFSS which was clearly against continued membership in the CFS. Further, SFSS representatives, poll clerks and even people connected with the IEC were campaigning against the CFS at polling stations. Other people were loitering at the polling stations. Little effort was made to control access to ballots. It is submitted that this must have created an oppressive situation for anyone considering voting in favour of the CFS such that the lack of voting secrecy was highly prejudicial to the CFS.

367. Given the recorded results for the Vote, it would have taken a vote change by 749 SFU students to change the result into one which favoured continued membership in the CFS. It is submitted that the SFSS cannot meet the onus proving that the result in the Vote would have been the same regardless of all of the issues raised by the CFS.

368. For example, there are 4,200 graduate students at SFU. It is unknown how many of them voted. There is evidence though that a good deal of the support for defederation came from the graduate students. (An example is Michael Letourneau who was a director of the Graduate Students Society at SFU at the time of the Vote and



was also one of the principal organizers and founders of that Graduate Students Society.)

Affidavit # 1 of M. Letourneau sworn September 2, 2008 at paras. 88-89.

369. With respect to other issues raised by the CFS and CFS-S, such as the failure to adequately provide for secrecy of ballot or to prevent campaigning at polling stations, it is not possible to say how many students were influenced to vote against the CFS (or not vote at all), but it is likely significant. The same holds true for matters such as early campaigning, the use of unapproved inaccurate, defamatory campaign materials by the SFSS, the fact that the vote took place at the same date as the SFSS general elections, the use of the Second Question by the SFSS, the breach of confidentiality by SFSS representatives and the lack of opportunity to participate by SFU's students at Kamloops. All of these matters would have clearly influenced student voters against the CFS and although it is not possible to quantify the number of voters affected, again, it is submitted, that it was likely significant.

370. In addition to these difficulties, there is strong evidence that the chief electoral officer, Mr. McCullough, who was running the Vote, had a strong personal bias against the CFS. Certainly, there is a reasonable apprehension of bias. The failure of the IEC to do anything to control the campaign or follow-up on complaints of infractions with respect to the Vote support the conclusion that the IEC shared the SFSS's bias against the CFS.

*Administrative Law in Canada*, 4<sup>th</sup>, Sara Blake, Butterworths, Ontario, at pp. 101 – 102.

371. It is submitted that all the circumstances, the principles of fairness and natural justice require that the Vote be declared invalid and that there be another referendum of members of the SFSS with respect to continued membership in the CFS and CFS-S.

372. A vote with respect to an association is considered invalid not only where there has been a breach of the association's bylaws or the principles of fairness and

natural justice. A court will also consider whether the process was carried out in good faith.

373. In *Mowat v. University of Saskatchewan Students' Union*, the petitioner, Mr. Mowat, challenged a decision of the University of Saskatchewan Students' Union to ratify referendum results in which a majority of students voted in favour of joining the CFS. Following the referendum, the oversight committee established in relation to that referendum was presented with a number of complaints from both sides of the campaign regarding polling irregularities and infractions. The oversight committee considered the complaints but determined that the results of the referendum were an "accurate reflection of the will of the students" at the University of Saskatchewan. The oversight committee report was then presented to the University of Saskatchewan Election Board. That board refused to ratify the result and recommended that another referendum be held with ground rules that were better settled and broadly disseminated. The report of the Election Board read in part:

"In terms of the process, this report only highlights the key issues which the EB believed would have significantly affected the will of the voters: (1) the lack of preparation or groundwork prior to establishing the ROC, (2) the fact that there was no specific call for campaign teams to register, (3) the evolving nature of the ROC Protocol, the fundamental document which was to determine the "ground rules" for campaigning and for the complaint process."

The University of Saskatchewan Students' Union chose to disregard the decision of the Election Board and ratified the referendum result.

*Mowat v. University of Saskatchewan Students' Union*, [2006] S.J. No. 681 (Sask. Court of Q.B.), at para. 22; affirmed at 2007 CarswellSask 483 (Sask. C.A.).

374. Mr. Mowat challenged the decision of the University of Saskatchewan Students' Union to ratify the referendum result in the face of its own Elections Board's refusal to do so. The Court considered the controverted election jurisprudence. The Chambers Judge held that he did not believe the controverted election jurisprudence was applicable to the problem before him. Rather, relying on *Walton (Litigation Guardian of) v. Saskatchewan Hockey Association et al.*, and related cases, he concluded that the proper test for relief was whether the University of Saskatchewan

Students' Union had acted in "good faith and generally in accord with the concepts of natural justice". He answered that question in the negative and at paras. 60 – 62 said:

"In those cases, the Court does not ask itself whether the results have been skewed, but rather has the organization acted in good faith and generally in accord with the concepts of natural justice? This does not mean, as noted in Martineau, supra, that there must be an exacting legal process or an application of the full "panoply" of procedural natural justice rules. The question is, has the organization acted in a fashion that meets the legitimate expectations of a fair-minded observer?"

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

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

[emphasis added]

*Mowat v. University of Saskatchewan Students' Union*, [2006] S.J. No. 681 (Sask. Court of Q.B.) at para. 60 - 62 affirmed at 2007 CarswellSask 483 (Sask. C.A.);  
*Walton (Litigation Guardian of) v. Saskatchewan Hockey Association*, [1998] S.J. No. 125 (Sask. Court of Q.B.).

375. In the present case, the SFSS made a decision to change the rules of the referendum despite the fact that it was bound to follow the CFS Bylaws. Specifically, as set out above, the SFSS:

- (a) withdrew from the Oversight Committee;
- (b) unilaterally appointed the IEC to conduct the Vote which effectively led to an unregulated Vote;
- (c) added the Second Question to the one that had been agreed to by the Oversight Committee;

- (d) allowed the SFU graduate students to participate in the Vote despite the fact that such students were not affected by the outcome of the Vote;
- (e) did not provide an effective means for students at the SFU Kamloops campus to participate in the Vote; and
- (f) through the IEC, allowed polling Infractions to occur and then failed to investigate and address the complaints and polling Infractions related to the Vote.

376. In effect, when the Oversight Committee process did not appear to be proceeding accordingly to the agenda of the SFSS, it substituted its own IEC and election rules in place of the Oversight Committee and the CFS Bylaws.

377. The CFS and CFS-S submit that those actions constitute a breach of duty of good faith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 28, 2009

  
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Solicitor for Canadian Federation of Students  
and Canadian Federation of Students –  
Services

THESE SUBMISSIONS are made by Martin L. Palleson, of the firm of Gowling Lafleur Henderson LLP, Barristers and Solicitors, whose place of business and address for service is P.O. Box 30, 2300 - 550 Burrard Street, Vancouver, B.C., V6C 2B5, Telephone: 604-683-6498.