REPLY SUBMISSIONS OF THE SIMON FRASER STUDENT SOCIETY

I. INVALIDITY OF CFS BYLAWS

1. The main thrust of the CFS's submissions is that the Defederation Referendum was invalid because it did not comply with the CFS Bylaws I (6) and (7). It is the SFSS' position that the Defederation Referendum did not violate those Bylaws for the reasons set out in the SFSS' Main Submissions. However, the Court need only decide that issue if it is satisfied that the Defederation Referendum was governed by Bylaws I (6) and (7). It is the SFSS' position that before it can argue that the Defederation Referendum violated Bylaws 1(6) and (7), the CFS must first establish that those Bylaws were legally enacted.

2. All three CFS entities have known that the validity of the Bylaws were in issue in this litigation since December 2008, at the very latest. Furthermore, the issue had been raised in earlier litigation. In his affidavit in the *Kwantlen* case, Titus Gregory not only raised the issue, he deposed that the issue had been raised in the lengthy Acadian litigation, as far back as 1996. Ms. Watson does not dispute this but simply states in paragraph 92 of her Affidavit #1 that the Bylaws remained "intact", probably referring to the fact that the case had settled without any ruling on the issue.

Gregory Affidavit #1, Chambers Record, Vol III(A), Tab 34, para. 16

Watson Affidavit #1, Chambers Record, Vol (IV)(B), Tab 43

3. Despite the fact that the legality of their Bylaws has been in issue for many years, none of the CFS entities has been able to produce any evidence establishing that the 1995 amendments complied either with the provisions of their own bylaws governing amendments, or the legislation under which the entities were created. The CFS's National's position appears to be that it is sufficient for Ms. Watson to simply assert that the Bylaws were adopted by a resolution in May 1995. CFS BC has simply attached a document to a legal assistant's affidavit, asserting that these document are lawfully adopted bylaws. The CFS Services had not provided a copy of its bylaws, let alone provided any evidence as to how they were enacted.

4. The SFSS submits that the onus falls on the parties as follows. First, since the CFS is relying on the Bylaws, it must establish, through admissible evidence, that the resolution was

adopted by the members present at the 1995 AGM, in accordance with the CFS bylaws (including those on quorum) and all applicable legislation. If, but only if, the CFS has established that the resolution was legally adopted, the burden would fall on the SFSS to introduce evidence to the contrary. In the present case, the CFS has failed to produce any evidence that the resolution amending the Bylaws was approved at the May 1995 meeting or otherwise. Even if the CFS had introduced *prima facie* evidence that the bylaws were adopted, the SFSS has introduced evidence to the contrary, in the form of the draft minutes of the 1995 AGM attached as Exhibit "H" to Mr. Gregory's Affidavit #1.

See Book of Bylaws and related materials, Tab 6, p. 268, 478-80.

1. NON-COMPLIANCE WITH THE *CANADA CORPORATIONS ACT*

5. The CFS National and CFS-Services were established pursuant to Part II of the *Canada Corporations Act.* Under that act, the CFS National had a positive duty to maintain minutes. Section 112, which provides to Part I and Part II corporations, provides as follows:

> *112. (1) Every company shall cause minutes of all proceedings at meetings of the shareholders and of the directors and of any executive committee to be entered in books kept for that purpose.*
>
> *(2) Any such minutes if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting are evidence of the proceedings.*
>
> *(3) Where minutes, in accordance with this section, have been made of the proceedings of any meeting of the shareholders or of the directors or executive committee, then, until the contrary is proved, the meeting shall be deemed to have been duly called and held and all proceedings had thereat to have been duly had and all appointments of directors, managers or other officers shall be deemed to have been duly made.*

Canada Corporations Act* s. 157(1)(e) [incorporating s. 112 into Part II]; s. 112, Petitioner's Supplementary Brief of Authorities, Tab 7, see also, *Table of Public Statutes* at Tab 8 for legislative history of *Act.

6. It is an offence for a Part II corporation to fail to keep such minutes books:

***Canada Corporations Act* s. 157(1)(e) [incorporating s. 113 into Part II]; s. 113, Petitioner's Supplementary Brief of Authorities, Tab 7.**

7. Section 138 of the *Canada Corporation Act* suggest that purpose of this requirement is to ensure that the minute books are available to provide evidence if proceedings are challenged, as in the present case:

> *138. (1) All books required by this Part to be kept by the company are, in any action, suit or proceeding against the company or against any shareholder, evidence of all facts purporting to be thereby stated.*
>
> ***Canada Corporations Act* s. 157(1)(e), s.138, Petitioner's Supplementary Brief of Authorities, Tab 7.**

8. The SFSS submits that the if CFS wants to assert in legal proceedings that certain business was transacted at an AGM, it must produce its minutes, duly signed by the chair of the meeting, as evidence of that transaction. It should certainly be able to do so given that it has a positive requirement to keep minutes. Here, the CFS has failed to produce any minutes of the May 1995 meeting at which resolution amending Bylaws I (6) and (7) was purportedly enacted. The draft minutes of the meeting, while providing some of what happened at that meeting, do not meet the requirements of the *Act* since they are not signed.

9. The CFS has argued that the draft minutes are inadmissible because they have not been authenticated. The SFSS does not agree. While they may not meet the requirements of the *Canada Corporations Act*, they are the only record of what went on at that meeting. Neither Lucy Watson nor any other CFS affiant has deposed that the minutes do not accurately reflect what went on at the meeting. However, if the CFS is correct that the draft minutes are inadmissible, then there is no direct evidence of what occurred (in the form of duly signed official minutes) and there is no indirect evidence (in the form of the draft minutes). There is no admissible evidence that the resolution amending the Bylaws was even considered.

10. The SFSS submits that the CFS cannot obtain an order enforcing the purported amendments in the face of its own failure to comply with its statutory obligation to maintain the books that would provide *prima facie* evidence of whether the resolution had in fact been passed.

1.1 No Ministerial Approval

11. Regardless of what the minutes say, amendments to bylaws of *Canada Corporations Act* corporations, including Part II corporations such as the CFS National and CFS Services, do not have force until they are approved by the Minister. Sub-section 155(2) provides that the bylaws of a Part II corporation shall include a:

> *"special provision that the repeal or amendment of by-laws not embodied in the letters patent shall not be enforced or acted upon until the approval of the Minister has been obtained."*
>
> **Canada Corporations Act s. 155(2), Petitioner's Supplementary Brief of Authorities Tab 7**

12. This obligatory provision was incorporated into the first bylaws of the CFS, and is found in the version of the Bylaws attached to the affidavit of Lucy Watson No. 1, which the CFS rely on. Article XV.4 of the bylaws states that:

> *The repeal or amendment of this Constitution and Bylaws will not be enforced or acted upon until the approval of the Minister of Consumer and Corporate Affairs has been obtained.*
>
> **Affidavit of Titus Gregory No. 1, Ex. "A", Chambers Record Vol III, tab 34, p. 21; Affidavit of Lucy Watson No. 1, Ex. "A", Chambers Record Vol IV(A)** p. 87

13. There is no evidence that the amendments the CFS rely on were ever submitted to the Minister for approval, much less that the Minister approved them. The CFS relies on a letter dated 1 May 1998 found at Tab "G" of Titus Gregory's Affidavit. In that letter, an official with Industry Canada advised Ms. Watson that "the by-law amendments which were duly sanctioned by the members at *the November 1997 general meeting*" had received "Ministerial approval" effective 20 April 1998. This is clearly not referring to the 1995 Amendments to Bylaw I(6) and (7) the CFS now relies on.

2. NON-COMPLIANCE WITH THE *SOCIETY ACT*

14. The British Columbia *Society Act* provides that bylaws can only be amended by way of a special resolution at a general meeting. In respect to bylaws enacted at meetings, "special resolution" is defined as a resolution passed by 75% of the voters, where at least 14 days notice has been given of the resolution.

Society Act, s. 1, 2, Petitioner's Supplementary Book of Authorities, Tab 4

15. Furthermore, the *Society Act* provides that the amendment only takes effect on the date it is filed with the Registar of Companies.

> *23 (1) A society may change its bylaws by special resolution and the resolution is effective on the later of*
>
> *(a) the date on which it is filed with the registrar, and*
>
> *(b) the date specified in the resolution.*
>
> *(2) After a special resolution is filed with the registrar under subsection (1), the registrar must retain one copy of it and return the other copy to the society, certified as having been accepted by the registrar.*

16. In the present case, the CFS BC has simply attached a copy of what it alleges are Bylaws to an affidavit of a legal assistant with counsel's firm. It has not led any evidence to suggest that there was ever even a vote on the bylaws, let alone a special resolution filed with the registrar.

3. Quorum

17. The SFSS further submits that even if the resolution had been filed with the federal or provincial Ministers and Registrar (which they were not), the resolutions themselves would not have been legally valid unless the meeting that purported to pass them was a properly constituted meeting and the amendments complied with the CFS own Bylaws. If they did not, then there was no "resolution" to file or approve. In the present case, the draft minutes, which provide the only evidence of what happened at the 1995 Annual General Meeting, show that the amendments did not comply with the CFS Bylaws.

See, Main Submissions, paras 468-476

18. Like the British Columbia *Society Act*, the CFS National and BC Bylaws require that bylaws may only be amended by a two-thirds vote of voting members present at a general meeting and that the voting members get four weeks notice of the proposed amendment. As noted above, the CFS-National bylaws also state that amendments "will not be enforced or acted upon until the approval of Minister of Consumer and Corporate Affairs has been obtained".

Book of Bylaws and Related Materials, Tab I Bylaws, XV,

19. Finally, CFS Bylaw 11(7) provides that quorum at the transaction of business at any meeting "shall consist of not less than one-half of the members of the Federation having voting rights. These provisions appear to have been contained in the original bylaws of the CFS. and have continued until the present day. As outlined in paragraph 464-476, the 1995 AGM had lost quorum by the time Bylaw I(6) and (7) were purported enacted,

Bylaws, II (6), Book of Bylaws and Related Documents, Tab 6, pp. 478, 492-495, 564-63, 585

Affidavit of Titus Gregory, para 6, Exhibit "A: Bylaw II (6)(a), XXIII

20. If the Court concludes that the CFS has failed to make a *prima facie* case that the amendments were lawfully enacted, the Court need not consider the interpretation of those provisions.

4. NO SFSS ACQUIESENCE TO THE BYLAWS.

21. The CFS takes the position that it is not open to the SFSS to challenge the validity of the Bylaws. To start with, it argues that the SFSS has "acquiesced" to the amendments by not challenging them. This argument, which is based on contractual notions of acquiescence, is without merit.

22. First, the contractual doctrine of acquiescence does not apply to society bylaws. This issue was raised in *Nagra v. Khalsa Diwan Society of Victoria* (1997), 68 A.C.W.S. (3d) 796 (S.C.), (1997) CarswellBC 137 (S.C.). In that case, the petitioner commenced proceeding to force the respondents to comply with the society's bylaws concerning elections. The respondents acknowledged that they had not complied with the bylaws, but argued that the society had not conducted elections in compliance with the bylaws since 1985. Since no one had objected, they argued that the petitioners had in effect acquiesced to the practice. The Court rejected that argument. Firstly, it noted that the acquiescence of the voters in 1985 did not bind future members. Secondly, it noted that changes to the bylaws had to comply with the *Society Act:*

> *As I understand the respondents' argument, they say the failure to hold an election for membership in the Executive Committee, despite the requirement of the Society's bylaws, should be excused because the petitioners have acquiesced to the process since 1985. They want the 1996 selection process "validated."*

> *At law, the bylaws of a society constitute a contract between the Society and its members. In contract law a party may be deemed to acquiesce in changes to the contract if the party sits idly by and accepts the changes:* Re: Canadian Temple Cathedral of the Universal Christian Apostolic Church *(1971), 21 D.L.R. (3d) 193 at 199. But I do not believe the same principle always applies to members of a society.*
>
> *First of all, one might say that in 1985 some or all of the members of the Society agreed specifically or by way of acquiescence to ignore the provisions of the bylaws requiring a secret ballot. Yet that agreement and that acquiescence did not necessarily bind all future members who were not members in 1985 and thus were not parties to the 1985 agreement. The concept of acquiescence in contract applies to the original parties to an agreement or their assignees. It does not fit well into a Society's relationship with an ever-changing membership base.*
>
> *Second, the Society is and was bound by the* Society Act. *By section 23 of that Act any changes to the Society's bylaws can only be made by a 75% vote of the Society's members. It does not allow the members to amend the bylaws by contract.*
>
> **Petitioner's Supplementary Brief, Tab 4, at paras 17 and 18.**
>
> **See, also *Demiris v. Hellenic Community of Vancouver (2000), Carswell BC 974 (S.C.)* at para 43, Petitioner's Supplementary Brief, Tab 1, at para 43, following *Nagra*, supra.**

23. In the present case, the evidence has not established that the SFSS voted in favor of the improperly enacted Bylaws in 1995, or subsequently agreed to abide by them, knowing they were invalidly enacted. There is no evidence that they were even aware of the issue prior to Mr. Gregory raising the issue in the *Kwantlen* litigation. The CFS, who were aware of the issue, never raised it, presumably in the hopes that SFSS would proceed in the mistaken belief that the CFS Bylaws were valid.

24. Furthermore, the 1995 amendments had to comply with the *Companies Act* and, in the case of the CFS BC, the *Society Act,* which they did not. As noted in the *Nagra* case, *supra,* a society cannot contract out of its statutory requirements, including the requirement that membership in the organization be governed by its validly enacted Bylaws.

25. The CFS says that the SFSS is attempting to set aside the bylaws, and is bound by a six year limitation period. The SFSS is not attempting to set aside validly adopted bylaws. Rather, it argues that the bylaws were never adopted in the first place. The bylaws were either in force or they were not in force. The SFSS does not have to commence an action to set aside bylaws

that were never enacted. If the CFS wants to rely on them to argue that the Defederation Referendum was invalid, they must establish that they are valid. Furthermore, the CFS has not provided legal support for the proposition that challenge to a society's bylaws (or any bylaws) that did not comply with a society's governing legislation are governed by a six-year limitation period.

26. Finally, this is the first time that the SFSS entered into litigation with the CFS concerning the application and interpretation of the CFS Bylaws. Accordingly, while the CFS's involvement in previous litigation put it on notice that the legality of the Bylaws were in issue, the SFSS would have had no reason to turn its mind to the issue.

27. To summarize this issue, the SFSS submits that the respondents' failure to establish that the CFS Bylaws I (6) and (7) were legally enacted is fatal to their argument based on those Bylaws. The issue, therefore, is not whether the Defederation Referendum complied with those Bylaws, but whether it met the common law test as set out in cases such as *Leroux* and *Anderson*. As noted in those cases, the burden is on the CFS to prove that there were "substantial irregularities, calculated to affect the result" of the Defederation Referendum.

See Main Submissions, paras 173-177.

28. Accordingly, while the SFSS has made and will reply to arguments concerning the proper interpretation of Bylaws I (6) and (7), the SFSS submits the Court need not consider the interpretation of those Bylaws unless it finds that they were legally enacted.

5. PAST PRACTICE AND BYLAWS

29. The CFS' arguments about the force of its bylaws are internally inconsistent. The principal submission of the CFS appears to be that the bylaws govern, and any deviation from the bylaws in a defederation referendum invalidates the referendum. However, many of the procedures that the CFS says should have been followed were either not contained in the CFS bylaws or would violate the bylaws. For example:

(a) While the CFS claims that the ROC must set the dates for the Defederation Referendum, the CFS Bylaws do not contain any such provision, but include a mandatory

requirement that the dates of the referendum be set out in the notice. Since the ROC is not created until after notice is given, the requirement that the ROC set the dates is inconsistent it the CFS's Bylaws.

(b) While the CFS argues that a Defederation Referendum cannot be held on the same day as elections, the CFS Bylaws, which do stipulate dates on which referenda may not be held, do not stipulate that a referendum may not be held at the same time as local general elections.

(c) While the CFS asserts that deliberations of the ROC must be kept secret, there is no such provision in the CFS Bylaws.

30. In the face of these arguments, the CFS falls back to the argument that the parties are bound by custom and practice, even if the custom and practice deviates from the CFS' own bylaws. The SFSS submits that this reliance on "custom", as opposed to the bylaws themselves, is an implicit acknowledgment that the deviations from the bylaws are not necessarily fatal to a defederation referendum.

31. The evidence CFS relies on in support of CFS customs and practices are Lucy Watson's assertions in her affidavits. On one hand, Watson claims that it is the CFS's clear and invariable practice that referendum be held in accordance with CFS Bylaws I (6) and (7) .

Watson Affidavit #1, Chambers Record Vol. IV(A), Tab 43

32. However, she also makes the following claims:

(a) It is CFS practice and custom that the ROC select the dates of the referendum if the dates are not included in the petition (notwithstanding the mandatory requirement that the date be specified in the notice that precedes the creation of the ROC).

Watson Affidavit #1, *ibid*, para 2

(b) It is CFS practice and custom that referenda are not held on the same day as general elections (notwithstanding that there is no such requirement in the bylaws).

Watson Affidavit #2, Chambers Record Vol V(A), Tab 44, para 5

(c) It is CFS custom and practice that ROC deliberations be kept confidential (notwithstanding that there is no such requirement in the bylaws).

Watson Affidavit #1, *ibid*, para 34

(d) It is CFS custom that there be no pre-campaigning in defederation campaigns and to draw a distinction between general promotional material (which is allowed) and material that specifically mentions referenda dates (which is prohibited) in determining what amounts to "pre-campaigning" (notwithstanding that there is no such prohibition in the bylaws).

Watson Affidavit #2, *ibid*, para 36(c)

(e) It is CFS custom that when graduate students are planning to leave a local organization they cannot vote in a referendum (notwithstanding that there is no such prohibition in the bylaws).

Watson Affidavit #2, *ibid*, para 43

(f) It is CFS practice to only have one question on the ballot (notwithstanding that there is no such requirement in the bylaws).

Watson Affidavit #2, *ibid*, para 14

(g) It is CFS practice to run elections in accordance with the numerous rules that Lucy Watson sites in paragraph 45 of her Affidavit #2 (notwithstanding that there is no such requirement in the bylaws).

Watson Affidavit #2, *ibid*, para 45

5.1 THE LAW

33. While custom and practice may be incorporated into a society's rules, they are only incorporated when the custom and practice is so well established that it becomes an implied term of the contract. In *Lakeside Colony* the Supreme Court of Canada held as follows:

> *[I]t has been held that a sufficiently well-established tradition or custom may be considered an implied term in the contract making up the Articles of a voluntary association. For instance, in John v. Rees, [1970] Ch. 345, Megarry J. suggests at p. 388 that long usage can provide sufficient authority for a set of rules even if they have not been formally adopted:*
>
> > *In the case of a club, if nobody can produce any evidence of a formal resolution to adopt a particular set of rules, but on inquiry the officers would produce that set as being the rules upon which it is habitual for the club to act, then I do not think the member would be free to reject those rules merely because no resolution could be proved.*

> *In that case, the rules in question were written rather than a matter of pure tradition, but the real question is the authority of rules which have not been formally adopted, whether written or unwritten.*
>
> ***65*** *A long-standing tradition provides a* ***kind of notice*** *to the member of what rules the association [page192] will follow. We also must remember that voluntary associations are meant largely to govern themselves, and to do so flexibly. Therefore, tradition or custom which is sufficiently well established may be considered to have the status of rules of the association, on the basis that they are unexpressed terms of the Articles of Association. In many cases, expert evidence will be of assistance to the court in understanding the relevant tradition and custom.*
>
> ***Lakeside Colony of Hutterian Brethren v. Hofer*** **[1992] 3 S.C.R. 165 [1992] S.C.J. No. 87, Petitioners Book of Authorities Tab 43, paras 64-65**

34. The following points emerge from the *Lakeside* case:

(a) A party cannot simply assert that a custom or practice exists. The party asserting the custom must provide historical (and perhaps expert) evidence of actual practices, from which the Court may make its determination about the existence of a custom or practice. In *Lakeside,* for example, there was abundant evidence about the past practices of the Hutterite Church, from which the Court was able to make a finding of fact and law that a traditional custom existed. In the present case the Court has nothing but the assertions of Lucy Watson set out in her Affidavit prepared for purposes of this litigation.

(b) Tradition and custom may serve as rules where the body has never formally established rules or where the custom compliments existing rules. The Supreme Court of Canada did not say that custom or practice can displace a society's bylaws or constitution, nor did the Supreme Court of Canada state that custom or practice could have the effect of amending bylaws. As noted in the *Nagra* case, regardless of a Society's practice, bylaw amendments will only be enforceable if they comply with the governing legislation.

(c) Long-standing tradition stands as *notice* to the members of the society. In order for a party to rely on tradition or custom they must establish that the tradition or custom was generally known within the society. In the present case, the CFS is arguing that the SFSS and its members are be bound by customs and traditions that they were not aware of and were not informed of.

5.2 LACK OF EVIDENCE

35. As noted above, the only evidence of CFS customs and practices are Lucy Watson's assertions in her affidavits. The SFSS submits that her assertions do not constitute evidence of custom and practice. For example, in paragraph 9 of her first affidavit she states:

> *9. As of December, 1982, the Canadian Federation of Students was a new organisation and its 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 so as to include a mandatory referenda process as of May, 1995, the* ***clear and invariable practice*** *became and has been since requirement 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 on the Canadian Federation of Students it must be conducted in accordance with the CFS Bylaws.*
>
> *(emphasis added)*

Affidavit of Lucy Watson #1, Chambers Record Volume IV, Tab 43, paras. 9

36. However, the CFS has not led any evidence upon which the Court could conclude that a traditional practice of complying with Bylaws I(6) or (7) has developed. Ms. Watson has not provided even one example of a defederation referendum being conducted wholly within the CFS bylaws, much less evidence that would allow the court to draw its own conclusion that any such tradition developed. (The University of Victoria referendum will be addressed below.)

37. Similarly, Ms. Watson asserts that:

> *the practice of the Canadian Federation of Students is to not hold a membership referendum on the same day as a general election for the member local associations is being held;*

Affidavit of Lucy Watson No. 2, Chambers Record Volume IV, Tab 44, para. 5(a)

38. Ms. Watson does not provide evidence of one referendum campaign where the issue ever arose, let alone where a decision was made not to hold a referendum on the same date as an election, nor does she refer to any case where that "practice" prevailed in circumstances where the bylaws of the local association required referenda to be held on the same day as the general election.

39. As another example, Watson asserts that:

> *34. The custom and practice of the CFS is that all discussions and deliberations of oversight committees are to be confidential.*
>
> **Affidavit of Lucy Watson No. 1, Chambers Record Volume IV, Tab 43, paras. 34**

40. Ms. Watson did not provide evidence of even one prior referendum where the ROC enforced such a rule or where the issue even arose.

41. Ms. Watson has deposed that she was on the ROC for a Defederation campaign at the University of Victoria. There is no evidence, from Ms. Watson or anyone else, that the Victoria ROC followed any of the customs and practices alleged in Ms. Watson's Affidavit.

Affidavit of Lucy Watson No. 1, Chambers Record, Tab 43

42. Furthermore, the SFSS submits that Ms. Watson's assertions concerning the existence of these customs are not supported by the surrounding evidence.

43. Firstly, the SFFS submits that the CFS's conduct is not consistent with the existence of the alleged customs and practices. For example, when the SFSS sent notice of the Defederation Referendum to the CFS in August 2007 setting out the dates of the referendum, the CFS did not object to the form of the Notice or say anything about the fact that the Petition did not include the dates of the Defederation Referendum. Most significantly, it did not indicate that since the Petition did not include the dates, the custom was for the ROC to choose them. If there actually was such a custom or practice, as the CFS now claims, one would have expected the CFS to have informed the SFSS of it when it received the notice documents. Its failure to do so is strong evidence that the CFS itself did not recognize any such practice.

44. Similarly, when the SFSS sent the CFS its letter of November 2007, enclosing the Draft Procedures, (both of which were forwarded to Lucy Watson), it explicitly stated that the elections would be held at the same time as the Defederation Referendum. If there actually was a practice prohibiting concurrent votes, one would have expected the CFS to have responded that its custom and practice prohibited holding the two votes at the same time. It did not do so.

Draft Procedures and related correspondence, Book of Key Documents, Tabs 9 and 10

45. Likewise, if there was a long standing tradition and custom of the CFS prohibiting "pre-campaigning" (whatever that may be), one would have thought the CFS would have notified the SFSS that it was in breach of that rule, given that the CFS now claims that the SFSS was "pre-campaigning" as far back as September 2007. When the CFS raised their concerns about the "pre-campaigning" at the first ROC meeting on 4 February 2008, they did not inform the SFSS appointees of any such practice or custom. In fact, when the SFSS members asked if the CFS was proposing a prohibition against pre-campaigning, the CFS responded that it was not proposing anything. Once again, one would have thought that if the CFS had a custom and practice prohibiting "pre-campaigning", it would have said so.

Watson Affidavit #2, Chambers Record, Vol. V(A), Tab B, p. 57-58

46. More generally, if the CFS had all of the long-standing traditions and customs concerning referendum that it now relies on as binding rules, including the very detailed procedures set out in paragraph 45 of Lucy Watson's Affidavit #2, one would have thought they would have sent a list of them to the SFSS in response to Mr. Harder's letter enclosing the Draft Procedures in November 2007. One would have also thought that the CFS appointees to the ROC would have circulated a copy to the SFSS appointees. The fact that they did not raises serious questions about the credibility, not to mention the fairness, of their position.

47. In addition to being inconsistent with the CFS' conduct during the relevant period, Ms. Watson's evidence concerning CFS custom and practice is internally inconsistent. For example, in paragraph 9 of her Affidavit #1, Ms. Watson states there is an "invariable practice" that local associations comply with Bylaw I(6). If that is the case, then it must have been the invariable practice for local societies to provide the date for the referendum in its notice, in accordance with the mandatory notice requirements set out in Bylaw I(6)(b)(iii).

48. However, Ms. Watson also states:

> *22. Because the Petition did not specify a date for the Referendum, in accordance with the CFS Bylaws and the longstanding practice and custom of the Canadian Federation of Students, setting the date for the Referendum is a matter for the Oversight Committee. No date was ever agreed to by the Oversight Committee.*

Affidavit of Lucy Watson No. 1, Chambers Record Volume IV, Tab 43, para. 22

49. As noted above, there is no requirement in the Bylaws that the Petition set out the dates of the referendum, furthermore, the practice of the ROC setting the dates is inconsistent with the notice requirements set out in Bylaws I(6)(iii). If Ms. Watson's evidence in paragraph 22 of her affidavit is true, then the CFS has adopted a longstanding practice of ignoring the requirement in Bylaw I(6)(b)(iii) which makes it mandatory for the notice document to include the dates of the defederation referendum and mandatory that six months notice be given. Since that notice must be delivered prior to the ROC even being created, the ROC can play no role in selecting the dates. It is of particular note that under the CFS bylaws there are only three requirements which, if not observed, result in the referendum being invalidated (Bylaw I(6)(b)(v)). One of them is the requirement that the Notice must specify the exact date of the referendum in Bylaw I(6)(b)(iii). Therefore, if what Ms. Watson says in paragraph 22 of her affidavit is true, that the CFS must have developed a longstanding practice of ignoring an express mandatory requirement, the violation of which, under its own bylaws, would have invalidated the referendum.

50. This has two implications.

(a) First, what Ms. Watson swore in paragraph 9 and paragraph 22 of her Affidavits cannot both be true. If it is the "invariable practice" to follow the bylaws, then there cannot also be a "longstanding practice" of allowing the ROC to specify the date of the Defederation Referendum.

(b) Second, the CFS' most basic contention in this litigation is that failure to comply with its Bylaws must result in the referendum being invalidated yet, if Ms. Watson's evidence is believed, it has a longstanding custom, amounting to a rule, that mandatory provisions of the Bylaws may be ignored with no effect.

II. INTERPRETATION OF THE CFS BYLAWS

51. Once again, the SFSS's first position is that the Court need not consider the interpretation of Bylaws I(6) and (7), given that the CFS has not established a *prima facie* case that they were legally enacted. In the alternative, the SFSS has the following Reply with respect to the CFS's submissions on matters of interpretation and the application of the Bylaws I(6) and (7).

6. Mandatory v. Directory provisions

52. In paragraphs 142, 143 and 304 of its Main Submissions, the SFSS cited the *Anderson v. Stewart* case for the proposition that election provisions that require an officer to fulfill a public duty are considered directory as opposed to mandatory, based on the policy consideration that the failure of public officers to fulfill their duties should not be allowed to disenfranchise votes. The SFSS argued that Bylaw I(6)(f) which outlines the ROC's duties is directory and that the ROC's failure to fulfill its duties does not invalidate the election. The SFSS has argued that this is consistent with the fact that CFS Bylaw I(6)(v) – the provision that states that failure to comply with certain Bylaws invalidates the vote – expressly does not include Bylaw I(6)(f) as one of the mandatory bylaws. In response, the CFS says that *Anderson* only applies to public elections, and not to votes in voluntary associations.

53. The *Anderson* decision has been followed in many British Columbia cases concerning societies, for example, *German Triathlon Union v. International Triathlon Union* cited in paragraph 173 of the SFSS Main Submissions.

> ***German Triathlon Union v. International Triathlon Union*, [2002] B.C.J. No. 124 (S.C.) Petitioner's Book Of Authorities, Tab 11, p. 5-6 at paras. 10, 12,**
>
> **See also, *Gill v. Khalsa Diwan Society*, (1999) CarswellBC 1106 (SC), Petitioner's Supplementary Book of Authority, Tab 2**

54. Similarly, the SFSS has argued that rules governing elections and referenda should be interpreted in a fashion that facilitates the vote, rather than impeding it, based on the Supreme Court of Canada decision in *Haig*. Once again, the CFS response is that the *Haig* case only applies in public election cases.

> **See Main Submission, para 144**

55. The principles set out in those cases are based on fundamental principles of democracy and aimed at protecting the franchise from incompetent or dishonest officers (in the case of *Anderson*) and rules that unduly restrict or limit the right to vote (in the case of *Haig)*. The underlying principle that the right to exercise the franchise should be protected must apply to any democratically structured body and is reflected throughout the law governing such bodies. In this case, the CFS holds itself out as a democratic organization - one of its stated purposes is to organize students on a "democratic basis" – and it is a fundamental principle of the organization

that membership decision are to be made by the individual members by way of vote. Accordingly, the Bylaws must be interpreted in a manner that protects the franchise in accordance with the principles set out in *Haig* and *Anderson* cases, and it is hardly open to the CFS to argue that those basic democratic principles have no application.

7. NO CONFLICT BETWEEN BYLAWS

56. The CFS has argued that when a conflict arose between the CFS bylaws and the SFSS bylaws on the question of whether an election could be held on the same day as the Defederation Referendum, the SFSS preferred the SFSS bylaws to the CFS bylaws. In fact, there was no conflict between the two bylaws. The SFSS bylaws required the referendum to be held on the same day as the election, while the CFS bylaws are silent.

8. The 1982 And 1987 Agreements

8.1 THE 1982 AGREEMENT

57. During its submissions, the CFS National made submissions concerning the 1982 Agreement. The SFSS submits that the 1982 Agreement is an aid to interpreting CFS Bylaw I (6) and (7), should the court conclude that those Bylaws governed the Defederation Referendum.

58. Under the CFS Bylaws, Individual Members of a university or college join the CFS by voting in favour of doing so in a referendum. After that happens, the Local Association signs an agreement with the CFS providing for the payment of membership fees and other matters which becomes the binding contract between the parties. That agreement is then ratified.

CFS Bylaws (2)(a) (i) and (ii), Book of Bylaws and Related Materials, Tab 1.

59. The SFSS joined the CFS in 1982. The 1982 agreement between the CFS and SFSS is attached as Exhibit "C" of Derrick Harder's Affidavit #1. It essentially provides that the SFSS is to collect and remit membership fees, which would be set from time to time, collected on behalf of the CFS to the CFS. It further states:

> *The Member institution shall conduct all referenda required by the By-laws of the Federation in the same manner as any other referenda.*

This Agreement shall remain in force for so long as the Member Institution shall remain a member of the Federation.

Key Documents, Tab 1

60. This is the only copy of any agreement from 1982 before the Court. During the fall and winter of 2008, the SFSS attempted to get access to the CFS archives to determine whether there were any copies of this document or other relevant documents or, in the alternative, to get a copy of the relevant documents from the CFS. They were not able to get access and the CFS did not provide the SFSS with any documents pursuant to their request.

Harder Affidavit #1, Chambers Record, Vol II, Tab 33, para 3

61. In her affidavit, Lucy Watson deposes that the CFS has been unable to find a copy of the 1982 Agreement, but does not deny that there was an agreement. The SFSS submits that there has to have been some written agreement in 1982. To start with, the later 1987 Agreement contemplates an earlier agreement since it confirms that the SFSS agreed to pay fees in 1982. Furthermore, it is the written contract between the parties that establishes the local associations obligation to pay fees. The 1982 agreement, although signed by one party only, is, the best evidence before the Court concerning the agreement. At the very least, it is evidence of the SFSS' intentions upon joining the CFS.

Watson Affidavit #1, ibid, para 8

8.2 The 1987 Agreement

62. There was a second written agreement in 1987 which clarifies the procedures for payment of fees and further states the following:

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

This Agreement is in force so long as the Member Local Association is a member of the Federation.

Key Documents, Tab 2

63. The 1987 Agreement itself does not state what the remedy is for non-payment of fees. However, under the CFS Bylaws, the stated remedy is expulsion from the CFS. Bylaw I (5) provides that the local member associations may expel or suspend members by way of resolution

at a national general meeting if they violate their obligations to the CFS under Bylaw I(c) which includes the obligation to collect fees.

64. The CFS claims that the 1987 Agreement superseded the 1982 Agreement. As in all such cases, the interaction between the two agreements turns on the intention of the parties, as interpreted from the words of the agreement and the surrounding circumstances. It is SFSS's position that the parties did not intend that the 1987 agreement would supersede or replace the 1982 agreement, but rather to clarify it for the following reasons:

(a) The 1987 Agreement does not claim to supersede the earlier agreement with respect to referendum.

(b) The stated purpose of the 1987 Agreement was to clarify the early agreement and set out the method of collection and payment.

(c) The two Agreements can be read in harmony. The SFSS agreed to abide by the CFS Bylaws, subject to its right to have membership referenda conducted in accordance with its own Bylaws.

(d) As noted in para 9 of Lucy Watson's Affidavit #1, when the SFSS joined the CFS, and later when it signed the second agreement in1987, referenda on membership were governed by the rules of the local association. As such, it would not have been in the parties' contemplations that by signing the 1987 Agreement, the SFSS would lose the authority to conduct referenda on membership according to its own bylaws.

65. Accordingly, the SFSS submits that even if the CFS had proved Bylaws I (6) and (7), the 1982 Agreement, while not decisive, would be of assistance in interpreting Bylaws I (6) as follows:

(a) First, this historical background suggests that, at a minimum, it was an implied term of the CFS-SFSS Agreement that the ROC would conduct referendum in a manner that was consistent with the SFSS Bylaws, as well as the CFS Bylaws (which would be possible).

(b) Second, it suggests that the SFSS did not agree to divest itself of all authority for ensuring that its members had an opportunity to vote on membership or to transfer that responsibility to the ROC. Rather, it reserved a right to ensure that its members had the right to exercise their franchise.

Canadian Federation of Students v. Kwantlen University College Student Association **(14 March 2008) Van. Reg. S081553 (S.C.)**

Affidavit of Titus Gregory # 1, Chambers Record Tab Vol.III, Tab 34, Exhibit "B", p.101 ll. 29-42

70. The Court further noted that one of the problems with the ROC was that it had become "distracted" by matters that were not within its responsibility:

> *This is a university or college setting and the problems with that, it strikes me, are quite obvious. Student bodies turn over quite quickly, and there appears to be no good reason why this matter wasn't brought on in time, except that the oversight committee seems to have been distracted by matters beyond its responsibilities, which were to ensure that a fair referendum be held,* ***not to argue to the point where one couldn't be held.***

Ibid **p. 102 ll. 13-21**

71. When it became clear that the ROC was not able to provide the necessary guidance for the defederation referendum, the KSA hired an outside company called Schiffner Consultants Inc. ("Schiffner") to act as Chief Returning Officer and run the referendum. The CFS commenced a Petition pursuant to sections 200 and 272 of the *Company Act* for an oppression order preventing the referendum from continuing.

72. Mr. Justice McEwan found that the KSA had taken matters into its own hands by hiring Schiffner, which the Court could not ignore since the matter had been brought before it, and concluded that the ROC should be given another chance. The vote was postponed to April 8-10 and the matter was remitted back to the ROC with directions that it come back to Court the following week, 20 March 2008, with either a protocol for running the referendum or a summary of the parties' differences.

Ibid, p. 102 ll. 27-47

73. The parties appeared back before Mr. Justice McEwan on 20 March 2008. While they had made some progress, they had not developed a protocol. Accordingly, the Court vested authority to run the vote in the Chief Returning Office, Mr. Schiffner, and not the ROC:

> *With respect to the responsibility for management and running of the election, while I think it has been clear as of the appearance last week that my hope in setting out the guidelines I attempted to last week was that the ROC could come up with some sort of understandings that would make it unnecessary for this court*

> *to deal with this matter further. That has not been the case, although progress was made.*
>
> ...
>
> *Considerate of the fact that they have been unable to agree on these matters, having had a week or so to do so, leaves me with no really pragmatic way to approach this other than to generally vest in the chief returning officer the responsibility for running the nuts and bolts of the election.*
>
> **Canadian Federation of Students v. Kwantlen University College Student Association (20 March 2008) Van. Reg. S081553 (S.C.),**
>
> **Affidavit of Titus Gregory No. 1, Exhibit "C"", p.23 ll.18-43**

74. Mr. Justice McEwan's ruling on 30 March 2008 is relevant for the following reasons:

(a) The ROC in that case was unable to resolve their problems and develop a workable protocol for the referendum, even after the Court gave it a deadline in which to do so.

(b) The problems the ROC faced in that case were much like the problems faced in the present case: it had become embroiled in disputes that were beyond its responsibilities that prevented it from fulfilling its duties under Bylaw I (6)(f).

(c) In the end, the Court concluded that it was necessary to run the referendum without the ROC (and therefore outside the CFS bylaws).

75. One important difference between the two cases is that in the *Kwantlen* case, the CFS acted in a timely manner and commenced proceedings prior to the referendum. In the present case, they threatened to do so but never did. There is a significant difference between moving the vote a couple of weeks, which is what happened in the *Kwantlen* case, and overturning a referendum that occurred over a year earlier.

76. Finally, there are a number of arguments that the SFSS has made in the current litigation that were not argued in the *Kwantlen* case. In particular, counsel for Kwantlen did not make arguments concerning the legality of the CFS Bylaws I (6) and (7) although the issue had been raised in its affidavit materials.

IV. THE ROC WAS DYSFUNCTIONAL

77. In paragraph 22 of her Affidavit #2, Ms. Watson agreed that the ROC in the SFSS Defederation Referendum had become dysfunctional. However, she claimed that, based on her experience, "it is highly likely that the Oversight Committee would have been able to conduct a referendum had the SFSS not elected to use the IEC". Ms. Watson was one of the CFS appointees to the ROC at Kwantlen and one of the affiants in the *Kwantlen* litigation. Ms. Watson has failed to explain how her experience in the *Kwantlen* litigation reconciles with her that assertion the ROC would have been able to conduct the referendum in this case.

Chambers Record, Vol. V (A), Tab 44, p. 7, para 22

78. Indeed, there is evidence and case law before the Court concerning six defederation or federation referenda: Acadia University, Kwantlen College, the University of Saskatchewan (*Mowat)*, the University of Victoria, the University of Ottawa, and SFU. Five of the six (all but University of Victoria) ended up in litigation. The Acadia litigation lasted 11 years and the *Mowat* litigation went to the Saskatchewan Court of Appeal. The numerous problems in the Saskatchewan ROC – where the local student association and the CFS were both supporting federation – are set out in the *Mowat* case. That case notes, for example, that the ROC protocol governing the vote was not settled until over one month after the referendum.

Affidavit of Titus Gregory #1, Chambers Record, Vol. III (A), Tab 34, para16 (Acadia)

Affidavit of Lucy Watson #1, Chambers Record, Vol. IV (B), Tab 43, para 92 (in response to Gregory evidence re Acadia)

Affidavit of Titus Gregory #1, Ibid, paras 5-16 (Kwantlen)

***Mowat v. University of Saskatchewan Student's Union, [2006] S.J. No. 681 (Q.B.) at para 15 and 22at Tab 31* Respondent's Book of Authorities, Tab 31, aff'd [2007] S.J. No. 463 (C.A.)**

***Canadian Federation of Students (Ontario) v. Student Federation of the University of Ottawa,* [1995] O.J. No. 4774 (Ont. Crt. Justice), Respondents Book of Authorities, Tab 11 (Ottawa)**

79. The only evidence of the ROC model working is Lucy Watson's evidence that there was a ROC in a defederation referendum at the University of Victoria. However, there is no evidence from anyone at the University of Victoria concerning the functioning of the ROC.

80. In paragraph 22 of Ms. Watson's Affidavit #2, she further asserts that her notes of the tape recordings she (secretly) made of the ROC meetings at SFU reveal that the two sides were able to work cooperatively. Once again, it is the SFSS's position that those notes are inadmissible. Leaving admissibility aside, what the notes actually show is that while both sides remained civil throughout the process (to their credit), the ROC became bogged down by arguments and was not in a position to run the Defederation Referendum.

81. In paragraph 42 of their written submissions, the CFS National outlines various preliminary steps the ROC had completed in support of the proposition that the ROC could have run the Defederation Referendum, had the IEC not stepped in. Some of those decisions were made well after the campaign period began and, in some cases, the day before the vote. Furthermore, the CFS appointees to the ROC had openly stated that they did not want the Defederation Referendum on the scheduled dates and, by late February 2008, their counsel had indicated that the CFS would not accept the result. In the circumstances, it cannot reasonably be suggested that the ROC would have run the Defederation Referendum, but for the involvement of the IEC.

82. In addition, while the ROC may have established a protocol for approving campaign material in February 2008, it did not follow it, as outlined in paragraphs 189 to 192 of the SFSS's Main Submissions. In paragraph 213-14 of its submissions, the CFS states that the ROC had agreed that decisions concerning campaign material could be deferred. The 11 February 2008 minutes of the ROC meeting at which the procedure was established do not support that assertion. Rather, they expressly state that the ROC would give its decision on whether the material s would be approved by 5:00 the next business day after the materials were submitted.

Minutes, Key Documents, Tab 48

83. Finally, regardless of the fact that the ROC may have agreed on some issues, the fact remains that it was not prepared to run a Defederation Referendum:

(a) It did not agree on the location of polling stations, make any arrangements to set up polling stations or obtain the tables, screens and other items necessary to do so.

(b) It did not make any arrangements for off-campus students to vote.

(c) It did not make any arrangements to obtain a voters list or set up a system to determine voter qualification.

(d) It did not make any arrangements to hire polling clerk or to print ballots.

(e) It did not make any arrangements to provide ballot boxes or arrange for the storage of ballot boxes.

(f) It did not make any arrangements for counting the ballots.

84. All of these are logistical steps that had to be arranged ahead of time. Furthermore, while the ROC could have run the Defederation Referendum in conjunction with the IEC, which had taken these logistical steps, the CFS appointees refused to do so. The bottom line was that the CFS had decided, by early February 2008 (if not earlier), that it did not want the Defederation Referendum to proceed as scheduled. CFS counsel took the position that the CFS would not respect the outcome of the vote by the end of February 2008. It not reasonable to suggest, in these circumstances, that the ROC could have run the Defederation Referendum on 18-20 March 2008 or the following week, as the CFS appointees suggested, without the assistance of the IEC. It is the SFSS position that the ROC appointees to the ROC had no intention of running the Defederation Referendum either on the dates scheduled or on any other date.

Letourneau Affidavit, Chambers Record III (B), Tab 37, para 26 (re proposed alternative dates)

85. In paragraph 215 (d) of its submissions, the CFS submits that it had suggested mediation but the SFSS refused. However, it did not make that suggestion until 11 March 2008, seven days before the vote was to commence and eight days after the campaign had commenced. At that point, it would not have been possible to arrange and attend mediation prior to the vote on 18 March 2008. The CFS did not suggest mediation as an alternative to arbitration when the SFSS first raised the issue in the Draft Procedures in November 2007 – or at any time thereafter prior to 11 March 2008.

Draft Procedures and related correspondence, Key Documents, Tab 9

V. REPLY TO SPECIFIC ARGUMENTS

9. SFSS Bylaws Concerning Referenda

86. Counsel for the CFS referred the Court to a portion of the SFSS bylaws concerning referenda and elections, suggesting that the CFS Bylaws do not require that the Defederation Referendum be held at the same time as the elections. That is not correct. Under the SFSS Bylaws, a referendum may be commenced by resolution of the board of the SFSS, or by a petition signed by more than 5% of the students. If a petition is presented, then the referendum *must* be placed on the ballot at the next regularly scheduled election. The referendum in this case was commenced by petition. Accordingly, it had to be held at the same time as the next regularly scheduled election.

SFSS Bylaws, sections 17(2) through (4), Book of Bylaws, Tab 3, p. 18

87. The CFS has further argued that the referendum and the election could not be held on the same date because some of the candidates for election were identified with the "No" side or the "Yes" side. There is no evidence to support that assertion. Counsel for CFS submits, without evidence, that holding the votes at the same time would be too confusing for the voters. There is no evidence that any of the voters were in fact confused by the fact that the election and the referendum were held at the same time. The fact that persons running for election may hold public opinions on one side or another of a referendum question does not mean that holding the election and referendum together it is confusing or unfair. Elections and referenda are routinely held at the same time throughout Canada and the United States.

88. The CFS claims that the cost of holding the referendum with the election would not be a question, because the CFS would pay for the referendum. There is no evidence to support this claim.

10. PRE-CAMPAIGNING

89. The CFS referred the Court to CFS Bylaw I (4)(e) for the proposition that under the CFS bylaws the CFS's ordinary promotional materials are not to be considered campaign materials.

This submission was made in response to the SFSS position that CFS's complaint that the SFSS had engaged in early campaigning is hypocritical given its "I am CFS" campaign. However, Bylaw I (4) – refers to *federation* referenda, not *defederation* referenda. As a simple matter of interpretation, since the CFS included that provision in the bylaw governing *federation* referenda, but did not include a similar saving provision for *defederation* referenda, it must not have intended for that saving provision to apply in the context of defederation referenda. Different dynamics are at play in federation referenda (in which the local association and CFS will presumably be on the same side) and defederation referenda (in which they might not be), and the CFS appears to have taken those into account in drafting its rules.

90. In addition to arguing that there is no prohibition against pre-campaigning in the CFS Bylaws or common law, the SFSS has argued that the problem with imposing such a requirement would be the difficulty in defining what constitutes "pre-campaigning". In his submissions, counsel for the CFS National concedes that the CFS material described, amongst other things, the benefits of membership, but sought to distinguish this from what the CFS claims was pre-campaigning s follows:

> ...[T]he practice of the Canadian Federation of Students ... has also been to draw a distinction between general promotional material and material which refers specifically to an upcoming referendum that seeks to persuade votes to vote in a certain way or another.
>
> **Transcripts, 29 February 2009, p. 39, ll 20-29**

91. As noted above, one would have thought that had this been a "practice", the CFS would have told the SFSS. Furthermore, there is no principled reason to distinguish between the promotional materials that outline the benefits of membership (and thereby influence voters) and materials that challenge the benefits of membership (and thereby influence voters) just because the latter mentions the referendum. Given that notice of the Referendum had been given in August 2007, the public viewing the promotional materials would have been aware of the referendum in any event. Even assuming that distinction was valid, which the SFSS says it is not, the SFSS notes that only *three* of the approximately thirteen posters that the CFS claims constituted impermissible "pre-campaigning" referred to the referendum. Finally, there is no evidence of when those materials were posted, other than Lucy Watson's assertion that they were

posted prior to the commencement of the campaign. Given that Ms. Watson was not on campus and has not described the basis of her knowledge, that assertion is without evidentiary value.

See Watson Affidavit #1, para. 41 through 50, Exhibits "P" –"U", Chambers Record, Vol. IV(A)

92. In paragraph 76 of their submissions, the CFS notes that the "I am CFS" program was in place before the CFS received the Petition asking for a Defederation Referendum in August 2008. However, as noted in Derek Harder's Affidavit #1, the issue of defederation had been debated at SFSS (with the CFS present) as early as January 2007 and the SFSS had held referendum in 2007 to determine if its members wanted it to pursue the issue. Further, the question of whether SFSS (and other student societies) should remain part of the CFS has been a live issue for many years. It is difficult to imagine any purpose for an expensive "I am CFS" campaign other than to influence students on this political issue.

Harder Affidavit #1, Chambers Record Vol. II, Tab 33, paras. 4-9

93. The CFS also referred the Court to CFS Bylaw I(4)(e)(iv), which provides that *federation* campaign materials shall not be misleading, potentially libellous or false. Once again, the Bylaw I(6) that governs defederation does not contain such a provision in recognition, perhaps, that defederation campaigns are more likely to be contentious and hard fought.

11. KAMLOOPS STUDENTS

94. In his submissions, counsel for the CFS asserted "we do know that no Kamloops students voted." There is no evidence to support that claim. The only admissible evidence before the Court is that a single student does not recall receiving the pre-election e-mail, and for that reason did not vote.

See, SFSS Main Submissions, paras 246-277

95. The CFS claims that there is no evidence about who was in the email list. In fact, Bobbie Grant, who is the Senate Assistant and Electoral Officer for the University, has deposed that the mass e-mail list that J.J. McCullough used contained the e-mail addresses of the Kamloops students.

Affidavit of Bobbie Grant, Chambers Record, Tab 58, para 2.

96. The CFS says that there is no mention of what the referenda question were. However, the e-mail says that if the voters want more information, they could contact a website for more information.

12. NO USURPATION BY BOARD

97. The CFS denies that it walked away from the referendum when it sent its letters of 27 and 29 February 2008 through counsel indicating that it would not recognize the results of the Defederation Referendum. The CFS claims that the SFSS had already walked away from the process on 25 February 2008, by passing the resolution giving the IEC notice of the referendum.

98. As has already been stated, the SFSS was obliged to give notice of the Defederation Referendum under its bylaws. The motion that gave notice to the IEC also gave notice of the other five referenda. There is no mention in the resolution about who would run the referendum, much less is there any request or direction that the IEC run the referendum.

Affidavit of Derrick Harder No. 2, Ex. L, Book of Documents, Tab 51, p. 86-88.

99. Mr. Harder and Mr. McCullough have both given evidence that the request from the SFSS to the IEC was not to take over the referendum, but simply to be prepared to provide support if the ROC was unable to do so, as appeared likely by the end of February.

Affidavit of Derrick Harder No. 2, Chambers Record Vol. II, Tab 33, para. 32

Affidavit of J.J. McCullough No. 1, Chambers Record, Vol. III, Tab 36, para. 10-11

100. In paragraph 82 of its submissions, the CFS incorrectly asserts that it was "excluded" from participating in the Defederation Referendum. As noted in paragraphs 298 to 301 of the SFSS' Main Submissions, the IEC repeatedly invited the ROC to participate in the procedure and the ROC refused.

101. In the *University of Toronto* case that the CFS relies on, a group of students left one society to join another. The departing students complied with the bylaws of the society they were going to join, but completely ignored the bylaws of the society they were leaving and did not give it notice of the vote. That is obviously not the case here.

***Association of Part-time Undergraduates*, Respondents Book of Authorities, Tab 2**

13. BYLAW 1(7)

102. Counsel for the CFS characterizes the SFSS's position on Bylaw I (7) as being that Bylaw I (7) allows defederation without determining the will of the students by way of a vote. That is not the position of the SFSS. The position of the SFSS is that Bylaw I (7) would allow defederation if the CFS were satisfied that that was the will of the students, even if the vote had not occurred pursuant to Bylaw I (6). The example the SFSS used was that Bylaw I (7) might be used where a referendum was held that was suitable for determining the will of the students, but failed to comply with all of the procedural requirements of Bylaw I (6).

See, Main Submissions, para 484

103. In his oral submissions, counsel for the CFS conceded that it would be improper for the Annual General Meeting to overturn a valid referendum pursuant to Bylaw I (7). Accordingly, if the Court upholds the Defederation Referendum, it need not consider the interpretation of Bylaw (I)(7).

Transcript, 29 January 2009, p.21-22, ll 44-47.

104. Furthermore, the CFS conduct is not consistent with its interpretation of Bylaw I (7). It takes the position that its practice is for the CFS to consider referenda at its General Meetings. In this case, the SFSS provided notice under Bylaw I (7) in April 2007 and asked that the CFS consider its application to withdraw at its AGM in May 2007. In October 2007, the CFS responded that it would not consider the application since there had not been a referendum. The referendum was held and passed. However, the CFS did not, to the SFSS knowledge, ever ask its members to consider the SFSS' notice of withdrawal at its next AGM pursuant to Bylaw I (7) or otherwise.

Book of Key Documents, Tab 5,6 and 8

14. THE FUNDING QUESTION

105. On 30 January 2009, the Court asked whether the question concerning fees, is actually a funding question, in the sense of raising new or additional funds; or whether it was an allocation question, in the sense of asking the students how the SFSS should spend funds it was already entitled to collect. It was a funding question.

Transcript 30 January 2009, p. 22 ll. 10-25

106. Under the *University Act,* SFU collected funds directly from the students for the CFS. The SFSS was a mere conduit for passing along student funds to the CFS. In other words, this was not money collected for the SFSS that the SFSS chose to spend on CFS membership out of its own budget. Until there was a referendum on fees, the fees in issue had to be forwarded to the CFS:

> *(3) On annual notice from a student society, the board [of the University] must collect fees on behalf of a provincial or national student organization, and remit them to the student society or directly to the provincial or national student organization, as may be agreed by the board and the student society, if*
>
> > *(a) the board [of the University] collected fees on behalf of the provincial or national student organization between June 1, 1998 and June 1, 1999, or*
> >
> > *(b) the student society has held a referendum and the majority of the members of the student society voting in that referendum voted in favour of joining the provincial or national student organization.*

***University Act,* Petitioner's Book Of Authorities, Tab 44**

107. SFU's obligation to collects fees for the CFS was conditional on the SFSS remaining part of the CFS. If the SFSS voted to leave the CFS, the University would no longer be collecting the fees on behalf of the CFS. However, the SFSS would not get the fees that previously went to the CFS unless it passed a referendum authorizing the University to collect the additional fees. The students would pay less fees.

108. From the perspective of the SFSS, the fee that it would be receiving if the fee question passed in March 2008 was new money; it was an increase in the amount of money the SFU would collect for the SFSS. Therefore, it required a referendum to allow SFU to collect it. It

was necessary to have a referendum to authorize SFU to collect what was a new (or additional) SFSS fees, and remit them to the SFSS.

109. In paragraph 80 of its submissions, the CFS-National asserts that the use of the second question was contrary to a decision of the ROC. However, there was no decision of the ROC concerning that issue.

See, Minutes of ROC, Key Documents, Tabs 47, 48, 49, 50, 51, 52, 53,54

110. The SFSS argument on the fairness of this question is set out in the SFSS' Main Submissions at para. 223

15. GRADUATE STUDENTS ISSUE

111. The CFS alleges that the graduate students of SFU were not entitled to vote. In oral submissions, counsel for the CFS conceded that the graduate students had not "technically" left the SFSS, but claimed that they had left "in essence." There is no rule that voters who are "technically" members of the SFSS, but who had left "in essence" are not entitled to vote.

112. Under the CFS bylaws, the members of a local association are "individual members" of the CFS. As set out in paragraphs 138 of the SFSS Main Submissions, the CFS Bylaws provide that "individual" members have the sole power to decide all membership issues. On 18-20 March 2008 the graduate students of SFU were members of the SFSS, and therefore individual members of the CFS. Neither the CFS nor the SFSS had the power to exclude them from the vote.

CFS Bylaw I(1), Book Of Bylaws, Tab 1, p. 6

113. Counsel for the CFS referred the Court to SFSS minutes dated 10 October 2007, apparently to support the proposition that the graduate students had left by then. However, the minutes make it clear that the graduate students' split from the SFSS would not take place until either 1 May 2008 or 1 September 2008. This was because the graduate students had already paid SFSS fees and CFS fees for the year. Whether the date for the split was May 1st or September 1st, 2008 the graduate students were members of the SFSS and the CFS, and entitled to vote on 18-20 March 2008.

Affidavit of Michael Letourneau No. 1, Exhibit "S", Book Of Documents Tab 46, P. 121. Agenda Items 10-10-07:006 and 10-10-07:007

15.1 KNOWLEDGE OF THE CFS

114. In paragraph 43 of her Affidavit #1, Lucy Watson asserts that the ROC never had a chance to deal with the graduate student issue because the IEC stepped in. In fact, the CFS knew, by early February 2008, at the very latest, that the graduate students were going to be leaving the SFSS. In the "transcript" of Lucy Watson's tape recordings of the very first ROC Meeting on 4 February 2008, the first thing that the SFSS appointees to the ROC did was to expressly state that the graduate students would be leaving the SFSS in April or May 2008. The CFS never raised the issue or objected until well after the Defederation Referendum.

Affidavit of Lucy Watson #2, Tab 44, "B", p. 40-41

116. The circumstances are nearly identical to the objection raised by the unsuccessful petitioner in *Schierbeck v. Danish Community Centre of Vancouver*. In that case, there was an issue about whether a group of potential voters – corporate members – were entitled to vote. The court was unable to resolve that issue, but concluded that a resolution was not necessary because "the petitioner's acquiescence in the voting as it had occurred was the determinative factor" in dismissing the petition. It is submitted that the same result should apply here.

Schierbeck v. Danish Community Centre of Vancouver **[1979] B.C.J. No. 1294, Petitioner's Book of Authorities, Tab 21, para 6-7**

117. The CFS says that the graduate students had no "interest" in the second question because they would be leaving the SFSS. That is irrelevant. All members of the SFSS can vote, including undergraduates who would be graduating in June, and who would otherwise not be at SFU at all when the fees are collected. The SFSS' submissions concerning the graduate students interest in the vote is at p. 66 and following of its Main Submissions.

16. ALLEGED IRREGULARITIES IN THE VOTE

16.1 INADEQUACY OF CFS AFFIDAVIT EVIDENCE

118. In response to SFSS' argument concerning the inadequacy of the affidavits alleging irregularities in the actual voting process, the CFS has responded that it is not normal to provide

details in affidavits and relies on the problems with its own affidavit evidence as grounds for arguing that there should be a trial.

> *Firstly, the criticisms that the affidavits are not specific as to points of observation, nearness, vantage points, all that sort of thing, and my submission is that that is not normally the type of thing that's found in an affidavit, in my experience at least. In an affidavit you just can't get into that sort of detail. I mean if you're recording observations and conversation, its not normal to set the scene, describe the lighting*
>
> **Transcript 30 January 2008, p. 4-5**

119. As noted in paragraph 462 of the SFSS' Main Submissions, it is incumbent on any party to litigation to present its evidence. Affidavit evidence in summary trials is often detailed and complex – as it is in this case. There is no reason why the affidavits could not have provided detail, assuming further detail would have been helpful to the CFS. During his submissions, counsel also suggested that what the SFSS really wants is to cross-examine the CFS affiants on their affidavits **(Transcripts, 30 January 2008, p. 4 ll. 41-47)**. That is not the SFSS' position. Had the SFSS wanted to cross-examine on the affidavits, it would have applied to do so. Rather, it is the SFSS' position that the burden is on the CFS to prove that there were "substantial irregularities calculated to affect the result" of the Defederation Referendum and that the CFS evidence falls far short of discharging that burden.

16.2 Impossibility of Answering CFS' Vague Allegations

120. The CFS says that an inference should be drawn from the fact that the SFSS has not answered each and every allegation about polling infractions. The SFSS could not answer most of the complaints because the CFS affiants have not identified who was involved, or given sufficient detail to allow an investigation to be conducted. The first affidavits of the CFS affiants who allegedly observed these infractions were not delivered until June 2008, three months after the vote, and the last until January 2009 (despite the ROC's rule that complaints must be made within 24 hours), making it impossible to investigate. The SFSS submits that the CFS deliberately withheld its complaints until that time to make it impossible to verify or refute them.

16.3 Waiver of SFSS Rules

121. Counsel for the CFS has claimed that the referendum became a "free for all" with no rules, and referred the Court to an e-mail in which Mr. McCullough notes that the Board of the SFSS voted to suspend certain rules for the Defederation Referendum. Whether or not there was compliance with the SFSS bylaws is irrelevant. The CFS has not pleaded that the SFSS did not follow its own bylaws, and it has not advanced a legal theory that would allow it to complain if the SFSS failed to follow its own procedures.

122. The SFSS submits that it is not true that the SFSS suspended all the rules for the Defederation Referendum. All Mr. McCullough did was to suspend the SFSS policy AP27, which is found at Exhibit "C" of Lucy Watson's Affidavit #2, in an effort to harmonize the CFS bylaws and the SFSS election and referendum rules. AP27 deals with the following:

(a) *Spending limits*. The CFS did not have a spending limit rule, so suspending that rule for the Defederation Refederendum would simply have had the effect of harmonizing the rules.

(b) *Applications for the "Yes Vote" and "No Vote" committees be submitted to the IEC.* Since the CFS did not recognize the IEC or send its application into the IEC, the IEC waived this requirement in an effort to accommodate the CFS.

123. The only other rule that Mr. McCullough indicates he waived was the rule that campaign materials be submitted to the IEC. He noted that while the SFSS had submitted their material, he doubted, quite correctly, that the CFS would send theirs in. Once again, Mr. McCullough waived this requirement to accommodate the CFS.

Affidavit of Lucy Watson #2, Chambers Record IV(B), Exhibit "A"

16.4 No Evidence of Running Out of Ballots

124. Counsel for the CFS asserted that it is common ground that the polling stations ran out of ballots. That is not common ground. There is no admissible evidence that any of the polling stations ran out of ballots, much less ballots related to the Defederation Referendum. The evidence in the CFS affidavits is unattributed hearsay. Even that unattributed hearsay does not

specify that the polling stations ran out of Defederation Referendum ballots as opposed to other ballots.

16.5 SECRET BALLOT

125. In paragraphs 363 and 364 of its written submissions, the CFS argues that the alleged lack of secrecy surrounding the vote on 18-20 March 2008 invalidated the result. It relied on the *Hotra* and *Clark* cases for the proposition that any failure to provide secrecy renders an election invalid. The SFSS submissions concerning the secrecy issue are found at paragraph 433 to 455 of its Main Submissions. In reply to the CFS submissions, the SFSS notes that the *Clark* and *Hotra* cases are of little application in the present case. In both *Clark* and *Hotra*, there was a complete lack secrecy. In both cases, voters were given a ballot and an envelope to use to mail in the completed ballot. In *Hotra*, the name and address of the voter was printed on the envelope the voter was given, making it easy to identify the ballot with the voter. In *Clark*, each voter was assigned a number, and that number was marked on the envelope, once again making it easy to identify the ballot with the voter. Furthermore, the envelopes used in the *Clark* case were somewhat transparent, and there was evidence that the process had created the impression that the voter could be identified. Both cases concerned union votes, which had in fact given rise to the particular concern over secrecy related to such elections. There is no evidence from any of the voters at the SFSS indicating that they were concerned about lack of secrecy. Finally, in both cases, the Constitution of the unions expressly provided for secret ballots, unlike in the present case.

> ***Clark v. Teamsters Local Union No. 464*, [1997] B.C.J. No. 2878 (S.C.) at para 13[Petitioners Authorities, Tab 22];**
>
> ***Clark v. Teamsters (1998)*, CarswellBC 2711 (S.C.) at paras 10, 11, and 21 (Respondents Authorities, Tab 15),**
>
> ***Hotra v. H.R.C.E.B. Local 40*, [1987] B.C.J. NO. 1774 (S.C.) at p.1-3**

17. AQUIESENCE OF CFS

17.1 FAILURE TO BRING COMPLAINTS TO ROC

126. The SFSS has made submissions about the failure of the CFS to bring its complaints to the ROC under the ROC's complaint procedure shows that it acquiesced in the result. The CFS

response was that the ROC did rule on the validity of the referendum, holding it invalid, as reflected in the minutes of 28 March 2008.

127. First, the minutes of the 28 March 2008 meeting do not reflect any decision: there was no decision to accept the results of the referendum, and there was no decision to reject the results. All that happened was that a SFSS appointee, Michael Letourneau, suggested that the ROC consider a motion to approve the results of the Defederation Referendum. In response, the CFS representatives asked that a self-serving statement be included in the record. The statement repeated the position that the CFS had taken through counsel in his letters of 27 and 29 February 2009. In the end, no motion was put on the floor, and no decision was made. Therefore, there was no decision of the ROC nullifying the Defederation Referendum.

Minutes of ROC meeting, 28 March 2008, Book of Documents Tab 54(B)

128. The CFS bylaws do not give the ROC the right to determine whether a vote is valid. They provide that the ROC has the power to "adjudicate appeals" (Bylaw I (6)(f)(vii)). The ROC resolution adopted on 17 March 2008 provides details of how the ROC would exercise that power. Read together those provisions mean that the ROC would have the power to hear complaints and to adjudicate appeals. It is conceivable that in an extreme case a complaint might be made that the entire referendum was invalid, and the ROC would have the power and the duty to rule on that complaint. However, that is far from saying that in the absence of such complaint and any ruling on the complaint, the Defederation Referendum would be automatically invalid unless the ROC approves the result, which is what the CFS appears to be suggesting. In any event, CFS members never made any complaint to the ROC, and never asked the ROC to rule. The self-serving statement Lucy Watson inserted into the unapproved minutes was not a ruling of the ROC.

129. Further, there is no rule in the CFS bylaws or the ROC that would allow the CFS to defeat the referendum by the simple expedient of having the CFS nominees on the ROC declare that the CFS does not accept the results.

130. Therefore, it is not accurate to say that the CFS did follow the ROC procedures and nullified the Defederation Referendum in accordance with its rules.

17.2 Late Disclosure of Complaints

131. CFS relies on the hearsay evidence of a SFSS student Andrew Fergusson to counter that allegation that it did not make timely complaints to the IEC. The SFSS submits that Andrew Fergusson's evidence is not admissible, since he did not file an affidavit in this action. In the alternative, in paragraphs 337 and 338 of its submissions, the SFSS has pointed out that Mr. Fergusson did not make his complaints until it was too late for the IEC to have observed or addressed the alleged infractions he complained of. In response, the CFS has argued that Mr. Fergusson should not be faulted for late delivery of the complaints to the IEC, implying that it would have been difficult for him to comply with the rules of the ROC, or otherwise object more quickly. However, there is no admissible evidence from Mr. Fergusson about why he chose to wait until 20 March 2008 to lodge the complaints from March 18th, or why he waited until March 23rd to lodge the complaints relating to March 19th and 20th. There is certainly no evidence from which the Court could conclude that there was any logistical impediment that prevented Mr. Fergusson, or any of the CFS affiants, from making their complaints known to the poll clerks as the relevant events were unfolding.

17.3 CFS' Excuse for Acquiescing in Alleged Irregularities

132. The CFS has offered only one response to the SFSS' argument that the CFS acquiesced in the alleged irregularities by not raising complaints to the IEC or the poll clerks at a reasonable time: they claim that they were concerned that the IEC commissioner, J.J. McCullough, was biased. (The SFSS denies this allegations for the reasons set out in paragraphs 230 to 235 of its Main Submissions). Counsel for the CFS sought to excuse the CFS' failure to take up the IEC's offer that it supervise the vote and to participate in counting of the vote referring on an e-mail attached purportedly between JJ. McCullough and a third party attached to the affidavit of Lucy Watson. The SFSS submits that this cannot have been the real reason the CFS chose not to cooperate.

133. First, there is no evidence from any witness they refused to cooperate or report the irregularities they allegedly saw because of concerns about bias on the part of Mr. McCullough, the IEC commissioner.

134. Second, there is no evidence any of the witnesses were even aware of the email at the time of the referendum. Lucy Watson has deposed that she only found out about the email on 26 March 2008, which was well after the referendum:

> *76. On or about **March 26, 2008** it came to my attention that Mr. McCullough, the Chief Electoral Officer at the IEC responsible for overseeing the Vote, holds an anti-CFS bias. This has been made clear by certain correspondence from Mr. McCullough. Now produced and shown to me and marked as Exhibit "JJ" to this my Affidavit is a true copy of a transcript of an MSN message between Jeremy David Peters and Mr. McCullough on or about April 10, 2007.*
>
> **Affidavit of Lucy Watson No. 1, Chambers Record Volume IV, Tab 43, para 76**

26 March 2008 was a week after the referendum. Obviously, that could not have affected the CFS' decisions before and during the referendum. Ms. Watson has not explained the circumstances that led to the email coming into her hand. Given the date, there is a strong inference that the CFS was casting about to find excuses for their decision not to accept the results of the referendum.

135. Third, even if the CFS did have concerns about Mr. McCullough, those concerns do not explain why they did not participate in supervising the vote and the count. If they were concerned about Mr. McCullough's alleged bias, that concern would have given them greater reason, not less reason, to participate in the supervision of the referendum – if they actually wanted to see a fair referendum, rather than gather evidence of alleged infractions so they could complain if they lost the referendum.

136. The CFS asserts that the IEC Commissioner, J.J. McCullough, did not give serious consideration to the complaints that the CFS made after the balloting was completed, and argues that this is proof that Mr. McCullough was biased against them. This amounts to saying that when a person decides an issue summarily he or she must be biased. There is no support in law or logic for such a proposition. Further, it is clear that Mr. McCullough had direct, first hand, involvement in the voting process, and was able to judge the complaints on the basis of his own observations. J.J. McCullough deposed as follows:

> *23. I am aware that certain persons have made allegations with respect to a number of alleged irregularities and incidents of misconduct principally relating*

to active interference in the conduct of the balloting and have read the affidavits of Michael Olsen, sworn September 8,2008, Shamus Reid, sworn June 23, 2008, Jeremy Salter, sworn July 9) 2008, and Nora Loreto, sworn July 10, 2008. It is my view, having been involved at the closest level in the balloting process, that there were no procedural irregularities in the conduct of the referendum balloting which would be considered to be material, and that no such incident (nor the sum of such incidents) could reasonably be deemed to have had any material effect on the outcome of the referendum.

24. *I was aware that there were a number of occasions where people advocating both the "yes" and "no" sides to the referendum issue were engaged in various levels of campaigning during the course of the balloting. However I did not observe any incident where any "yes" or "no" advocate was engaged in any conduct which appeared to me to interfere in any way with the conduct of the balloting or with the casting of any ballot by any student voter, nor did any of the referendum staff bring any such incident to my attention.*

25 *Had I been made aware of any inappropriate interference in the balloting process by any person (whether on behalf of the "yes" side, the "no" side or otherwise), I would have immediately intervened and directed that such interference immediately cease. At no time did I have cause to do so.*

Affidavit of J.J. McCullough No. 1, Chambers Record, Vol. III, TAB 36, para. 10-11

137. It is evident that Mr. McCullough had personally observed the voting, and drew his own conclusion about the extent of irregularities, or lack thereof.

17.4 Delay In Commencing Proceedings

138. The CFS seeks to excuse its delay in commencing its action by arguing that the Petition filed by the SFSS was not the proper way for the SFSS to apply for a remedy for oppression. This assertion simply makes no sense. Whether the SFSS filed for an oppression remedy by petition or action, correctly or incorrectly, has no bearing whatever on the ability of the CFS to commence its action for the recovery of fees. Lucy Watson has not deposed that the CFS wanted to challenge the referendum, but believed they were constrained from doing so until the SFSS had commenced a valid oppression action by way of Writ. The CFS knew all along that it would have to commence an action to recover the fees it is claiming. There is no evidence – as distinct from submissions of counsel – explaining why the CFS waited to file its claim until the eve of the hearing of the Petition.

139. The CFS invites the Court to infer that the agreement of the SFSS to discontinue against the CFS is tantamount to an admission that the Petition was improperly commenced in the first place. That is a surprising and troubling submission. The SFSS discontinued against the CFS-National and CFS-S as part of the negotiated agreement that is now set out the letter filed as Exhibit "A" in these proceedings. The agreement provides that in consideration for the CFS parties agreeing that there should be one hearing or trial to hear the petition and both actions together, the SFSS would agree to discontinue against the CFS-National and CFS-S. Discontinuing against those entities removed complex questions about the application of the British Columbia the *Society Act* to federally incorporated societies. Those questions do not apply to the CFS-BC, which was incorporated under the British Columbia *Society Act*.

140. The CFS claims that it was procedurally incorrect to commence the oppression remedy by petition. It SFSS' position that the *only* way to commence an application for an oppression remedy is by petition. The rules are set out in the SFSS Main Submissions at page 19, para. 77 to 86.

141. With respect, the CFS position that the oppression remedy should not be heard by petition confuses two separate issues: (1) how is an application for an oppression remedy *commenced*; (2) once commenced, whether it is appropriate to have the oppression application heard by summary procedure, or should the issues be determined by a full trial. A respondent can always argue that the issues raised by the petition are not suitable for summary determination (the SFSS says that in this case they are), but it cannot reasonably argue that the originating application cannot be commenced by petition. If the CFS wanted the Petition to be dealt with in other than a summary manner, it should have applied under Rule 52 to turn the originating application into an action.

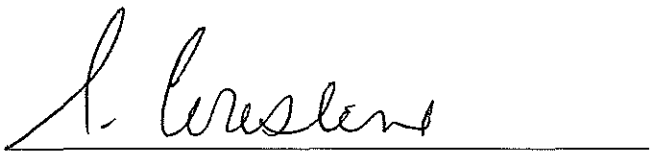
142. Whatever they now say about turning the Petition into an action, it does not explain why they made no effort to commence their action until Christmas 2008 (CFS-National) and January 2009 (CFS-BC).

143. The CFS has submitted that the matter is not suitable for determination because it raises issues of credibility. For the reasons set out in paragraphs 102 to 113, the SFSS submits that the issues raised in this case are suitable for disposition. The key issues are legally. In terms of the

factual issues, the debate is not so much about what happened, but the parties' characterization of events. To the extent that the Court must decide issues of credibility, it can do so without hearing from the witnesses. As noted in *Lalli* v. *Lalli (1998), Carswell BC 2543 (S.C)* the Court can decide questions of credibility based on circumstantial evidence, such as documents and other affidavits.

144. For all the above reasons and the reasons set out in the SFSS' Main Submissions, the SFSS asks that this Court find uphold the Defederation Referendum was binding and dismisses the CFS claims against the SFSS.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Counsel for the SFSS