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 – BC COMPONENT, and the CANADIAN FEDERATION OF STUDENT -SERVICES

RESPONDENTS

AND

NO. S-089144

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

AND

NO. S-090331
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN FEDERATION OF STUDENTS – BRITISH COLUMBIA COMPONENT

PLAINTIFF

AND:

SIMON FRASER STUDENT SOCIETY

DEFENDANT

WRITTEN ARGUMENT OF THE SIMON FRASER STUDENT SOCIETY

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I. OUTLINE OF ARGMENT

1. INTRODUCTION

1.1 THE REFERENDUM

1. This litigation concerns the validity of a referendum concerning membership in the Canadian Federation of Students held at Simon Fraser University ("SFU") on March 18-20, 2008.

2. The petitioner / defendant is the Simon Fraser Student Society ("SFSS"), the student society for students at SFU. Before the referendum, the SFSS and its members were members of the respondent / plaintiff Canadian Federation of Students ("CFS") and related organizations. The referendum asked the students at SFU whether they wished to remain as members of the CFS. Such a referendum is called a "Defederation Referendum" under the CFS bylaws and will be referred to as such in this argument. The referendum question was:

> *Are you in favour of maintaining members in the Canadian Federation of Students: Yes or No?*

3. The "No" side won, 66.97% to 33.03%. The voter turnout was exceptionally high. The turnout for most elections and referenda is between 5% and 6% of SFSS members. The turnout for the Defederation Referendum and the accompanying general election was 17%, approximately three times the norm. The voter's rejection of the CFS was overwhelming, both in the number of students who voted, and the percentage of voters who voted "No" to the CFS.

Affidavit of Derrick Harder No. 1, paras. 15-16, Chambers Brief Vol II, tab 32, p. 4

4. Notwithstanding the results of the Defederation Referendum, the CFS and its related entities have refused to remove the SFSS from their list of members, and continue to claim fees from SFU students.

5. It is the SFSS' theory that CFS did not want the Defederation Referendum to proceed and made a concerted effort to prevent it from doing so. The CFS could not gain from the vote, it

could only lose. If the students voted "Yes", that would simply maintain the status quo. If the students voted "No", the CFS would no longer be able to collect hundreds of thousands of dollars in fees annually from SFU students. It knew it was not popular amongst SFU students. Accordingly, the CFS unsuccessfully attempted to prevent the Defederation Referendum from proceeding and, when they could not do so, they refused to accept the results. When the SFSS commenced its Petition seeking a remedy under the *Company Act* and the CFS could no longer ignore the Defederation Referendum, it commenced an action against the SFSS for fees ("the Fees Action"). It waited until the last minute to do so, in the hopes of causing a delay in the proceedings and avoiding a hearing on the merits.

6. The outcome of both the Fee Action and Petition turn on the validity of the Defederation Referendum.

1.2 THE PARTIES

7. The SFSS is a society formed pursuant to the *Society Act*.

8. The respondent / plaintiff Canadian Federation of Students – British Columbia Component ("CFS-BC") is a society formed pursuant to the *Society Act*.

9. Canadian Federation of Students National ("CFS National"), the Canadian Federation of Students – Services ("CFS-S") were formed under Part II of the federal *Corporations Act* . They are also extra-provincially registered societies in British Columbia under the *Society Act*. CFS National purports to represent students across Canada. The Plaintiff CFS – Services provides services to university students across Canada. These organizations and the CFS-BC will be referred to collectively as the CFS unless otherwise specified.

1.3 THE PROCEEDINGS

1.3.1 The Petition

10. On 16 April 2008, the SFSS commenced a petition seeking a remedy under sections 71 of the *Society Act* and sections 200 and 272 of the *Company Act* ("the SFSS Petition"). The SFSS Petition claims that the CFS' conduct towards the SFSS and its members with respect to the Defederation Referendum, and CFS' refusal to remove the SFSS from its list of members is oppressive and unfairly prejudicial. As a remedy, it has sought an order that the CFS remove the

SFSS from its membership list and rectify its documents to reflect that the SFSS is no longer a member.

11. The central issue in the petition is the validity of the Defederation Referendum.

1.3.2 The CFS Actions

12. When they were members of the CFS, the students of SFU paid fees to the CFS and its related entities. The fees the SFU students were obliged to pay the CFS depended on the numbers of students enrolled. In 2007-2008, they paid the CFS a total of $470,524.08.

Affidavit of Derrick Harder No. 1, para 8, Chambers Brief Vol II, tab 32, p. 3

13. Members of the CFS National at British Columbia universities are automatically members of the CFS-BC and CFS-S. The obligation of SFU students to continue to pay the CFS fees depends on the validity of the Defederation Referendum. The various CFS entities claim that they are entitled to receive membership fees from the SFSS students notwithstanding the results of the Defederation Referendum, because they say the vote was invalid for the reasons set out in their affidavits in the SFSS Petition.

14. On 23 December 2008, the CFS - National and Services commenced their Fee Action, claiming payment of the fees that the SFU students would have owed but for the Referendum.

15. On 15 January 2008 the CFS-BC commenced their Fee Action, also claiming fees. The Statement of Claim filed by the CFS-BC is nearly identically to the statement of claim filed by the CFS – National and Services

16. The central issue in both actions, as in the SFSS Petition, is the validity of the Defederation Referendum.

1.4 SUMMARY DETERMINATION

17. As argued further below, it has been SFSS' position from the start that the validity of its elections and referenda must be decided expeditiously. Therefore, even though it was not the party challenging the results of the Defederation Referendum, the SFSS commenced the Petition

shortly after the Defederation Referendum was decided. The SFSS did so because it wanted a quick resolution to its dispute with the CFS.

18. The CFS immediately acknowledged that the matter should proceed by Writ and Statement of Claim, by which it presumably was referring the fee issue, which could only be brought by an action commenced by the CFS. The CFS did nothing to advance that claim for nine months. It waited until the end of 2008, shortly before the hearing of the SFSS Petition, to commence its Fee Action. The CFS-BC delayed even longer, waiting until the eve of this hearing. Neither party has offered any explanation for their delay.

Letters from Gowlings dated 28 April 2006, Affidavit of Watson No. 1, Exhibit TT, Chambers Brief Vol IV(B), PETITIONER'S BOOK OF DOCUMENTS, TAB 37

19. The evidence filed by the CFS in the SFSS Petition is identical to the evidence it relies on in the Fees Actions. The CFS-National filed lengthy and detailed affidavits in response to the SFSS Petition. The only evidence it has filed its Fee Action is an affidavit, which simply attaches the affidavits it already filed in the SFSS Petition. It has filed no new substantive evidence. The only evidence the CFS-BC has filed in its action is an affidavit that simply attaches the affidavit of the CFS - National that attaches the CFS - National affidavits from the SFSS Petition.

20. The CFS now argues that there should not be a summary determination of the validity of the election, and that that issue should be adjourned to a full trial. Such a trial could not be completed before late 2010, approximately than two and a half years after the Defederation Referendum.

1.5 CFS' OBJECTIONS TO THE REFERENDUM

21. The CFS allegations concerning the Defederation Referendum fall into three broad categories: (1) objections relating to the process leading up to the Defederation Referendum; (2) objections to the date of the Defederation Referendum and (3) allegations of irregularities during the voting.

1.5.1 Process leading to the Defederation Referendum

22. The Defederation Referendum process begins with a petition signed by10% or more of the local students asking for a Defederation Referendum. If the students submit such a petition to the CFS, a Defederation Referendum *must* be held. There is no genuine issue here about the validity of the petition the SFU students signed and delivered in August 2007 asking for a referendum on membership in the CFS("the 2007 Petition").

23. The CFS claims that once the petition has been accepted, its bylaws give the sole power to manage the referendum to a Referendum Oversight Committee ("ROC"), composed of two members of the CFS and two members of the local student society (here, the SFSS). The SFSS denies that the bylaws the CFS relies on in making that assertion were validly adopted, or if they were adopted, that they should be interpreted as the CFS alleges.

24. The CFS claims that the ROC has the exclusive power to organize *all* aspects of all defederation referenda. Further, the CFS claims that if the ROC fails to organize *any* aspect of a defederation referendum, the referendum simply cannot be held. If one is held in those circumstances, then it is invalid. The CFS makes that claim notwithstanding the fact that it acknowledged that the 2007 Petition was in good order and that a Defederation Referendum must be held.

25. There are four people on the ROC – two appointed by each side. The two-two composition of the ROC, with no tie-breaking vote, creates the obvious and predictable possibility of stalemate, even if both parties are acting in good faith but have reasonable differences. In effect, the CFS position would mean that if the ROC becomes stalemated, the referendum cannot be held, notwithstanding the obligations that arise upon receipt of the petition. The SFSS says that even if the CFS bylaw that creates the ROC is a valid Bylaw, the failure of the ROC to fulfill its responsibility to organize the referendum does mean the referendum cannot be held. Rather, the SFSS says that upon receipt of a petition, a referendum must be held. If the ROC fails to do its duty, the referendum may be organized and conducted by another appropriate body, so long as it is fair. Under the SFSS Bylaws, all referenda are organized and held by an Independent Election Commission ("IEC"). In the present case, the IEC organized the polling stations and counted the vote. The SFSS says that the IEC and the

ROC had joint competence to organize the Defederation Referendum. The fact that the ROC was unable to do its duty did not prevent the IEC from doing its duty, nor did it justify the CFS refusing to proceed with the Defederation Referendum commenced by the 2007 Petition.

26. The two-two composition of the ROC, which could cause problems at the best times, creates an opportunity for one party to derail the referendum process simply by refusing to participate in good faith. The SFSS says that, in this case, the CFS tried to frustrate the work of the ROC because it did not want the Defederation Referendum to proceed.

27. Notwithstanding the eventual deadlock, the ROC did make a number of important decisions. For example, it made general rules about campaign materials, and it established a process for investigating and adjudicating complaints. However, the ROC did not make decisions on many of the logistical procedures necessary to run any referendum; for example, how the vote would be conducted (i.e. location of stations and hiring polling clerks), and who would participate in the vote count. It is critical to recognize that the CFS complaint is not that the Defederation Referendum was conducted in a manner that violated rules that the ROC had made with respect to these key issues; rather, that the Defederation Referendum in the absence of the ROC making rules on them.

28. The SFSS submits that principal reason the ROC failed to make decisions was that the CFS abdicated its duty to participate in good faith. On 29 February 2008, well before the Defederation Referendum was held, the CFS advised the SFSS that it would not recognize the results of the Referendum. It was clear from at least that point (if not earlier) that the CFS was no longer going to participate in the Defederation Referendum process in good faith.

29. The essence of the CFS position is that it has the power to veto a referendum, duly commenced by Petition, by the simple expedient of announcing that it will not recognize the results, frustrating the workings of the ROC, and then claiming that the vote is invalid because the ROC did not run the Defederation Referendum.

1.5.2 Date for the Referendum

30. The CFS took the position and continues to take the position that the ROC had the power to decide the date of the Defederation Referendum, which is inconsistent with the Bylaws they

rely on. Since the members of the ROC could not agree on a date, the CFS claims that the Defederation Referendum could not be held. Again, the CFS position is that it can block or veto a referendum, duly commenced by petition, by unreasonably deadlocking the ROC in respect to choosing the date.

31. The answer to this complaint is simple and clear. The ROC does not have jurisdiction to set the date. That power resides in the local association, in this case the SFSS. The Bylaws that the CFS relies on state that local society must give the CFS notice of a Defederation Referendum, including the "exact dates." After notice is given, an ROC is created. Obviously, the ROC cannot fix the date for the Defederation Referendum if the date must be specified in the notice that results in the creation of the ROC. That issue could have been resolved quickly, by simple reference to the bylaws the CFS relies on. Instead, the CFS insisted that the ROC pick the date, which the ROC did not have jurisdiction to do, and refused to agree to the dates set out in the Notice provided by the SFSS, which the ROC did not have authority to change. The CFS' insistence on these unfounded positions was intended to create and did create a deadlock in the ROC and doomed it to failure. The SFSS submits that the CFS' unreasonable and unsupportable position with respect to this simple issue is a strong indicator of the bad faith with which the CFS approached the Defederation Referendum generally.

CFS Bylaw I.6.b.iii, Affidavit of Lucy Watson No. 1, Ex. "A", PETITIONER'S BOOK OF BYLAWS, TAB 1, P. 10

1.5.3 Alleged Voting Irregularities

32. As noted above, the IEC had concurrent jurisdiction with the ROC to oversee the Defederation Referendum. The Chair of the IEC, went out of his way to ensure that the CFS had the fullest opportunity possible to participate in managing the vote. The CFS was invited to appoint scrutineers to oversee the voting and to supervise the vote count. It chose not to do either. It may be inferred that the CFS did not participate because it wanted the vote to be frustrated. It was more interested in finding grounds to object to the vote, then it was in helping to facilitate a fair referendum.

33. Instead of participating in the vote in an official capacity, which would have allowed the CFS to help prevent and avoid any voting irregularities, it chose to have a number of operatives

surveille the voting covertly and compile lists of complaints. Given that the CFS had already announced its intention not to recognize the vote, it is not surprising that the operatives claim to have observed irregularities. The evidence supplied by these operatives is vague, often inadmissible, totally lacking in an evidentiary foundation, and manifestly unreliable.

34. As noted above, the ROC created rules for making, investigating, and adjudicating complaints. Those rules had specific deadlines, and required that complainants provide specific information necessary to investigate the complaints. The CFS evaded or ignored those rules. It never lodged its complaints about irregularities with the ROC, much less within the specified time limits. The complaints the CFS now makes raises in its affidavits lacks the detail required by the ROC rules, and are incapable of being verified or dismissed.

1.5.4 Right to Veto Referendum After the Fact

35. The CFS claims that even if a Defederation Referendum is conducted properly, and the CFS loses, its Bylaws empower the other members of the CFS to veto the referendum.

36. The SFSS says that the Bylaw the CFS relies on, Bylaw I(7, was not validly adopted; or, in the alternative, if it was validly adopted, the CFS interpretation of the Bylaws is wrong.

37. In summary, according to the CFS interpretation of its Bylaws, the CFS has the right to prevent its members from leaving by:

(a) Refusing to agree to the dates the local student association (or other body representing individual members) sets for the Defederation Referendum.

(b) Appointing individuals to the ROC, the body created under the CFS Bylaws to provide oversight for the referendum, who take positions that prevent the ROC from fulfilling its responsibility for running Defederation Referendum, in which case, according to the CFS, the vote cannot proceed.

(c) Unilaterally refusing to accept the results of the Defederation Referendum, which the CFS claims it has the right to do under its Bylaw I(7).

38. It is the SFSS position that the CFS does not have these rights under its Bylaws or otherwise. It is the SFSS' position that the CFS' conduct with respect to the Defederation

Referendum was inconsistent with the Bylaws it now relies on, its contractual agreements with the SFSS, its duty to proceed in good faith and basic democratic principles.

39. The central issue before the Court is the legality of the Defederation Referendum. While the CFS has raised a number of distinct complaints about the process leading up to the Defederation Referendum and the voting process itself, the fundamental question is this:

> *In what circumstances does the CFS has the authority, under its Bylaws or otherwise, to prevent the SFSS membership from leaving the CFS if a majority of the SFSS membership vote in favour of doing so?*

40. This overarching question is reflected throughout the CFS complaints and central to determining the legality of the Defederation Referendum.

1.6 SUMMARY OF ISSUES

41. The following issues are before the Court.

(a) Should the proceedings be heard together, with the evidence in one being evidence in all?

(b) Should the issue be decided by summary proceedings?

(c) Was the Defederation Referendum valid and binding on the CFS?

(d) If the Defederation Referendum was valid and binding on the CFS, does the SFSS own the CFS any fees?

(e) If the Defederation Referendum was valid and binding, do the oppression remedies set out in the *Company Act* apply to the various CFS entities and, if so, is the SFSS entitled to remedy pursuant to those sections?

II. NECESSITY FOR SUMMARY PROCEDURE

2. Urgency In Having Matter Resolved

42. The SFSS submits that one of the factors the Court should consider in determining whether the matter should proceed summarily is the fact it concerns the legality of a vote, held almost a year ago, affecting the rights of SFU students:

(a) There is a strong presumption that election cases will be heard and determined quickly and summarily. That principle applies equally to votes concerning referenda.

(b) By law, when the question of the validity of an election is raised in oppression proceedings, such proceedings must be commenced by petition, and are presumptively determined summarily. Even if the validity of an election is challenged in proceedings commenced by writ of summons and statement of claim, they are generally resolved by summary trial.

(c) In the present case, the petition was commenced in April 2008 and set down to be heard summarily. No significant new issues concerning the validity of the Defederation Referendum have come to light since that date. If the CFS actions raise new issues, they are legal issues. There are no new factual issues.

(d) The members of the SFSS are university students. By nature, the student body is a changing body. Students signing the 2007 Petition calling for a referendum, which is requirement under the bylaws the CFS relies on, initiated the Defederation Referendum. Under the CFS Bylaws, if more than 10% of the students of a local association sign a petition requesting a defederation referendum, it must be held. There has been no challenge to the validity of the 2007 Petition. Delay in resolving the issues concerning the legality of the Defederation Referendum will deny the students who signed that Petition and voted in the Defederation Referendum the right to be heard. It will also inevitably increase costs. While the cost of litigation may not be a concern to the administrators of the CFS, it is a concern to the SFSS and its student members.

(e) The CFS has stated since 29 February 2008, weeks before the vote was even held, that it would not recognize the results of the Defederation Referendum. The CFS has done

nothing between then and now to facilitate a quick and efficient resolution of the dispute over the legality of the vote. To the contrary, the CFS unconscionably delayed in commencing its actions, and is now using the fact that it did so as an excuse to further delay the proceedings.

2.1 PROPONENT OF REFERENDUM HAVE A RIGHT TO THE FRUITS OF THEIR LABOUR

43. The Defederation Referendum that occurred in March 2008 was the culmination of over a year of work by many SFU students. It was clear even before the Defederation Referendum that there was widespread support for an initiative that would allow the students of SFU to be heard on the issue.

44. From time to time, the SFU students had discussed and debated the value of their continued membership in the CFS. The issue came up in 2007 at a meeting of a SFU student organization called Forum. This organization is created by SFSS Bylaws 7 and 8 and is the most broadly representative body at SFU, being composed of the SFSS Board, undergraduate and graduate representatives of SFU departments, and representatives of constituency groups. Although Forum's main function is to provide a venue for debate and discussion for SFU students, it does have certain independent powers under the SFSS Bylaws, including the power set out in SFSS Bylaw 17 to put a resolution to referendum.

SFSS Bylaws 7 and 8, Affidavit of Derrick Harder No. 1, Exhibit "A", PETITIONER'S BOOK OF BYLAWS, TAB 3, P. 9-11

45. In January 2007, Forum created a working group to investigate the issue of membership in the CFS and report back to Forum. In February 2007, the working group reported back and Forum voted in favour of holding a referendum under the SFSS Bylaws on the issue of leaving the CFS. It did so because its members anticipated that the process of severing relations with the CFS was likely to be time consuming, contentious and expensive and did not think it appropriate to commence the process unless the Board had a mandate from SFU students to do so.

Affidavit of Derrick Harder No. 2, paras 6-7, CHAMBERS BRIEF VOL II, TAB 33, P. 2

46. CFS representatives were present at the Forum meeting in February 2007 and made presentations to Forum on the benefits of SFU students remaining in the CFS.

Ibid.

47. The initial referendum was held in March of 2007 ("the 2007 Referendum"), along with other referenda which were held during the general elections that year. It asked, amongst other things, the following:

> *Do you agree that the Simon Fraser Student Society should do the following:*
>
> *(i) Cease to be a member of the Canadian Federation of Students and the Canadian Federation of Students- British Columbia Component, as well as cease to be a member of the Canadian Federation of Students- Services;*
>
> *(ii) Cease collecting student fees for the Canadian Federation of Students and the Canadian Federation of Students - British Columbia Component (at present $7.50 per full-time student per semester; $3.72 per part-time student per semester: $23.50 for a full time year; $11.16 for a part-time year; for a total of $435,204.72 for 2006);*
>
> *(iii) Instead, collect $7.50 per full-time student per semester and $3.72 per part-time student per semester, and put said fees towards improving student services such as departmental student unions, club infrastructure, online student services, affordable student housing, staffing at satellite campuses, a publicly-accessible indexed archive of SFSS documents, and lobbying the government for SFU student interests.*

Affidavit of Derrick Harder No. 2, para 8, <u>CHAMBERS BRIEF VOL II, TAB 33, P. 3</u>

48. Under SFSS Bylaw 17, at least 5% of SFU students must vote in order for a referendum to be valid. Approximately, 5.6% of SFU students voted in the 2007 Referendum and, of those, 877 voted in favour of the SFSS leaving the CFS and only 248 voted against.

Affidavit of Derrick Harder No. 2, para 9, <u>CHAMBERS BRIEF VOL II, TAB 33, P. 3</u>

49. Given the results of the 2007 Referendum, the SFSS commenced the process of terminating membership in the CFS. While the SFSS did and does not agree with the CFS interpretation of the relevant CFS Bylaws or agree they were validly enacted, it attempted to comply with the process set out in the CFS Bylaws in the interests of ensuring an orderly proceeding. It also recognized the need to comply with its own Bylaws.

2.2 APPLICATION TO WITHDRAW

50. One apparent route for terminating membership is under Bylaw I (7), which provides that the local association give notice of its intention to withdraw to the CFS National who would then review the notice and if it concluded the notice was in order, make recommendations and put the matter to a vote in the next AGM.

51. In accordance with Bylaw I(7), following the 2007 Referendum, the SFSS gave notice of its intention to withdraw and asked the CFS to put the matter to a vote at the November 2007 AGM. They refused to do so on the grounds that, as they interpreted Bylaw I(7), the AGM could only vote on the motion if the individual members of the local association had already voted to leave pursuant to the defederation referendum process under Bylaw I(6).

Affidavit of Lucy Watson No. 1, Exhibits "E" and "F" and "J", PETITIONER'S BOOK OF DOCUMENTS, TAB 5, 6, AND 8

52. The SFSS also circulated a Petition asking for the Defederation Referendum over the summer of 2007 and obtained the signature of over 10% of the students at SFU.

Affidavit of Derrick Harder No. 2, Exhibits "C", PETITIONER'S BOOK OF DOCUMENTS, TAB 7

53. Between the activities in Forum, the 2007 Referendum and the Petition, many students worked hard over an extended period to secure their right to have a Defederation Referendum. They then gave notice and had to wait from August 2007 to March 2008 to have the vote. In the ordinary course, university students graduate and move on. Lengthy delays will deprive these students of their to have a vote on membership in the CFS and, if successful, to the benefits of that vote.

54. Derrick Harder, President of the SFSS at the time of the Defederation Referendum, has outlined why it is important to the SFSS to have the issues to be resolved expeditiously:

(a) A number of the individuals at the SFSS, who participated in the Defederation Referendum, and events leading up to it, were students at SFU. Some of them, like Mr. Harder were graduating. Others were leaving for the summer or moving on to other projects. He was concerned that the SFSS would lose witnesses as time passed.

(b) A new Board of Directors was assuming office on 1 May 2008. Only three of the Board members from 2007-2008 were on the new Board and they had limited involvement in the Defederation Referendum. He felt that it would not be responsible or fair to leave it to them (and future Boards) to sort out the dispute.

(c) There was a new academic term commencing in May 2008 and SFU would be collecting student fees. In previous years, SFU had collected a percentage of students' fees, which the SFSS forwarded to the CFS. The CFS was only entitled to those fees if the Defederation Referendum was invalid and the students at SFU were still members of the CFS.

(d) The SFU students who voted in the Defederation Referendum had an interest in having this matter resolved conclusively and quickly.

Affidavit of Derrick Harder No. 1, sworn 14 April 2008, para. 20, CHAMBERS BRIEF VOL II TAB 32, P. 5

55. Mr. Harder has further deposed that he was concerned, based on what he believed that occurred at another universities, that the CFS would commence a Fee Action but would delay in doing so and that the litigation would drag on for some years. Mr. Harder has referred to fee litigation between the students' society at Acadia University and the CFS arising from Acadia's defederation from the CFS. Titus Gregory referred to the same ongoing litigation, which he notes commenced in 1995. He also notes that an issue in the litigation was whether the 1985 amendments had been validly adopted. In Lucy Watson's Affidavit, which responds to Mr. Gregory's Affidavit, Ms. Watson does not dispute Mr. Gregory or characterization of the issue. Her only response was that the issue was finally settled in 2007 (having commenced in 1996), without there ever being a ruling on the validity of the CFS bylaws. Apparently, the legality of the CFS Bylaws was in issue in that litigation as they are in this.

Affidavit of Derrick Harder No. 2, sworn 4 September 2008, para 53, CHAMBERS BRIEF VOL I, TAB 33, P. 16 AND EXHIBITS "A", "U",

Affidavit of Titus Gregory No. 1, CHAMBERS BRIEF VOL III(A), TAB 34, P. 8, para. 16

Affidavit of Lucy Watson No. 1, para. 92, CHAMBERS BRIEF VOL IV(A), TAB 43, P. 25

56. Clearly, the CFS has been aware since 26 May 2008 (the date Ms. Watson swore her affidavit) that the validity of the bylaws is a live issue for the SFSS, because the issue was raised in the Harder and Gregory affidavits, and Ms. Watson responded to it in her affidavit.

57. All of the reasons for Mr. Harder's concerns have intensified. Yet another SFSS Board will assume office in May 2009, another year of SFU students will have graduated and moved on, and another year of students will soon be joining the SFU student body and paying their fees.

3. Chronology

58. The Bylaws the CFS relies on state that the individual members of the CFS collectively belonging to a member local association have *sole authority* to initiate a defederation referendum by submitting to the CFS National Executive a petition, signed by not less than ten percent (10%) of the Individual members of the association, calling for the referendum. The CFS Bylaws do not state when the referendum must be held following receipt of a petition, but it is implicit that it must be held expeditiously, at a time when the persons signing the petition would be able to exercise their franchise.

CFS Bylaw I(3)(iii), Lucy Watson Affidvit #1, sworn 26 May 2008, Exhibit "A", p. 10, PETITIONER'S BOOK OF BYLAWS, TAB 1, P. 7

59. In the summer of **2007**, 10.57% of the registered students at SFU signed the 2007 Petition asking for Defederation Referendum. The Registrar of SFU confirmed that the persons who signed it were SFU Students.

Affidavit of Derrick Harder No. 2, para. 15, Exhibit "C", PETITIONER'S BOOK OF DOCUMENTS, TAB 7 P. 18

60. On **27 August 2007**, the SFSS delivered to the CFS the 2007 Petition and a Notice of Intention to Hold a Referendum ("the Notice") pursuant to the CFS Bylaws. The Notice also set out the date of the Defederation Referendum, 18-20 March 2008, as required by CFS Bylaws. The date of the Defederation Referendum is one of the key issues in these proceedings because the CFS says that holding the Defederation Referendum on those dates invalidated the Defederation Referendum. The CFS has known about those dates since August 2007.

Affidavit of Derrick Harder No. 2, Exhibit "C", PETITIONER'S BOOK OF DOCUMENTS, TAB 7, P. 17

61. On **3 December 2007**, Amanda Aziz, National Chairperson of the CFS, acknowledged that the 2007 Petition had the requisite number of signatures and that a Defederation Referendum would be held. (There is no explanation on the record for why the CFS waited from 24 August

2007 until 3 December 2007 to formally acknowledge the 2007 Petition). This meant that, under the CFS Bylaws, the students of SFU had a right to vote in the Defederation Referendum. This right dates from 27 August 2007, when the CFS received the official notice of the Defederation Referendum and the Petition.

Affidavit of Derrick Harder No. 2, Ex. "F", PETITIONER'S BOOK OF DOCUMENTS, TAB 11

62. On **27 February 2008**, several weeks before the voting was to commence, the CFS advised the SFSS, though counsel, that, in its view, there could not be a fair vote. In that letter the CFS said that if its demands were not met, it would consider court action. There was sufficient time for the CFS to apply for a court order to rectify what it saw as deficiencies in the procedures, as it did in the case of a defederation referendum by the Kwantlen Students' Society in March 2008. It chose not to do so.

Affidavit of Lucy Watson No. 1, Exhibit "X", PETITIONER'S BOOK OF DOCUMENTS, TAB 19

63. In another letter from counsel date **29 February 2008,** the CFS informed the SFSS that it would not accept the results of the Defederation Referendum.

Affidavit Watson Ex. "X", PETITIONER'S BOOK OF DOCUMENTS, TAB 21

64. The vote in the Defederation took place on **18-20 March 2008**. The results were released the same day.

Affidavit of Derrick Harder No. 1 para. 15, CHAMBERS BRIEF VOL II, TAB 32, P. 15

65. On 1**6 April 2008**, the SFSS commenced proceedings by way of the SFSS Petition, in the hopes of getting the matter heard expeditiously.

66. On **28 April 2008**, counsel for the CFS National wrote to counsel for the SFSS stating his position that the matter should be resolved by writ and statement of claim:

> *You have commenced the Proceeding on behalf of the SFSS by way of petition. For the reasons set out in this letter. this matter is complex in terms of both legal and factual issues. In our view, this matter cannot be dealt with by way of petition pursuant to Rule 10 of the Supreme Court Rules. The CFS's position is that this matter must be dealt with by writ and statement of claim and it will*

> *oppose any effort to proceed by way of petition. We ask that you reconsider and deal with this case by way of writ and statement of claim.*
>
> **Affidavit of Lucy Watson No. 1, Exhibit "TT", PETITIONER'S BOOK OF DOCUMENTS, TAB 37, P. 430**

67. The letter then continued to raise all the complaints that the CFS now raises in their statements of claim. There is no evidence of a change of circumstances between April 2008 and now that could justify the CFS delaying in commencing the action. If the CFS believed that the validity of the election could be resolved through the petition, but that the petition should have been converted to a trial, it should have made such an application pursuant to Rule 52. If it was of the view that the CFS' claim for fees had to be resolved through a separate action, then it was incumbent on to CFS to bring that action expeditiously.

> **Affidavit of Lucy Watson No. 1, Exhibit "TT", PETITIONER'S BOOK OF DOCUMENTS, TAB 37**

68. Counsel for the CFS then made a the following objection as to the form of service:

> *As well, we now have your letter of April 24, 2008 with respect to service. With respect, the issue is where the CFS and CFS-Services were served, not their status in British Columbia. Please provide evidence of service In British Columbia. If there is no such evidence, we cannot see how these parties can be said to have been served within British Columbia.*
>
> **Affidavit of Lucy Watson No. 1, Exhibit "TT", PETITIONER'S BOOK OF DOCUMENTS, TAB 37, P. 435**

69. The SFSS had tried to serve the CFS - National and the CFS-BC at their registered addresses. Personnel in the office of the CFS-BC initially refused to accept service. Furthermore, the address for service of the CFS - National and Services was no longer current, so their head offices in Ontario were served. In any event, counsel was obviously acting for the CFS – National (as he had been throughout), and he had the documents as he was making the objection. It is difficult to conceive of any purpose in raising such an objection, other than to cause delay

> **Affidavit of Karen Kirkpatrick No. 3, CHAMBERS BRIEF VOL V(B), TAB 57, Ex. A, P. 1**

70. On **29 April 2008, 12 May 2008, 16 July 2008, and 21 July 2008** counsel for the SFSS wrote to the CFS urging them to provide their affidavits in a timely fashion, if not in accordance

with the rules. The CFS failed to do so, indicating, through counsel, that it did not see the need to do so

Affidavit of Karen Kirkpatrick No. 3, CHAMBERS BRIEF VOL V(B), TAB 57, Ex. A, B, L AND O

71. On **8 September 2008**, counsel for the CFS wrote counsel for the SFSS demanding the payment of fees. In that letter, counsel for the CFS acknowledged that the Petition would not resolve all the issues between the parties.

Affidavit of Derrick Harder No. 2, Exhibit "V", pp.115-16, PETITIONER'S BOOK OF DOCUMENTS, TAB 39, p. 116

72. On **11 September 2008**, counsel for CFS-BC wrote to counsel for the SFSS demanding payment of fees and adopting the CFS position.

Affidavit of Derrick Harder No. 2, Exhibit "W", PETITIONER'S BOOK OF DOCUMENTS, TAB 40

73. The hearing was originally set for **October 2008**, but on **23 October 2008** it was rescheduled to be heard on **28-30 January 2009.**

74. On the afternoon of **23 December 2008,** the last working day before the Christmas holidays, the CFS delivered its Writ and Statement of Claim. This was ten months after the CFS had notified the SFSS that it would not accept the results of the Defederation Referendum. The CFS has provided no explanation for the delay between February and December, or between September 2008 (when it acknowledged that it would have to bring its own action) and the end of December 2008. On 12 January 2008, after delivery of the SFSS' 18(A) application, the CFS national delivered a Demand for Discovery of Documents.

75. On **15 January 2008**, the CFS-BC delivered its Writ and Statement of Claim. This was almost eleven months after counsel for the CFS advised the SFSS that it would not accept the results of the referendum. The CFS-BC has provided no explanation for the delay between February 2008 and January 2009.

76. If the matters were put onto the trial list for a trial of two weeks, it is unlikely that a decision would be rendered before late 2010. It is reasonable to infer that the majority of SFU

students who signed the 2007 Petition and voted in the Defederation Referendum will have graduated by then.

4. OPPRESSION PROCEEDINGS MUST BE BROUGHT BY PETITION

77. The SFSS Petition must be brought by petition. It seeks a remedy under Part 9 of the *Company Act, R.C.B.C. 1996*, c.62. The *Society Act* incorporates the provisions in Part 9 of the *Company Act* dealing with relief from oppression. Section 71 of the *Society Act* provides as follows:

> 71 *(1) Despite the repeal of the Company Act, R.S.B.C. 1996, c. 62, Part 9 of that Act continues to apply to a society and an extra provincial society as though Part 9 of that Act had not been repealed.*
>
> ***Society Act*, R.S.B.C. 1996 c. 433 ("the Society Act''), s. 71, PETITIONER'S BOOK OF AUTHORTIES TAB 35**

78. Part 9 of the *Company Act* includes section 272, which provides as follows:

> *272 If 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, if it is of the opinion that the applicant is entitled to relief either by winding up the company or under section 200, either may make an order for winding up or make an order under section 200 as the court considers appropriate.*

79. Section 200 of the *Company Act* provides as follows:

> *200 (1) A member of a company may apply to the court for an order on the ground*
>
> > *(a) that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including the applicant, or*

80. The SFSS has also applied for relief pursuant to s. 85 of the *Society Act*. Section 85 provides that:

> 85 *(1) Despite anything in this Act, if an omission, defect, error or irregularity occurs in the conduct of the affairs of a society by which*
>
> > *(a) a breach of this Act occurs,*

> *(b) there is default in compliance with the constitution or bylaws of the society, or*
>
> *(c) proceedings at, or in connection with, a general meeting, a meeting of the directors of the society or an assembly purporting to be such a meeting are rendered ineffective,*
>
> *the court may*
>
> *(d) either of its own motion or on the application of an interested person, make an order*

81. Rule 10(1)(a) of the Supreme Court Rules provides that a person may commence an originating application, "where an application is authorized to be made to the court." This would include the applications authorized by sections 272 and 200 of the *Company Act.*

82. Rule 10(4) of the Supreme Court Rules provides that:

> *"a person wishing to bring an originating application must file a petition …"*

83. The leading case on the application of the oppression remedy to societies, *Buckley v. British Columbia Teachers' Federation,* was commenced by petition. Indeed, there is a very large body of cases concerning the oppression remedy that were commenced by petition, which is not surprising given the requirements of the *Company Act*.

> ***Buckley v. British Columbia Teachers' Federation*** **[1990] B.C.J. No. 491(SC), aff'd [1992] BCJ No. 587 (CA), PETITIONER'S BOOK OF AUTHORTIES TABS 1 AND 2**

84. It is therefore clear that the legislature intended that applications for orders to remedy oppression, and applications pursuant to rule 85 of the *Society Act*, be brought by petition and be determined summarily.

85. It was open to a respondent like the CFS to apply to convert the petition into a trial. In the nine months since the petition was filed, none of the CFS entities have applied to do so. It is submitted that it would not be appropriate for the court to consider such an order now, particularly in the absence of any application. The opening words to Rule 52 make it clear that there must be an application before the court in order for the court to exercise the powers set out in that section.

> *On an application the court may*
>
> …

> *(d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application. [Am: B.C. Reg. 95/89]Rules of Court, Rule 52(11)(d)*

86. The SFSS submits that the issues between the parties are not significantly more complex than they were when the Petition was commenced in April 2008. The question of whether the relationship among the parties was governed by the SFSS bylaws, the CFS bylaws, and the written agreements between the parties, or otherwise has been a live issue from the outset of the relationship among the parties. There is no reason why the CFS could not have applied to have the Petition turned into a trial in a timely fashion, if that was its intention.

5. PRESUMPTION THAT ELECTIONS/REFERENDUM MUST BE RESOLVED SUMMARILY

87. It is a general rule in democratic organizations that challenges to votes, elections, and referenda that affect the rights and interests of the organizations members should be determined expeditiously to ensure the proper functioning of the organization.

88. For example, the SFSS bylaws require that a request for a recount of votes must be made within seventy-two hours after the close of the polls.

> ***SFSS Bylaws 14(21) and 17(5),*** **Affidavit of Derrick Harder No. 1, Ex. "A", PETITIONER'S BOOK OF BYLAWS, TAB 3, P. 17 and 18**

89. The *British Columbia Election Act* requires that challenges to elections must be brought within 30 days unless they deal with "corrupt practices, duress, intimidation" in which case they have three months. Also under the *Elections Act,* challenges are brought by petition, not writ of summons and statement of claim.

> ***Election Act,*** **R.S.B.C. 1996 c. 106, s. 150, PETITIONER'S BOOK OF AUTHORITIES, TAB 39**

90. While this legislation is not binding in the present case, it confirms that the legislatures of this province have recognized the need to have election and referendum challenges resolved summarily. [1]

91. The CFS takes the position that decisions of the ROC govern the conduct of defederation referenda. The ROC established procedures for making, investigating, and adjudicating complaints of irregular practices. Under this procedure all complaints concerning either an alleged violation of the Bylaws or the referendum rules had to be made within 24 hours of the alleged violation and decided within 24 hours of receipt of the complaint:

> *No complaint will be considered by the Oversight Committee unless it is submitted to the cfs.sfss.roc@gmail.com e-mail address and is received within 24 hours of the alleged violation.*
>
> *Where a complaint is received and found to be complete, the Oversight Committee shall investigate the facts and shall, within 24 hours, either dismiss the complaint or schedule a meeting of the Committee where the complaint will be heard. Such a meeting will be scheduled within one week…*
>
> **Minutes of 17 March 2008 ROC Meeting, Affidavit of Michaeal Letourneau, Exhibit "D", p. 008, PETITIONER'S BOOK OF DOCUMENTS, TAB 50, P. 8**

92. This procedure is significant for two reasons. First, it is an illustration of the general principle that challenges to elections and referenda must be made and decided quickly. Second, as a general principle courts refrain from deciding disputes in private societies if the complainants have not exhausted their internal remedies. It is submitted that that principle should be applied here, and the Court should decline to rule on the CFS complaints of irregular voting practices that could have and should have been brought to the ROC. Even if the ROC had remained deadlocked and was unable to decide the complaints, if the complaints had been made in a timely fashion, it would have been possible to investigate them, and possibly verify or dismiss the complaint.

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1. [1] The November 2000, US presidential election, with vastly more complex issue than are presented here, was heard and determined by state courts, federal courts, and the US Supreme Court within the ten weeks between election day and inauguration day in January 2001.

6. APPROPRIATENESS OF SUMMARY TRIAL

93. It is anticipated that the CFS may argue that the issues between the parties are not capable of summary determination, whether by petition or by summary trial, because the issues are too complex, or the evidence is too contradictory.

94. In *Samra v. Guru Nanak Gurdwara Society*, a member of a society commenced an application for relief by way of petition. The respondent applied to have the petition converted into a Writ of Summons and Statement of Claim, and for the matter to be decided as a trial (unlike the case at bar). The trial proceeded by way of summary trial under Rule 18(A). At the summary trial, the respondent argued that the issues were too complex to be tried summarily, and that the proceedings should be adjourned to the trial list. Mr. Justice Smart rejected the argument and the trial proceeded by way of 18(A)

> *48 There are many decisions regarding the limitations placed on a judge when making findings of fact based on conflicting affidavit evidence. Counsel have referred me to a number of these decisions, including Cotton v. Wellsby (1991), 59 B.C.L.R. (2d) 366, 50 C.P.C. (2d) 138, 4 B.C.A.C. 171; Jutt v. Doehring (1993), 82 B.C.L.R. (2d) 223, 24 B.C.A.C. 313; and Orangeville Raceway Ltd. v. Wood Gundy Inc. (1995), 6 B.C.L.R. (3d) 391, 59 B.C.A.C. 241, as well as numerous decisions of this Court. They all emphasize that a judge must exercise caution when faced with conflicting affidavit evidence. However, none of these cases resile from the following statement of Chief Justice McEachern in Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.) at para. 55:*
>
> > *... a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. <u>It may be, however, notwithstanding sworn evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given.</u> For example in an action on a cheque, the alleged maker might by affidavit deny signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.*
>
> *49 All of the membership enrolment and election decisions provided to me appear to have proceeded under Rule 18A. The reason, I expect, is the cost and inherent delay in proceeding with a full trial. Further, even after a full trial, conflicting testimony may not be easy to resolve.*

> *50 I believe this matter can be determined under Rule 18A. I believe I can make the necessary findings of fact. I will rely on those facts that are not in dispute and the documentary evidence upon which I find that I can place reliance. I will only give as much weight as is appropriate to affidavit or discovery evidence that is in conflict with other affidavit or discovery evidence, when it is supported by other evidence upon which I can rely.*
>
> *51 I recognize that it is alleged that some members of the executive have lied under oath or have been parties to backdating documents or creating false documents. These are serious allegations. I have been reminded by counsel of the need for a level of proof commensurate with such allegations.*

Samra v. Samra v. Guru Nanak Gurdwara Society **[2007] B.C.J. No. 1324 (SC), PETITIONER'S BOOK OF AUTHORITIES,TAB 3, P. 10. AFFIRMED [2008] BCJ NO. 843, AT PARAGRAPHS 87-93, p. 24-26**

See also*, Dockside Brewing Co. v. Strata Plan* LMS 3837 [2007] B.C.J. No. 583 (C.A.), PETITIONER'S BOOK OF AUTHORITIES,TAB 4

7. COST AND DELAY

95. In the *Samra* decision, Mr. Justice Smart cited two related reasons why election disputes should be decided summarily: delay and cost. Both of those factors are present in the case at bar. As noted above, if the validity of the referendum is remitted to the trial list, it will not be decided until some time in late 2010. By that time most of the students who were registered at SFU, signed the 2007 Petition and voted in the Defederation Referendum will have graduated. The passage of time will effectively deny them the right to a meaningful vote.

***Samra (Supreme Court), supra*, at para 50**

96. Second, the SFSS is financed by student fees. Remitting the matter to the trial list will necessarily increase the costs of the proceedings, with no guarantee of a clearer record of evidence. As Smart J. noted, "even after a trial, conflicting evidence may not be easy to resolve."

Ibid.

8. Complexity Of Evidence, And Contradictions In Evidence, No Bar To Summary Trial

97. As Mr. Justice Smart noted in *Samra*, and the Court of Appeal affirmed, the fact that the record includes contradictory evidence, even contradictory sworn affidavits, does not by itself constitute a bar to proceeding summarily.

98. The question of whether a judge hearing a summary trial is bound to remit the matter to the trial list on the ground of contradictory evidence was first considered by the Court of Appeal in *Inspiration Management v. Ltd. v. McDermid St. Lawrence Ltd.,* in the passage cited by Smart J. in *Samra.* The issue was again considered by the Court of Appeal in *Orangeville Raceway Ltd. v. Wood Gundy Inc.* (also cited by Smart J.). In that case there was conflicting evidence about whether an investor was had relied on Wood Gundy for investment advice and conflicting evidence about the investor's degree of sophistication. The Court of Appeal sat as a five judge panel to consider whether, under Rule 18A, the trial judge could decide the case notwithstanding the contradictions in the evidence.

99. In *Orangeville, supra* the appellant *Orangeville* had sued Wood Gundy and one of its employees for benefits they received from a sale of securities. The issue was whether Wood Gundy was acting as a principal or an agent. The appellant alleged that it thought they were acting as agent and not principal. The Court hearing the 18(A) concluded that Orangeville's position was not credible. The issue at the Court of Appeal was whether the Court was entitled to make this finding of credibility based on affidavit evidence:

> *4 The issue is whether the chambers judge erred in trying this action summarily under Rule 18A where credibility was the decisive issue.*
>
> …
>
> *33 In Inspiration the Chief Justice, speaking for the majority, approved earlier observations in this Court that a chambers judge is not obliged to place an action on the trial list simply because there is conflicting affidavit evidence.*
>
> *34 The chambers judge expressly asked and answered the question: was there sufficient evidence? Implicitly it must be taken that he concluded it would not be unjust to proceed on that evidence.*
>
> *35 We were urged by Orangeville that he was simply wrong in his conclusion.*

> *36 It was said on behalf of Orangeville that its Mr. Keeling was an inexperienced investor who looked to Mr. Wentworth-Stanley and Wood Gundy for advice and guidance.*
>
> …
>
> *41 The parties before us agreed to join issue under Rule 18A. The plaintiff undertook to prove by affidavit Mr. Keeling's naivety and reliance. This was contested by affidavits asserting his experience and lack of reliance. The plaintiff undertook to prove representations from which the chambers judge could reasonably conclude Wood Gundy was acting as Orangeville's agent on the lowest commission basis. This too was controverted by affidavit.*
>
> *42 The chambers judge made no findings on these contested issues. What he did do was to determine that the decisive question was: did the plaintiff know, or should it reasonably have known, from the disclosure made by the defendant in six preceding transactions as well as the transaction in question, that Wood Gundy was acting as a principal, selling or purchasing on its own behalf?*
>
> ***Orangeville Raceway Ltd. v. Wood Gundy Inc.*** **(1995), [1995] B.C.J. No. 1254 6 B.C.L.R. (3d) 391, 59 B.C.A.C. 241, PETITIONER'S BOOK OF AUTHORITIES,TAB 5, P. 2, 7-8**
>
> **See also *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), PETITIONER'S BOOK OF AUTHORITIES,TAB 6, P. 12 AT PARA. 55,**

100. In the present case, the SFSS submits that the issues before this Court can be resolved on the affidavit evidence and without a trial. The primary issue before the Court concerns the interpretation and validity of the various Bylaws and agreement. For the most part, the determination of the CFS complaints are concerned with the legal ramification of undisputed conduct. The SFSS will ask the Court to find that the CFS breached its duty of good faith towards the SFSS and its members in its conduct during and after the Defederation Referendum. In doing so, it will rely on the timing of events, which is not contested, the correspondence between the parties, and the Minutes of the ROC's meetings. This does not require the Court to resolve any contradictions on the evidence.

101. The allegation raised by the CFS fall into two main categories: allegations concerning the procedures leading up to the Defederation Referendum and allegations concerning alleged irregularities in the vote itself.

8.1 ALLEGATIONS LEADING UP TO THE ELECTION

102. **The Notice/Dates of Referendum**: The CFS takes the position that the Defederation Referendum was in breach of the CFS Bylaws and invalid because

(a) the dates of the Referendum were set out in the Notice and not in the 2007 Petition, which meant that the ROC and not the right to pick the dates of the Defederation Referendum; and

(b) the Defederation Referendum took place at the same time as the SFSS elections.

103. These are questions of law that will turn on the Court's interpretation of the Bylaws. To the extent that the Court must consider factual issues such as the manner in which Notice was given and the circumstances under which the issue arose, there is no conflict in the evidence.

104. **The Inclusion of the Fee Question:** The CFS takes the position that the Defederation Referendum was in breach of the CFS Bylaws and unfair because a referendum concerning the imposition of a new fee, should the Defederation Referendum be successful, was held at the same time as the Defederation Referendum. This is a question of law that will turn on the Court's interpretation of the Bylaws. The facts are uncontroversial.

105. **The Role of the IEC:** The CFS takes the position that the Defederation Referendum was in breach of the Bylaws and unfair and invalid because, in the end, the oversight for the vote was provided by the IEC and not the ROC. The central issue is whether the Defederation Referendum could proceed in light of the ROC's inability to fulfill its responsibilities under the CFS Bylaws. Once again, this legal issues turns on the interpretation Bylaws and other aspects of the legal relationship between the parties. To the extent that the Court must make findings of fact, it can do so without resolving any factual conflicts in the affidavit evidence.

106. **Confidentiality in ROC proceedings:** The CFS claims that there was an agreement within the ROC that ROC proceedings would be kept confidential and that the Defederation Referendum was unfair because the SFSS breached this agreement. This question as well turns on the Court's interpretation of the Bylaws. The issue, put simply, is whether there was any such agreement under the Bylaws or otherwise and if there was an agreement and it was breached, did the breach invalidate the election. This can be determined by the correspondence and Minutes of the ROC. The facts are not controversial. If a confidentiality agreement exists, it will be found

in the documents before the court. The alleged breach of confidentiality consists of a statement of a ROC member that was published in a student newspaper. That is not contradicted.

107. **Eligibility to Vote:** The CFS claims that the referendum was invalid:

(a) Because SFSS graduate students voted when, according, to the CFS, they were not entitled to; and

(b) No polling stations were set up to allow SFU students in the Kamloops program to vote.

108. Once again, these are legal issues, requiring a consideration of the CFS and SFSS Bylaws and documents relating to the creation of the graduate student society. To the extent that the Court must consider the evidence and make findings of fact and credibility, it can do so without resolving any conflicts in the evidence.

109. **Bylaw I (7):** The CFS claims that even if the SFSS members did vote to leave the SFSS, the vote had to be ratified by the CFS at is AGM. This issues turns on an interpretation of Bylaw I(7) and does not require the Court to resolve any conflicts in the affidavit evidence.

110. **Pre-Campaigning/ False campaigning:** The CFS also claims the Defederation Referendum was invalid because of what it characterizes as "pre-campaigning" by the SFSS, which appears to refer to the "We Want Out" side promoting its position prior to the two week campaign period.

(a) The SFSS submits that there was no prohibition against "pre-campaigning" in the CFS Bylaws and no such prohibition recognized under general principles of law governing elections and referenda. The resolution of this issue turns on the Bylaws and the law and there is no conflict in the evidence.

(b) In addition, the CFS says the Defederation Referendum was invalid because the SFSS campaign material was false, an allegation the SFSS denies. However, even if it was false, it could not justify overturning the results of the Defederation Referendum. Commonwealth courts have clearly stated that it is not the role of the Court to adjudicate on the truth or falsity of campaign material. One again, this is a legal issue and there is no material conflict in the evidence.

111. **Bias on the part of the IEC:** The CFS claims that the Defederation Referendum was invalid because the Chair of the IEC was biased. This issue does not require the Court to resolve any conflicts in the affidavits. Apparent bias is determined by objective facts, all of which have been put in evidence. The CFS bases its claim of bias on the basis of a newspaper article by the chair of the IEC, which is in evidence. The SFSS refutes the allegation on the basis of legal principles, and on the basis of a published newspaper article that it is in evidence.

112. **Irregularities in the Vote:** The CFS claims that the Defederation Referendum was invalid because of irregularities in the voting. The CFS bases its case on affidavits of a number of CFS operatives. The observations that these operatives claim to have made were transitory and uncorroborated by any independent evidence. There is no reasonable prospect that there are any documents that would verify or refute the claims. There is no reasonable prospect that there are additional witnesses with new evidence. There are no substantial contradictions in the evidence. In many cases, the CFS operatives claim they made observations, and drew inferences. In some cases, the subjects of the observations have filed affidavits supplementing and clarifying the evidence of the CFS operative. In any event, the Court will have to examine and consider this evidence *within* the petition and summary trial application to determine whether there are conflicts in the evidence that make it impossible to determine this issue on a summary basis. It is submitted that it would not be appropriate for the Court to entertain an application to dismiss the summary trial application as unsuitable for summary determination as a preliminary matter.

113. In addition to these complaints, the Court must consider the legality of the Bylaws, which the CFS claims were breached. It is the SFSS' position that the burden is non the CFS to prove the Bylaws and that they have not done so. There is no evidence concerning the alleged enactment of the CFS-BC Bylaws and the evidence suggests that the National CFS Bylaws were not legally enacted because the AGM at which they were purportedly passed did not have quorum. That is a legal issues that can be resolved by reviewing the Minutes of the AGM at which they were allegedly passed.

8.2 WHETHER EVIDENCE IS CONTRADICTORY IS NOT A PRELIMINARY DETERMINATION

114. It is submitted that that the determination of whether a proceeding can be resolved by summary trial, or requires a full trial with viva voce evidence cannot be made on the basis of a preliminary application. Rather, the Applicant respectfully submits that the trial judge should do as Mr. Justice Smart did: hear the evidence, consider the submissions of counsel as to the facts and law, and then (but only then) make a determination about whether the matter is capable of determination pursuant to Rule 18A.

9. CFS Has Made No Attempt To Obtain Further Oral Or Documentary Discovery

115. It is anticipated that the CFS will argue that they have not had time to obtain discovery of documents or examination for discovery.

116. In *Anglo Canadian Shipping Co. v. P.P.W., Local 8* ,a defendant was served with notice of a summary trial on December 9th of one year, for a summary trial on February 12th of the next year. The defendant argued that the summary trial should be dismissed because he did not have time for examinations for discovery or to obtain document discovery in that interval. The British Columbia Court of Appeal upheld the trial decision, rejecting that argument:

> *In my opinion, the summary trial procedure contemplated by Rule 18A cannot be open to being frustrated by one of the parties delaying the pre-trial procedures until it is too late for the summary procedure to use them effectively.*
>
> *I am not suggesting that there was any intentional delay in this case. But it must be the case that if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him into the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures frustrate the benefits of the summary trial rule.*
>
> *In this case, from the first discussion of the summary trial on December 9th until the summary trial itself on February 12th a period in excess of two months passed, and the date that was first set for the summary trial was one month after the discussion. Having regard to the kind of factual information that the defendant felt was missing, that month was, in my opinion, an adequate length of time to take more vigorous steps to prepare for the summary trial. In my opinion, it is not in this case appropriate that the judgment be set aside, on the ground that*

> *sufficient facts were not available to one of the parties to lay before the court on the summary trial application.*
>
> *I would not accede to the first point raised by counsel for the appellant.*
>
> ***Anglo Canadian Shipping Co. v. P.P.W., Local 8*** **[1988] B.C.J. No. 1380 (B.C.C.A.), PETITIONER'S BOOK OF AUTHORITIES,TAB 7, P. 3-4**
>
> **See also *Wendeb Properties Inc. v. Elite Insurance Management Ltd.* [1991] B.C.J. No. 92 (B.C.C.A.), PETITIONER'S BOOK OF AUTHORITIES,TAB 8, P. 3-4**

117. If the CFS was genuinely interested in obtaining further discovery, rather than using it as a delay tactic, it had a number of obvious options open to it. The first option was to commence an action and obtain discovery in the ordinary course in a timely fashion. The second was to apply under Rule 52 to have the Petition converted to an action, and then pursue discovery proceedings, which is what happened in the *Samra case, supra.* The CFS has not made any attempt to take advantage of those procedures or otherwise pursue disclosure.

118. The CFS has never asked to cross-examine any of the SFSS affiants. It has never asked for any specific documents. The CFS - National did not deliver its Demand for Discovery of Documents until 12 January 2009, and the CFS-BC did not deliver its Demand for Discovery of Documents until 21 January 2009.

119. The parties have exchanged many affidavits with dozens of exhibits. There is no evidence to suggest that there are outstanding and relevant documents. As noted above, there are three main categories of issues between the parties: (1) whether the pre-vote procedures undertaken by the CFS and the SFSS complied with the Bylaws (2) who got to choose the date of the Defederation Referendum and (3) how the vote was conducted on voting day. On the first issue, the central question is the interpretation of the bylaws. That does not require additional evidence. What the parties did between themselves, and in the ROC, is the subject of affidavit material.

120. On the second issue (the voting-day procedures), there is no realistic prospect that relevant documents exist. Although CFS political operatives claim that they observed voting irregularities, they did not bring their concerns to anyone's attention in time to allow a neutral third party to investigate. Furthermore, the types of irregularities the CFS operatives claim they saw are of such a nature that one would not expect there to be a record of any kind, unless a

contemporaneous complaint was made. Therefore, there is no realistic prospect that further documents exist about the alleged voting-day irregularities.

121. In *Pro Star Mechanical Contractors Ltd. v. Sandbar Construction Ltd* a party filed an affidavit deposing his belief that discoveries would yield further relevant evidence. The court found the affidavit evidence unsatisfactory, and concluded that the material documents were included in affidavits before it. In the case at bar, there is no evidence to support the assertion that the discovery process may produce more relevant evidence.

> ***Pro Star Mechanical Contractors Ltd. v. Sandbar Construction Ltd.*** **[1992] B.C.J. No. 867**
> **PETITIONER'S BOOK OF AUTHORITIES,TAB 9, P. 2**

10. ABSENCE OF EVIDENCE ON 1995 BYLAW AMENDMENT

122. It is anticipated that the CFS will argue that this matter should not proceed summarily because it does not have evidence that amendments to the CFS Bylaws that the CFS relies on ere validly adopted.

123. This is no justification for refusing the decide the matter summarily.

(a) First, the onus of proving society bylaws that a party relies on is on the party relying on the bylaws. Here, that is the CFS.

(b) Second, the SFSS Petition gave fair notice that this would be an issue. In the Petition, the SFSS pleads as follows:

> ***9*** *The Respondents do not have the power to amend the CSF-SFSS Contract unilaterally. Any provision in the CFS Constitution or Bylaws that purports to amend the CFS-SFSS Contract unilaterally is without force or effect.*
>
> ***11(d)*** *if the CFS amended its Bylaws, it would only do so in accordance with the CFS Constitution and Bylaws and the Society Act, and would not do so in a manner that conflicted with the Constitution, Bylaws or rules of the Petitioner concerning referenda; and*

(c) The present dates (January 28-30, 2009) were confirmed between counsel on 23 October 2008.

(d) On 9 December 2008 counsel for the SFSS wrote to counsel for the CFS-National and the CFS-BC emphasizing that the SFSS was intending to argue that the CFS had not proved its bylaws. It asked the CFS to admit the Minutes of the 1995 Meeting or, if it did not think they were accurate, to provide the Minutes of the Meeting.

Affidavit of Karen Kirkpatrick, CHAMBERS RECORD, VOL. V(B),TAB 57, sub-tab V

(e) On 16 December 2008, counsel for the CFS replied. He refused to provide the Minutes on the grounds that there are no discovery provisions for proceedings. It is submitted that the CFS cannot refuse to provide the evidence necessary for its case, and then rely on its own refusal to defeat a proper application for a summary trial.

Affidavit of Karen Kirkpatrick No. 3, PETITIONER'S BOOK OF AUTHORITIES,TAB 57, sub tab X

(f) The Statement of Defence of the SFSS in both CFS actions states that the SFSS puts the defendants to the strict proof of the bylaws the rely on.

Statement of Defence, CHAMBERS RECORD, VOL. I,TAB 28, P. 4 para. 14.

(g) The Reply to the Statement of Defence of the CFS claims that the relevant bylaws of the CFS-National and the CFS-BC were validly adopted. One would expect that the CFS had evidence of that point, particularly as the issue had been emphasized in correspondence between counsel over a month earlier.

CFS Reply to Statement of Defence, CHAMBERS RECORD, VOL. I,TAB 29, P. 3, para. 8

124. Third, counsel for the CFS sent his letter of December 16th seven days before the he filed the CFS' own action. As the CFS was relying on the bylaws in its own action, and on alleged violations of those bylaws, the validity of the bylaws was clearly a point that the CFS would have to prove in its own action.

125. Fourth, the absence of evidence at a summary trial could not justify a full trial unless there was evidence that the proceedings available at a full trial would produce new evidence relevant to a material fact. In the present case, the meeting at which the bylaws the CFS now relies on were purportedly passed occurred in May 1995. The evidence concerning that meeting

will have to be in documentary form. In fact, there is documentary evidence in the record and it indicates that the CFS general meeting lacked quorum at the time the bylaws were proposed. (This evidence is discussed below, under the heading *Bylaw I(7).*) It is not realistic to expect that *viva voce* evidence of a meeting fourteen years ago would add appreciably to the documentary record, particularly if that evidence contradicts the documentary record.

11. CONCLUSION ON NEED FOR SUMMARY TRIAL.

126. It is therefore submitted that this matter should be determined in a summary manner. As Mr. Justice Smart noted in *Samra*, election cases in private societies are generally tried by summary trial. The oppression remedy must be brought by petition, and must be heard by petition unless there is an application to have the petition heard as a trial. There has been no such application here.

127. In any event, it is submitted that the Court cannot make a proper assessment of this issue in a vacuum. It must examine and consider the evidence and the law in order to make a determination whether these matters may be determined summarily.

III. VALIDITY OF THE DEFEDERATION REFERENDUM

128. In order for an irregularity to result in invalidity of the referendum, the CFS must establish either:

(a) Bylaw I(6) was validly adopted and in force at all relevant times, and the irregularity violates a mandatory provision of Bylaw I(6) *and* Bylaw I(6) provides that such a violation results in invalidity; or

(b) that the irregularities are of such a nature to invalidate the referendum in accordance with the standard of review applied to elections in voluntary associations generally, as discussed further below.

12. NO PROOF OF BYLAW I(6).

129. The SFSS says that there is no proof that Bylaw I(6) in form relied on by the CFS was validly adopted. The proof of the valid adoption of a bylaw lies on the party who relies on it, here the CFS.

130. If this argument is correct, then it is submitted that all of the CFS arguments that turn on an interpretation of Bylaw I(6) fail.

131. The SFSS' argument on the invalidity of Bylaw I(6) is set out below, in the section that discusses Bylaw I(7).

13. CFS RULES GOVERNING DEFEDERATION

132. In the alternative, even if Bylaw I(6) was validly adopted, the Defederation Referendum does not violate it. In the further alternative, if the conduct of the Defederation Referendum was not in complete compliance with Bylaw I(6), the instances where compliance fell short do not justify nullifying the referendum.

133. Many of the objections of the CFS are based on their interpretation of CFS bylaws I(6) and I(7). The SFSS does not accept that these Bylaws were validly adopted. However, even if

they were validly adopted, the objections were unfounded. In this section of the argument the SFSS assumes, without conceding, that CFS Bylaws I(6) and I(7) applied to the Defederation Referendum.

134. The CFS- National and CFS-BC Bylaws are largely the same, except for numbering. This argument will refer to the numbering in the CFS National Bylaws, unless otherwise specified.

13.1 GENERAL GRASS-ROOTS PRINCIPLES

135. The rules governing Defederation Referenda in Bylaw I(6) and (7) must be read within the context of the CFS Bylaws as a whole

136. The objects of the CFS are set out in the Preamble to the CFS Constitution and Bylaws and include the following:

> *1…to organize students on a democratic, cooperative basis in advancing our own interests, and in advancing the interests of our community.*
>
> ….
>
> *5. …to facilitate cooperation among students in organizing services which supplement our academic experience, provide for our human needs, and which develop a strong sense of community with our members and other members of society*
>
> **PETITIONER'S BOOK OF BYLAWS, TAB 1, P. 3**

137. There are two categories of members in the CFS, as set out in the CFS Bylaw I(1):

(a) "Voting Members" - the local student association at the university or college whose students are members of the CFS and which is entitled to vote at CFS meetings. Voting Members are also referred to "Local Associations" in the CFS Bylaws. In the case of SFU, the Local Association is the SFSS.

(b) "Individual Members" - the individual students at the university or college, who collectively make up the Voting Member. In the case of SFU, the Individual Members are the students at Simon Fraser University ("SFU Students").

138. CFS Bylaw I(3)(a)(i) sets out the fundamental principle that that the Individual Members of the CFS (in this case the SFU students) have the final say on membership, by way of referendum, subject to other provisions in the Bylaws:

> ***3(a)(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 other provisions of this Bylaw.*
>
> (*emphasis added)*

PETITIONER'S BOOK OF BYLAWS, TAB 1, P. 7

139. In accordance with this principle, Bylaw I(3)(a)(iii) provides that the Individual Members of a society have the sole authority to initiate a referendum on membership.

> *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 by Article I(7) [sic]of this Bylaw, by submitting the National Executive of the Federation a petition, signed by not less then ten percent (10%) of the individual members of the association, calling for the referendum*

Ibid.

140. One of the core principles of the CFS constitution is that the decision of students to opt in or opt out of the CFS lies with the collectivity of individual students, not the leadership of the CFS or the local association. It is submitted that the actions that the SFSS took to get the Defederation Referendum on track and give the SFU students their right to vote was entirely consistent with the core values of the CFS Bylaws. The response of the CFS leadership, which was to create roadblocks to the Defederation Referendum, was not.

141. It is submitted that the individual members of the CFS (here, the SFU students) have a fundamental right to vote in a Defederation Referendum. The students cannot lose this right through the inadvertent failure of the CFS or the SFSS or the ROC to punctiliously observe the rule, nor can the students be deprived of this right by the deliberate actions of the CFS to undermine the Defederation Referendum.

142. In *Anderson v. Stewart and Diotte*, a New Brunswick case which has been followed in this province, a sheriff acting as returning officer of a county was alleged to have committed

many irregularities in the conduct of an election. Amongst other things, the rules stated that the sheriff "shall require" the person who files a nomination paper to swear, under oath, he knows the person who signed the nomination paper. The sheriff failed to do so. There was no doubt that the legislation placed an obligation on the sheriff to comply with this rule. The question remained whether his failure to do his duty would invalidate the election, to the prejudice of the electors and the successful candidates. Quoting the trial judge, the New Brunswick Court of Appeal said the following:

> ***24*** *Barry, J., in the course of his judgment considers very fully the question of construction, with respect to whether or not a statute should be regarded as mandatory or directory, and citing the judgment of Lord Campbell in Liverpool Borough Bank v. Turner (1860), 2 De G.F. & J. 502, 45 E.R. 715, 30 L.J. (Ch.) 379, he says, quoting from Maxwell on Statutes, ed. 3, p. 521:--*
>
> > *"A strong line of distinction may be drawn between eases where the prescriptions of the Act affect the performance of a duty, and where they relate to a privilege or power. Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the Legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under any other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative. ... When a statute confers a right, privilege, or immunity, the regulations, forms, or conditions which it prescribes for its acquisition are imperative, in the sense that non-observance of any of them is fatal."*
>
> ***25*** *And at pp. 528, 529: --*
>
> > *"On the other hand, where the prescriptions of a statute relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature; they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal indeed, but it does not affect the validity of*

> *the act done in disregard of them. It has often been held, for instance, when an Act ordered a thing to be done by a public body or public officers, and pointed out the specific time when it was to be done, that the Act was directory only, and might be complied with after the prescribed time. ... To hold that an Act which required an officer to prepare and deliver to another officer a list of voters, on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it, to disfranchise the electors; a conclusion too unreasonable for acceptance."*

26 *Barry, J., is thus using the summing up of the law as found in Maxwell on Statutes, ed. 3, pp. 528, 529, with which I fully agree, and it seems to me in the present case to affect with invalidity the nomination of Stewart and Diotte because the sheriff did not require the oath mentioned in sec. 69 of the Act to be administered, would work serious injustice not only to the candidates but to the electors of the county as well, and that sec. 69 and many other sections in the Act, apart from those which are clearly obligatory or declaratory, must be regarded as mere instructions for the guidance and government of the sheriff or of those on whom duties are imposed, or in other words, as directory only.*

…

30 *In giving judgment in the same case Strong, J., referred to the Monck Election case (1876), H.E.C. 725, in which it was held that the neglect or irregularities of the deputy returning officers will not invalidate an election unless they have affected the result of the election or caused some substantial injustice. Blake, V.-C., in the course of his judgment said at pp. 727, 728:--*

> *I do not think I should lightly disfranchise so large a body of the electors, nor should I lightly say the irregularity is of such a nature as to disfranchise and this disfranchisement being so general, the whole matter must be set at large and a new election ordered. I am of opinion that, under this clause, irregularities of the nature here relied upon, in order to invalidate the election must be substantial and not mere informalities. That the informality must be of such a nature as that it may reasonably be said to have a tendency to produce a substantial effect upon the election."*

31 *Blake, V.-C., also referred to the Hackney case (1874), 31 L.T. (N.S.) 69 at p. 72, quoting Grove, J., to the following effect:--*

> *"An election is not to be upset... it is not to be upset because the clock at one of the polling booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated to affect the result of the election."*

32 *And the Vice-Chancellor adds:--*

> *" It must also be borne in mind that if the Court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness today may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some sinister purpose, and have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him."*

Anderson v. Stewart and Diotte **[1921] NBJ No. 9, at paras 24-33, PETITIONER'S BOOK OF AUTHORITIES,TAB 10, P. 8-11**

143. The CFS position would mean that under its Bylaws the Defederation Referendum could not proceed if the ROC did not or would not be prepared to run the Defederation Referendum, which in this case it clearly was not. This interpretation of its Bylaws, would effectively disenfranchise the unusually large number of students who voted in the Defederation Referendum.

13.2 INTERPRETATION OF ELECTION/REFERENDUM RULES

144. The SFSS further notes that it is an accepted principle of interpretation that legislation and rules governing elections and referenda should be interpreted in a manner that facilitates the voting process:

> ***106*** *The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound it is essential for the preservation of democratic rights. The principle was well expressed in Cawley v. Branchflower (1884), 1 B.C.R. (Pt. II) 35 (S.C.). There Crease J. wrote at p. 37:*
>
> > *The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with... . It looks to realities, not technicalities or mere formalities, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute. [Emphasis added.]*
>
> ***107*** *To the same effect in Re Lincoln Election (1876), 2 O.A.R. 316, Blake V.C. stated (at p. 323):*
>
> > *The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable*

> *compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise ... .*
>
> *It can be seen that enfranchising statutes have been interpreted with the aim and object of providing [page1050] citizens with the opportunity of exercising this basic democratic right. Conversely restrictions on that right should be narrowly interpreted and strictly limited.*
>
> (emphasis added)

Haig v. Canada; Haig v. Canada (Canada Electoral Officer) **[1993] 2 SCJ No. 84, [1993] 2 SCR 995, PETITIONER'S BOOK OF AUTHORITIES,TAB 42, P. 36 (SCR p. 1049)**

13.3 LIMITED PENALTY OF NULLITY

145. It is also clear from a plain reading of the CFS Bylaws that the parties did not intend that the ROC's failure to fulfill its responsibilities would invalidate a referendum. Bylaw I(6) deals with six topics related to defederation referenda:

(a) the initiating petition (Bylaw I(6)(a);

(b) notice (Bylaw I(6)(b));

(c) campaigning (Bylaw I(6)(c);

(d) voting (Bylaw I(6)d);

(e) quorum (Bylaw I(6)(e); and

(f) the ROC (Bylaw I(6)(f).

CFS Bylaw I(6), PETITIONER'S BOOK OF AUTHORITIES,TAB 1, P. 10

146. Bylaw I(6) does not provide that failure to comply with each and every rule in Bylaw I(6) carries the penalty of nullity. Rather, Bylaw I(6)(b)(v) only provides that failure to comply with the notice provisions invalidates a referendum.

> *"Failure to adhere to the notice provisions in Articles b.i, b.ii. and b.iii. shall invalidate the results of the vote.*
>
> ***Ibid.***

147. By necessary implication, failure to observe the other aspects of Bylaw I(6) was not intended to invalidate a vote. This is consistent with Bylaw I(3)(a)(iii), which sets out the basic

principle that individual members have a right to decide issues of membership. It would be inconsistent with the basic democratic values expressed in that Bylaw if students could lose their right to defederate simply because an official with the SFSS or the CFS failed to observe all of the provisions of Bylaw I(6). It is also consistent with the legal principle that the failure by an electoral official to do his duty does not automatically invalidate the election and disenfranchise innocent voters and persons interested in the outcome. .

13.4 PETITION.

148. The SFSS complied with all the provisions of the CFS Bylaws over which it had any control.

149. The right to commence a Defederation Referendum by petition is repeated in Bylaw I(6)(a). As noted above, the first step in the defederation process process in CFS Bylaw I(6)(a), was for the SFSS to deliver a petition. On 24 August 2007, the SFSS forwarded the 2007 Petition to the CFS National Office calling for a defederation referendum, signed by more than 10% of SFU students. The Registrar of SFU, Katherine Ross, verified that the individuals who signed the Petition were registered as students at SFU.

> **Affidavit of Derrick Harder No. 2 paras 15-16, CHAMBERS RECORD, VOL. II ,TAB 33, P. 5 and Exhibit "C", PETITIONER'S BOOK OF DOCUMENTS ,TAB 7**

150. As noted earlier, while sending a petition to the CFS is the first step in the CFS process, it was not the first step for the organizers at SFU. Students at SFU had held an earlier referendum to test public opinion

13.5 NOTICE

151. The second step in the process, as set out in Bylaw I 6(b) of the CFS Bylaws, was for the SFSS to deliver six months notice, including the dates of the Defederation Referendum, to the CFS head office by registered mail. Bylaw I(6)(b) provides as follows:

> ***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 mall to the head office of the Federation not less than six (6) months prior to the vote.*
> *iii. Notice of the vote must include the exact dates and times of voting.*

> *Iv. In the case of a withdrawal referendum incorporating a mail·out component, the exact date of the referendum shall be the dale the ballots are mailed to the Individual members;*
> *v. Failure to adhere to the notice provisions In Articles b.i. b.lI. and b.iii. shall invalidate the results of the vote*
>
> **CFS Bylaw I(6), PETITIONER'S BOOK OF AUTHORITIES,TAB 1, P. 10**

152. Bylaw I (6)(b)(i) addresses periods in which no referenda could be held. The Defederation Referendum at SFU complied with that rule.

153. Bylaw I (6)(b)(iii) provides that, "*Notice of a vote on Defederation must include the exact dates and times of voting.* There is no requirement that the petition include the date of the vote. Since the receipt of the notice triggers the CFS obligation to create an ROC, it is logically impossible for the ROC to have the power to set the date of the vote.

> ***Ibid.***

154. On around 24 August 2007, the SFSS also sent the formal Notice of the dates of the Defederation Referendum by registered mail to the CFS national office in Ottawa and provincial office in Vancouver. The Notice stated the following:

> *This is official Notice that the SFSS will be holding a referendum to determine whether SFSS members wish to defederate from the CFS. The SFSS is also delivering a Petition to the CFS, signed by over 10% of its members, asking for the referendum.*
>
> *The vote will take place on 18,19 and 20 March 2008, between 9:30 a.m. and 7:30 p.m.*
>
> **Affidavit of Derrick Harder No. 2, Exhibits "D", PETITIONER'S BOOK OF DOCUMENTS, TAB 7 (Notice)**
>
> **Affidavit of Derrick Harder No. 2, Exhibits "D", CHAMBERS RECORD, VOL. II,TAB 33, Ex. "D" (Proof of Delivery)**

155. In accordance with the additional provision concerning notarization set out in the CFS-BC Bylaws, the Notice document had been signed by a Notary.

156. On 5 November 2007, the SFSS advised the CFS that the date for the Defederation Referendum coincided with its general election.

Affidavit of Derrick Harder No. 2, Ex. "E", PETITIONER'S BOOK OF DOCUMENTS,TAB 9

157. In a letter dated 3 December 2007, the CFS acknowledged receipt of the materials. The CFS did not express any concern with respect to the adequacy of the 2007 Petition, the form of notice or dates of the Defederation Referendum in its letter. The CFS acknowledged its duty to form a ROC, which necessarily means they acknowledged that the Petition was in good order.

Affidavit of Derrick Harder No. 2, Ex. "F", PETITIONER'S BOOK OF DOCUMENTS,TAB 11

158. As a result, the students of SFU had a collective right to vote in a Defederation Referendum, and the CFS had the corresponding duties to facilitate the process in good faith, and to respect the result.

13.6 PAYMENT OF FEES

159. The other step in the CFS process, as set out in Bylaw I (6) (g), is for the local association to pay any outstanding Federation fees no less than six weeks before the date of the referendum, which the SFSS did.

Affidavit of Derrick Harder No. 2, CHAMBERS RECORD, VOL. II,TAB 33, P. 7 para. 21

13.7 NOTICE UNDER THE SFSS BYLAWS

160. In addition to giving notice under the CFS Bylaws, the SFSS gave notice under its own notice provisions. The SFSS Bylaws require that the SFSS give 21 days notice of any referendum. In accordance with this requirement, the SFSS Board passed a series of resolutions on 25 February 2008, to the effect that five referendum questions, including the Defederation Referendum, be put to a vote on 18-20 March 2008

Affidavit of Derek Harder No. 2, Exhibit "L", PETITIONER'S BOOK OF DOCUMENTS,TAB 51, P. 86

161. Three of the other referendum questions were unrelated to the Defederation Referendum. The fourth question concerned the re-allocation of fees if the SFSS voted to leave the CFS. This was an internal SFSS referendum and presented to the voters on a separate ballot. It was necessary to put this question to vote at the same time as the Defederation Referendum. If the SFSS members voted in favour of leaving the CFS, the fees that had previously been allocated to

the CFS would have to be re-allocated. Under the SFSS Bylaws and *University Act* decisions the collection and remittance of fees must be done by referendum.

162. It is significant that the results of the Defederation Referendum and the development fund referendum were consistent in a very general way, but not identical. Two hundred and fifty more people voted on the Defederation Referendum than voted on the Society Development Fund. 66.97% of the voters voted in favour of the SFSS leaving the CFS, but an even greater number voted in favour of the Development Fund Referendum: 72.81% to 27.19%

Affidavit of Derrick Harder No. 1 , Exhibit "F", PETITIONER'S BOOK OF DOCUMENTS,TAB 42, P. 63(e)

13.8 THE ROC

163. Once a petition for a Defederation Referendum has been submitted, an ROC must be formed. Bylaw I(6)(f) provides as follows:

> ***f. Administering the Campaign and Voting***
>
> *Within three (3) months of the 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 fanned. The committee shall be responsible for:*
>
> *i. deciding the manner of voting, be that by referendum, general meeting or mailout ballot.*
>
> *ii. deciding the number and location of polling stations;*
>
> *iii. approving all materials to be distributed during the campaign;*
>
> *iv. deciding the ballot question;*
>
> *v. overseeing the voting;*
>
> *vi. counting ballots;*
>
> *vii. adjudicating all appeals; and*
>
> *viii. establishing all other rules and regulations for the vote.*
>
> **CFS Bylaw I(6), PETITIONER'S BOOK OF AUTHORITIES,TAB 1, P. 10**

164. The significance and interpretation of this provision will be discussed in greater length below, but for present purposes it is necessary to observe the following points.

(a) First, Bylaw I (6) does not say that a failure to comply with a rule or decision of the ROC results in the vote being invalid.

(b) Second, the concept that the ROC is "responsible" for the matters listed implies not just a power, but also a duty. It is the SFSS position that the provision that the ROC is "responsible" for running a referendum is "directory" not "mandatory"; that is, that a failure by the ROC to carry out its duty may lead to censure of the ROC, but it cannot lead to invalidation of the referendum. Such a result would prejudice the electors and those interested in the results of the referendum, when they have done nothing that merits being disenfranchised or losing the benefit of a successful result.

(c) Third, given the primary importance of the principle of grass-roots democracy embodied in Bylaws I (3)(a)(i) and (iii), *supra*, it would be illogical if students could lose their fundamental right to determine their membership in the CFS simply because the ROC failed to carry out its duties. There is no language in Bylaw I (6)(f) that could support such a result.

(d) Fourth, the list of responsibilities in Bylaw I (6)(f) necessarily implies that matters absent from the list are not within the jurisdiction of the ROC. This includes the date of referendum, "pre-campaigning", and other matters which the CFS appointees to the ROC insisted on.

13.9 THE ELECTION CAMPAIGN

165. Since the CFS Bylaw (I)(6) requires at least two weeks of campaigning, the campaign had to start on or around 3 March 2008 in order for the vote to proceed on 18-20 March 2008. The ROC never formally set campaign dates because the CFS appointees to the ROC would not agree to the dates set out in the Notice. However, both sides of the Defederation Referendum started campaigning in or around 3 March 2008, as did the individuals involved in the SFSS elections.

Affidavit of Derrick Harder No. 2, CHAMBERS RECORD, VOL. II,TAB 33, P. 15, para. 48

166. The campaign was actively fought on both sides and the CFS participated fully, including flying campaigners in from Ontario and other provinces. Both sides put up posters, handed out flyers, spoke in classrooms and participated in debates.

Affidavit of Derrick Harder No. 2, para. 49, CHAMBERS RECORD, VOL. II,TAB 33, P. 15, para. 49 and Exhibits S and T, PETITIONER'S BOOK OF DOCUMENTS,TAB 22 and 31,

13.10 THE CFS OPTS OUT

167. As noted above, on 27 February 2008 counsel for the CFS wrote to the SFSS complaining about several matters, and threatening court action. On 29 February 2008 counsel for the CFS again wrote to the SFSS, this time taking the position that it would be impossible to hold a fair referendum. While the ROC continued to meet, it was abundantly clear that the CFS appointees had no intention of facilitating the vote to be held on 18-20 March 2008.

Affidavit of Lucy Watson No. 1, Exhibit "X", PETITIONER'S BOOK OF DOCUMENTS,TAB 19

14. STANDARD OF REVIEW

14.1 REFERENDA

168. It is submitted that test to be applied in this case is the following:

> *the proper test for relief was whether the Students' Union had acted in "good faith and generally in accord with the concepts of natural justice".*

If the court concludes that the referendum was carried out generally in accordance with this test, the court will not overturn the results.

169. The law governing controverted elections provides a useful point of departure on some issues, and the SFSS refers to election cases in this argument. However, it is essential to appreciate that the Defederation Referendum was not an election. It did not involve the election of a person to office, with the implications for that person's rights and the ongoing governance of the society. Rather, the question at issue was one that, under the CFS Bylaws, could have been decided at a general meeting, which is much less formal and much less private than an election.

170. In *Canadian Federation of Students v. Mowat, the* Saskatchewan Court of Appeal considered a challenge to a federation referendum; that is, a referendum asking students whether they wished to join the CFS. The student society supported the CFS side. Before the election the student society passed a resolution making the society's election board the final authority on the validity of the election. The pro-CFS side had won the referendum, but the election board

refused to ratify it. The student society and the CFS then proceeded to ignore the decision of the election board. A student brought an oppression action, arguing that it was oppressive and unfairly prejudicial for the society to ignore its own resolution, which gave the election board final authority. The Court of Appeal held that the refusal of the student society to follow its own procedures was strong evidence of bad faith.

171. The Saskatchewan Court discussed the standard of review, as follows:

> ***24*** *The Students' Union and the Federation also contend that, even if he had standing, Mr. Mowat was not entitled to the relief granted by the Chambers judge. They say the judge took the wrong approach to s. 225 of the* Act. *In their view, he should have applied the case law dealing with controverted elections and, in that regard, focused on whether the alleged irregularities in the referendum process substantially affected the results of the vote.*
>
> ***25*** *In light of those submissions, it is useful to briefly summarize the reasoning of the Chambers judge. He began by referring to the controverted election cases and noted that, in light of the Elections Board report, the problems with the referendum must be taken to have been of a kind that would have affected its outcome. In other words, the judge found that the line of analysis laid down in the election cases would lead to the referendum result being set aside.*
>
> ***26*** *However, the Chambers judge went on to say that he did not believe the controverted election jurisprudence was applicable to the problem before him. Rather, relying on Walton v. Saskatchewan Hockey Association (1998), 166 Sask.R. 32 (Q.B.) and related cases***, he concluded that the proper test for relief was whether the Students' Union had acted in "good faith and generally in accord with the concepts of natural justice***"***. He answered that question in the negative. The relevant aspects of his analysis are set out below:***
>
> > *[60] 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?*
> >
> > *[61] 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?*

> *[62] 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.*

> ***27*** *I agree with the Chambers judge that the controverted election cases are not applicable in the circumstances of this case. Section 225 of the* Act *creates and delimits a statutory remedy for particular kinds of corporate conduct,* i.e. *conduct which is oppressive, unfairly prejudicial or unfairly disregards the interests of specified persons. Those provisions, like their counterparts in* The Business Corporations Act, *R.S.S. 1978, c. B-10, are remedial in nature and should be interpreted broadly. See, for example:* Saskatchewan Housing Corp. v. Gabriel Housing Corp. *(1998), 174 Sask.R. 200 (Q.B.) at paras. 68-69.*

> ***28*** *As a result, it is not appropriate to transplant into the* Act *the case law developed in the context of elections for legislative office and to consider that body of law to be of controlling effect. Such an approach runs the risk of deflecting s. 225 from its true purpose and of unduly limiting the potential scope and flexibility of its application.* **At the same time, however, I do accept that the courts should, in broad terms, be slow to intervene in voting-type disputes when the irregularities complained of are minor and of no demonstrable consequence. The Chambers judge properly recognized and appreciated this point.**

> ***Mowat v. Canadian Federation of Students*** **[2007] SJ No. 463, PETITIONER'S BOOK OF AUTHORITIES,TAB 41**

172. It is therefore submitted that the rigour that is sometimes applied in election cases does not apply to the case at bar.

14.2 CONTROVERTED ELECTION CASES

173. In the alternative, even if election cases have some application, it is submitted that none of the alleged irregularities in the referendum in the case at bar were of such a nature, individually or collectively, to justify nullifying the referendum. The standard of review for elections in voluntary associations is set out *German Triathalon Union v. International Triathalon Union,* [2002] B.C.J. No. 124 (S.C.)

> *Before turning to the arguments of the petitioners, I will refer to the applicable law, which counsel agree is set out in Leroux v. Molgat (1985), 67 B.C.L.R. 29 (B.C.S.C.). In Leroux, a defeated candidate in union elections contended that the*

election was conducted improperly and sought a declaration that it was null and void. McLachlin J. (as she then was) described the issues, at 31:

> *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; Giesbrecht v. Chilliwack (1982), 18 M.P.L.R. 27 (B.C.S.C.). Thus the main issues are whether irregularities are established, and, if so, whether the defendants responsible for the conduct of the election have shown that such irregularities did not affect the result.*
>
> ….

In Anderson v. Stewart which was cited in Leroux, Hazen, C.J. referred to numerous authorities and as to what must be shown, he said, at 115:

... In other words it must be proved that the constituency had not in fact a fair and free opportunity of electing a candidate whom the majority might prefer, and that the non-observance of the rules or forms must be so great as to satisfy the Court that it affect or might have affected the majority of the votes, or in other words the result of the election. ...

German Triathalon Union v. International Triathalon Union, **[2002] B.C.J. No. 124 (S.C.) PETITIONER'S BOOK OF AUTHORITIES,TAB 11, P. 5-6 at paras. 10, 12,**

174. In *Grey v. Parton,* for example, the Court was concerned with elections within a constituency association. One of the candidates, Parton had won over Grey by one vote. There was clear affidavit evidence a person who voted who was not eligible to do so. In the circumstances, this amounted to a substantial irregularity calculated to affect the result and the election was set aside. In the present case, the "No" side won by a margin of 1,510 out of a total of 4,490 votes.

Gray v. Parton,**[1990] B.C.J. No. 2256 (S.C.), PETITIONER'S BOOK OF AUTHORITIES,TAB 12**

175. In *Bowering v. International Union of Operating Engineers*, the Court noted that the alleged irregularities are to be considered individually and not cumulatively:

> ***39*** *Irregularities are to be considered individually and "...are not cumulative in their effect and it cannot be said that one irregularity that is not fatal becomes*

fatal when it is accompanied by irregularities which taken alone would be equally harmless" [Anderson v. Stewart, supra].

***Bowering v. International Union of Operating Engineers*, [2002] B.C.J. No. 1183**
PETITIONER'S BOOK OF AUTHORITIES,TAB 13, P. 5

176. Accordingly, the burden is on the CFS to prove that the alleged irregularities occurred, that they were substantial and that they were calculated to affect the result.

177. With this background it is possible to assess the CFS allegations.

15. EARLY CAMPAIGNING

178. The alleged irregularities concerning "pre-campaigning" are set out in the CFS - National statement of claim in paragraph 18, which alleges that the SFSS commenced a campaign to defederate starting in August 2007, and that this "early campaigning" resulted in an unfair vote. "Early campaigning" appears to refer to material appearing in posters and on websites and face book pages which supported the "We Want Out" position.

179. There is no prohibition against pre-campaigning in the CFS Bylaws or under the common law. CFS Bylaw 6(c), which addresses the issue of campaigning, simply provides that there be no less than two weeks of campaigning. It does not create any blackout period or prohibition against either side promoting it point of view prior to the commencement of the set campaign period.

180. Under the CFS' Bylaws, the individual members who want to defederate must circulate a petition and obtain signatures, as the SFSS did in the summer of 2007. During the course of that process, there would inevitably be publicity and positions taken on the merits of membership in the CFS. If there was a rule against pre-campaigning, the petition process, which is required by its own Bylaws, would be impossible to administer.

181. The CFS' position is also inconsistent with its own actions. As early as May 2007, the CFS began running an extensive and expensive advertising campaign, with advertisements throughout the Translink transit system, with the theme, "I am CFS." The CFS draws a self-serving distinction between its "I am CFS" materials and position, which it claims are aimed at

informing students and the "We Want Out" materials and position, which it claims are campaign materials. In reality, both positions promoted a particular point of view with respect to membership in the CFS. The distinction the CFS draws between information and campaign material is without merit and simply highlights the difficulties that the courts would face if a prohibition against "pre-campaigning" was implied into Bylaws governing elections in voluntary associations.

> **Affidavit of James Papadopulous, sworn 3 April 2008, CHAMBERS RECORD, VOL. III(B),TAB 42, and Exhibits "A" and "B" PETITIONER'S BOOK OF DOCUMENTS,TAB 55**
>
> **Affidavit of Michael Letourneau No. 1, CHAMBERS RECORD, VOL. III(B),TAB 37, P. 1, para. 6,7 and Exhibit "A", PETITIONER'S BOOK OF DOCUMENTS,TAB 55**

182. Imposing an indeterminate blackout period would be inconsistent with freedom of speech as well as unworkable. The free exchange of political points of view is critical to any democratic system. Just as the proponents of either side of a political debate have the right to express their views, their community has a right to hear and consider their views. The key role that free discussion plays in the democratic process was articulated in *Re Jolivet and Barker and the Queen and Solicitor General of Canada*:

> *[T]he ... right to vote ... means more than the right to cast a ballot. It means the right to make an informed electoral choice reached through freedom of belief, conscience, opinion expression, association and assembly -- that is to say with complete freedom of access to the process of "discussion and the interplay of ideas" by which public opinion is formed. Denial by the State of the freedoms necessary for the making of a free and democratic electoral choice involves denial also of the sort of right to vote contemplated by the Charter.*
>
> ***Jolivet and Barker and the Queen and Solicitor General of Canada* [1983] B.C.J. No. 1941 (S.C.) PETITIONER'S BOOK OF AUTHORITIES,TAB 14, P. 3, para. 12**

183. If one side to the debate feels that the other side is influencing potential voters in favour of one point of view, then it is up to that party to promote its position in response.

184. Any general prohibition against "pre-campaigning" would be impossible to enforce. It is not possible, or desirable, to prevent persons or organizations from speaking their minds or promoting political positions. Such a prohibition would open the door to endless court applications by defeated parties seeking to set votes aside on the basis of "pre-campaigning".

Such applications would require the court to determine, amongst, other things, what constitutes pre-campaigning, how long of a blackout period should be imposed, and what effect the pre-campaigning had on the vote.

185. The SFSS submits that the timing of this objection raises questions as to the CFS' good faith. The CFS alleges that the offending materials appeared as early in September of 2007. It did not express its concern about the issue until February 2008

16. Inaccurate And Defamatory Material

186. The CFS claims that "inaccurate and defamatory" materials were "widely distributed" without the authority of the ROC, and that as result the vote was unfair.

Statement of Claim, CHAMBERS RECORD, VOL. I,TAB 27, P. 9, para. 18(c)

16.1 NO APPROVAL BY ROC

187. Bylaw I (6) itself does not provide that distributing material that had not been approved invalidates an election. Therefore, an argument that the election should be invalidated simply because material was distributed without ROC approval must fail.

188. Further, although the ROC had procedures for considering materials for approval, it failed to abide by its own rules.

189. On 11 February 2008, it agreed to a process whereby campaign materials were to be submitted to the ROC in electronic form. Upon receipt of the materials, the ROC had until 5.00 p.m. the following day to decide on whether or not to approve them. The parties further agreed they would not engage on any fact finding with respect to the campaign materials unless specifically requested to do so by a third party.

Minutes of ROC, 11 February 2008, Affidavit of Lucy Watson No. 1, Exhibit "M", p. 155. PETITIONER'S BOOK OF DOCUMENTS,TAB 48

190. As noted, on 29 February 2008 counsel for the CFS announced that the CFS would not respect the results of the referendum.

191. On 3 and 4 March 2008, the first days of the campaign period, Garth Yule, an individual working on the "We Want Out" campaign, sent in materials for approval. While the SFSS appointees voted to approve these materials within the ROC deadline, the CFS appointees only approved a couple of the items. They made no decision with respect to the remainder within the time frame set out in their own rules. At the next meeting on 10 March 2008, the CFS appointees indicated that they would be objecting to many of the materials but did not say why. This was halfway through the campaign period. An approximately midnight on March 15, two days before voting was to start and twelve days after the first of Mr. Yule's materials were submitted, the ROC appointees e-mailed the SFSS appointees a list of their objections. The majority are simply frivolous. The ROC never did come to an agreement with respect to the campaign materials submitted by Mr. Yule.

Affidavit of Michael Letourneau No. 1, CHAMBERS RECORD, VOL. III(B),TAB 37, P. 14-17, para. 56-70; Exhibits J, and E, PETITIONER'S BOOK OF DOCUMENTS,TAB 56 pp. 25 ("Compare and Contrast"), 31 ("Take Back the Campus"), p. 35 ("I want my Voice Heard"), Exhibit E, ("Tiggles"),

Affiavit of Lucy Watson No. 1, Exhibit "DD", PETITIONER'S BOOK OF DOCUMENTS,TAB 36

192. This did not interfere with the actual campaign since both sides went ahead and posted their materials. It is simply another example of ROC`s inability to function.

16.2 ROC IS NOT A CENSOR

193. Although Bylaw I (6)(f)(iii) gives the ROC a role in "approving all materials to be distributed" in a campaign, the Bylaws do not provide any standards to be employed. It cannot reasonably be inferred that one faction in the ROC was intended to have a blanket veto over the other side's materials or to make decisions on materials arbitrarily. In the absence of specific standards in Bylaw I(6)(f)(iii), the only standards that could reasonably be applied are those recognized by the general law governing elections in voluntary associations.

194. The SFSS submits that the materials were not false or misleading. The majority of the posters and other materials expressed the opinions of SFSS members concerning membership in the CFS and the factors they considered in forming their opinions. The CFS may disagree with these individual opinions, but that does not render the material false or defamatory. The right to

express political opinions is at the heart of democracy and it is both healthy and inevitable that disagreements arise as to its contents.

Affidavit of Andrea Sandau, sworn 4 September 2008, PETITIONER'S BOOK OF DOCUMENTS,TAB 57

Affidavit of Jason Tockman, sworn 4 September 2008, Exhibit A, PETITIONER'S BOOK OF DOCUMENTS,TAB 58

195. Secondly, the CFS had the opportunity to and did post and circulate campaign materials to promote the benefits of their organization. If the CFS thought the SFSS campaign materials were false they could have and did put forth their position in their materials, in discussions with prospective voters, and during the debates. If they thought they were defamatory, the proper approach would be to file a claim in defamation.

196. Thirdly, there is no legal authority for a court in Canada to set aside elections or referendum results on the basis that assertions of fact and opinion in campaign materials are false or misleading. On the contrary, commonwealth courts and tribunals have repeatedly stated that it would be both undesirable and impossible for courts to try to judge the legitimacy of an election campaign based on the truth or falsity of campaign representations.

197. English and Canadian legislation, following the common law of Parliamentary elections, deemed certain election practices to be offences and provided that the commission of those offences, which were classified under the general heading of "corrupt practices", could invalidate an election. The prohibited activities include bribery, undue influence (by intimidation and\or fraudulent device), and treating (providing food or drink in return for a vote).

198. Section 256 of the *Election Act, R.S.B.C*, for example, prohibits the exercise of "undue influence", a historical prohibition again candidates and agents exercising "undue influence" on the will of the voters through violence, abduction, duress or the use of "fraudulent devices or contrivance" that tricked or deceived the voter. This offence was described as follows by Mr. Justice Willes in *In Re: Borough of Lichfield:*

> *The proper definition of that undue influence, which was dealt with in 17 & 18 Vict. c. 102, s. 5, is using any violence or threatening any damage, or resorting to any fraudulent contrivance to restrain the liberty of a voter so as to either compel*

> *or frighten him into voting or abstaining from voting otherwise than he freely wills.*
>
> (emphasis added)

***Re: the Borough of Lichfield*, (1869) 1 O' M & H 22, PETITIONER'S BOOK OF AUTHORITIES,TAB 115 , at p. 25**

***Election Act*, R.S.B.C. s. 256, PETITIONER'S BOOK OF AUTHORITIES,TAB 39**

199. The jurisprudence that has considered the offence of "undue influence" by way of "fraudulent device or contrivance" has repeatedly concluded that the prohibition is restricted to situations in which voters are in fact tricked or deceived in such a manner that they were prevented from exercising their free will to vote for their candidate of choice. In *The Stepney Case*, for example, the Court suggested that issuing voting cards which were intended to trick voters into believing that they could only vote for a particular candidate *might* constitute a fraudulent device if it could be established that voters were in fact deceived. In other words, the offence of "undue influence" by way of "fraudulent device or contrivance" is limited to activities that in fact interfered with the voting process itself and not activities that are directed at or might affect a voter's political judgment.

***Re: The Stepney Division of the Borough of Tower Hamlets*, (1886), 4 O'M & H 35, PETITIONER'S BOOK OF AUTHORITIES,TAB 16, at p. 57**

200. In *East Northumberland* (1875), 1 H.E.C. 387, Court concluded that issuing circulars falsely stating that one candidate had despaired of success and wanted his friends to vote for a second candidate could not constitute undue influence. The Court drew a distinction between representations that prevented electors from exercising their free will and voting for their candidates of choice, and acts that were directed at the formation of political judgment:

> *[E]ven assuming the matters stated in the circular to be false to the knowledge of the parties issuing it, it does not come within the 72nd sec. of the Act of 1868, which enacts that "everybody who shall directly or indirectly, by himself or by any other person on his behalf, by any fraudulent device or contrivance impede, prevent or otherwise interfere with the free exercise of the franchise of any voter, shall be deemed to have committed the offence of undue influence". It is, in my judgment, distinguishable from the Gloucester Case (2 O'M & H 60) which is the only case reported having any resemblance to the present. There the act complained of was one which, if it had been designed with the intent imputed, would have been calculated to have the effect of misleading*

> *persons, without any exercise of judgment, to place their mark on the ballot paper opposite the respondent's name only, and so have been calculated to make persons, by a trick and deception, vote for a candidate for whom at the time of voting they did not intend to vote. In the case before me, the most that can be said is (assuming the statement in the circular to be false to the knowledge of the parties issuing it), that they were by a falsehood appealing to the electors to exercise their judgment in voting for the friend of the parties issuing the circular.*
>
> *Now, I do not think that this clause of the statute was intended to cover cases where parties, although it be by falsehood and slander, appeal to the electors to exercise their judgment how to vote.*
>
> ***East Northumberland,* 1 H.E.C. 387 PETITIONER'S BOOK OF AUTHORITIES,TAB 17 at P. 390-91**

201. This fundamental distinction between activities and representations aimed at preventing individual electors from freely recording or exercising their vote for their candidate of choice and activities and representations that might affect the electorates' political judgment has been recognized and articulated in other jurisdictions.

202. In *Evans v. Crichton-Brown,* for example, the Australian High Court considered a series of statements made during the course of an election campaign, including statements about the past and future performance of political parties in the economic management of the country, the effect of that management on the public, and the relationship between the various political parties. The petitioners in *Evans* alleged that these statements were false and contravened s. 161 the *Commonwealth Elector Act*, which prohibited the following conduct:

> *Printing, publishing, or distributing any electoral advertisement, notice, handbill, pamphlet, or card containing any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote.*
>
> ***Evans v. Chrichton-Brown* [1980] 147 C.L.R. 169 PETITIONER'S BOOK OF AUTHORITIES,TAB 18 at p. 199**

203. The issue before the Australian High Court was whether the prohibition in s. 161 included statements made during a campaign that might have affected the voters' political judgment. The Court concluded that although the language of s. 161 was broad enough to

include misleading statements, it should not be interpreted in that manner. It considered, among other things, the impact which a broad interpretation of s. 161 might have on freedom of speech,

> *In the argument for the petitioners much stress was laid on the importance, in the public interest, of ensuring "the purity of elections" to which s.154 refers...*
>
> …
>
> *That is no doubt true as a statement of general principle. On the other hand, the framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not unduly restricted, especially during an election campaign, and the practical difficulties that might result if an election were liable to invalidation on the ground that statements made in the interests of candidates were found in subsequent litigation to be untrue or incorrect.*
>
> ***Evans*, supra, at 206**

204. The Court also noted that the broad interpretation promoted by the petitioners in that case would require the Court to assess the truth of statements of fact made during the course of an campaigns, a function that would involve the Court in a time consuming fact finding mission that it was ill suited to meet. The Court concluded that it would not attribute to the legislature an intention to expose election campaigns to such a process in the absence of clear language.

> *[E]ven if the paragraph were thought to apply only to those statements affecting a voter's choice of candidate which appear to be statements of fact, that construction would require an election campaign to be conducted in anticipation of proceedings brought to test the truth or correctness of any statement made in the campaign. Indeed any person who published an election advertisement containing an incorrect statement of fact might be exposed to criminal proceedings. In a campaign ranging over a wide variety of matters, many of the issues canvassed are likely to be unsuited to resolution in legal proceedings and a court should not attribute to the Parliament an intention to expose election issues to the potential requirement of legal proof in the absence of clear words ... [I]t can be seen that the result of many elections might be rendered uncertain if any untrue or incorrect statement of fact, opinion, belief or intention might have the effect of invalidating the election if the statement was intended or likely to mislead or improperly interfere with any elector in the formation of his political judgment.*
>
> ***Evans, supra*, at 207**

205. Canadian labour relation tribunals considering disputes arising from representation votes have reached the same conclusions. In *Gibralter Mines v. Canadian Association*, the

Steelworkers (the incumbent union) applied to set aside the certification of the CAIMAW on the grounds that the union had circulated false campaign material. After analysing the jurisprudence from the United States, Paul Weiler stated the following:

> *Our conclusions from this analysis are these. There is no explicit warrant in the Code for the Board policing the accuracy of campaign propaganda in representation elections and the positive value of such a Board-adopted policy is debatable. No one could deny that it is a bad thing if employees are misled in the representation campaign and vote for one union rather than the other as a direct result. But we are dubious that the atmosphere of a six-week contest at a mine can be compressed and conveyed at a Board hearing so that we can judge if and when this has occurred. Even when we do sense that campaign misrepresentations have influenced the vote, there is a serious question whether the election verdict should be overturned in any event. On the other hand, if this Board were to apply a standard similar to that of Hollywood Ceramics, the inevitable litigation would produce a drain on the resources of the parties and the Board and a lengthy delay in the final disposition of the representation battle. This is how Derek Bok summed up his analysis of the NLRB's effort to regulate the content of election propaganda:*
>
> > *"... these restrictions threaten established rights of the parties and depart from the normal principles governing political elections in return for a highly speculative contribution to the objectives which the law seeks to promote. Moreover, such restrictions resist every effort at clear formulation and tend inexorably to give rise to vague and inconsistent rulings which baffle the parties and provoke litigation..."* ((1964) 78 Harvard Law Rev. 38 at p. 92)
>
> *But whatever be its merits for the United States, in our judgment it would not be good labour relations policy for British Columbia to import that practice here.*
>
> ***Gibralter Mines Ltd. v. Canadian Association of Industrial, Mechanical, and Allied Workers*,[1975] B.C.R.D.B No 18 (BCLRB) at PETITIONER'S BOOK OF AUTHORITIES,TAB 19, at p. 15**
>
> ***Canadian Odeon Theatres Limited and Retail Clerks Union and International Alliance of Theatrical Stage Employees et al.* (9 May 1984) No. 185\84 (British Columbia Labour Relations Board) PETITIONER'S BOOK OF AUTHORITIES,TAB 20, P. 6**

206. In the present case, the Court need not and should not embark on an analysis of the truth and falsity of either side's campaign materials. If the CFS did not like the "We Want Out" materials, they were free to and did post their own materials in response. Finally, the SFSS notes that there is no evidence before this Court to support the allegation that any false or misleading campaign material by either side influenced any individual's vote.

17. Date Of The Defederation Referendum

207. The CFS claims that the SFSS "insisted" that the vote be held on the same day as its general elections: (1) without the authority or approval of the ROC; (2) contrary to by CFS Bylaws; and that this rendered the Defederation Referendum unfair.

208. In filed materials, the CFS appears to make three variants of this argument: (1) the 2007 Petition calling for the Defederation Referendum was deficient in that it did not state the date; (2) the right to pick the date of the Defederation Referendum is within the exclusive jurisdiction of the ROC, and (3) there is some general rule against holding a referendum on the same date as a general election.

209. These complaints figured prominently in letters sent by counsel for the CFS on 27 February 2008 and 29 February 2008, in which the CFS announced that the Defederation Referendum was invalid and it would not accept its results. They also figured prominently in the objections raised by the CFS appointees to the ROC.

Affidavit of Lucy Watson No. 1, Exhibit "X", PETITIONER'S BOOK OF DOCUMENTS,TAB 19

210. Each of these three variants is utterly without merit. It is submitted that the CFS' repeated insistence on these positions, which is must have known were without merit and would cause a deadlock on the ROC, is one of the most stark examples of the bad faith displayed by the CFS.

17.1 The Inadequacy of the Petition

211. As noted above, Bylaw I (6)(a) states that the local association must deliver a Petition signed by 10% of its local members. The SFSS did that. The Bylaws do not say that the petition itself must set out the dates of the referendum. Notice is dealt with in the next provision, Bylaw I (6)(b), which provides that local association give the CFS six months notice of the dates of the referendum and that the Notice set out the actual dates of the Defederation Referendum. The Notice delivered in respect to the Defederation Referendum complied with that provision.

17.2 ROC CANNOT FIX DATE

212. The CFS' claim that the ROC was entitled to ignore the dates set out in the Notice and set other dates for the Defederation Referendum is, once again, plainly inconsistent with the CFS own Bylaws.

(a) Bylaw I (6) (f), which sets out the responsibilities of the ROC does not include setting the date of the defederation.

(b) Bylaw I (6)(b) says that the local association must give six months notice of any referendum, including the dates of the referendum. Since the ROC is only created after notice of the Defederation Referendum is delivered setting out the dates, the ROC cannot have selected the dates.

(c) Bylaw I (6)(b) (v) of the CFS Bylaws provides that failure to comply with the notice provisions in Bylaws I (6)(b) invalidates the Defederation Referendum. If the ROC had moved the date of the Defederation Referendum it would either have had to move it six months or proceed in violation of the notice provision, thereby running the risk that the results could be challenged.

213. On a plain reading of these provisions, the ROC clearly cannot set the date of the referendum. It is the SFSS position that the CFS appointees' insistence on this point was not made in good faith and was intended to (and did) cause conflict within the ROC in the hopes of derailing the Defederation Referendum. The SFSS submits that the fact that the CFS only raised these concerns on the eve of the Defederation Referendum, months after they received notice of the dates, raises concerns about their lack of *bona fides*.

17.3 CONCURRENT SFSS ELECTIONS

214. The CFS claim that the fact that the Defederation Referendum was held on the same day as the SFSS elections violated the CFS Bylaws and created unfairness is also plainly without merit.

215. It is common for referenda and elections to be held together, as the drafters of the Bylaws would have known. However, Bylaw I (6), which prohibits referendum being held at particular times, does not prohibit referenda being held at the same time as elections.

216. On the other hand, SFSS Bylaw 17 requires referenda to be held at the same time as the general elections. There are good reasons for that rule:

(a) Firstly, it is difficult to get students out to vote and particularly difficult to get them out to vote more than once. Holding referenda and elections at the same time is thought to achieve a higher turnout of voters for both.

(b) Secondly, there are costs that the SFSS must pay when it holds elections or referenda, including paying staff to set up the booths, paying poll clerks, dedicating staff resources to support the IEC. These expenses must be paid out of student fees. If the elections and referenda are held at the same time, the SFSS avoids the cost of paying these expenses twice.

Affidavit of Derrick Harder No. 2, CHAMBERS RECORD, VOL. III,TAB 33, P. 3, para. 10

217. The SFSS requirement that elections and referendum be held at the same time did not conflict with any CFS Bylaw or any democratic principles and there was no valid reason for the CFS to object to it. The CFS has offered no reasons for holding the election and the Defederation Referendum on different days, except to say it would "confuse" students. That concern is without merit. It is common practice in democratic societies for referendum and elections to be held at the same time. Furthermore, there is no reason why the ROC and IEC could not have cooperated in respect to the logistics of the vote.

218. Once again, it is the SFSS' position that the CFS' objection to the two votes proceeding at the same time was simply another attempt to create an issue that the ROC would be unable to resolve. In order for the SFSS to agree to this request, they would have had to violate their own Bylaws. Furthermore, holding the votes together was better in terms of cost and voter turnout and the SFSS had a legitimate interest in both considerations. Once again, the CFS raised this complaint for the first time in February 2008, many months after the SFSS notified it that the two votes would be held together, and only formally objected in writing on 27 February 2008, five days before the campaign was to commence.

18. ADDITIONAL QUESTION

219. The students of SFU were asked to consider a number of referenda in addition to the Defederation Referendum. One of them asked whether the students approved of SFU collecting

the amount that would no longer be due to the CFS in the event that the students voted to defederate and remitting it to the SFSS. The ballot for this referendum was on a different piece of paper from the ballot on the Defederation Referendum question. As noted earlier, the results in the two referenda were similar, but not the same. The CFS alleges that having the two referenda without ROC approval violated the CFS Bylaws, and made the Defederation Referendum unfair.

Statement Of Claim, CHAMBERS RECORD, VOL. I,TAB 27. 18(e)

220. The argument that asking the additional question required the approval of the ROC has no merit. The ROC has the power and responsibility to decide the Defederation question. It has no power to rule on financial referenda held by the SFSS.

221. As noted above, the two ballots were separate and it was necessary for the SFSS to put the question about fees to vote. If the SFSS left the CFS, the SFSS and SFU had to have authority to adjust the payment and allocation of fees and the students had a right to decide how they were to be used. There were two options. SFU could have simply stop collecting the fees on behalf of the CFS, in which case the amount of fees the students paid would have been less. SFU could also collect the fees and remit them to the SFSS for its own use, in which case, the students would have paid the same amount.

222. The *University Act* confirms that it was the intent of the legislature in British Columbia that decisions concerning the collection of fees be determined by referendum. Under s. 27 the *University Act*, a university can only collect and remit fees to a provincial or national student organization if the students vote to join the organization by way of referendum. Although the University Act is silent as to what is to happen if the students vote to leave the organization, the only reasonable interpretation is that the University is no longer authorized to collect student fees for that organization.

***University Act*, PETITIONER'S BOOK OF AUTHORITIES,TAB 44**

223. The CFS asserts asking the fee question at the same time as the question on membership in the CFS made the Defederation Referendum unfair. Presumably the CFS has some theory about how students might be influenced by the possibility that the fees that used to go the CFS in Ottawa would instead be used by the SFSS locally. However, such theories can be nothing more

than speculation. Indeed, if students were tempted to voted for defederation because they wanted to pay less fees, the possibility that they would still have to pay the fees to the SFSS would make defederation much less attractive. This would benefit the CFS. Of course, this is mere speculation, as would be any contending theory about the effect of the two referenda on voters.

19. BREACH OF CONFIDENTIALITY OF THE ROC

224. The CFS complains that one of the SFSS appointees to the CFS, Mike Letourneau, breached a confidentiality agreement between the members of the ROC by allowing himself to be interviewed by the Peak Newspaper on 18 February 2008 concerning the two page Defederation Referendum question proposed by the CFS.

Statement of Claim, CHAMBERS RECORD, VOL. I,TAB 27, para. 18(f)

Affidavit of Lucy Watson No. 1, Ex. "N". PETITIONER'S BOOK OF DOCUMENTS,TAB 17

225. There is no confidentiality provision required under the CFS Bylaws or reflected in the Minutes of the ROC. There was no indication in the Minutes or otherwise that the meetings were in camera and no principle reason why they should be.

226. Furthermore, the CFS cannot reasonably suggest that Mr. Letourneau`s comments created unfairness. All that Mr. Letourneau did was to state his opinion that the two page question was confusing.

227. The CFS relies on what it calls a "transcript" of the ROC meetings. The so-called transcript is not admissible. It is simply one person's notes of a tape-recording, which has not been disclosed. The tape itself might have some value as evidence, and a court-certified transcript might have some value as evidence. The document that Lucy Watson has appended to her affidavit has none.

228. Further, Lucy Watson herself prepared the Minutes of the ROC meetings. The other members approved them. The ROC "Decisions" are recorded in the Minutes. Matters that may have been discussed casually during the meetings do not have any legal status, much less legal status that could bind the SFSS.

229. Finally, there is no legal principle that provides that a breach of an ROC internal agreement would disenfranchise the entire student body of SFSS.

20. BIAS OF INDEPENDENT ELECTORAL COMMISSIONER

230. The CFS complains that J.J. McCullough, the Chair of the Independent Electoral Commission, had an anti-CFS bias, which resulted in a biased and unfair vote, or a vote that appeared to be biased and unfair.

Statement of Claim, CHAMBERS RECORD, VOL. I,TAB 27, para. 18(g)

231. This claim has no basis in law, logic, or the facts. In law there is no requirement that a chief returning officer have the degree of impartiality expected of a judge, unless perhaps he or she is called upon to exercise quasi-judicial decision-making powers. Mr. McCullough did not exercise any such powers in respect of the Defederation Referendum.

232. It was noted above that the Saskatchewan Court of Appeal in *Mowat* held that the test to be applied was whether the referendum was conducted "in good faith and generally in accord with the concepts of natural justice." The court was careful, however, to distinguish the concept of natural justice applicable in the referendum from the concept of natural justice that is applicable to judicial review of quasi-judicial decisions:

> ***29*** *All of that said, there is room to question the Chambers judge's decision to build his analysis on the approach taken in cases like* Walton v. Saskatchewan Hockey Association, supra. *The authorities he referred to in this regard included* Martineau v. Matsqui Institution Disciplinary Board, *[1980] 1 S.C.R. 602;* Kanigan (Guardian ad Litem of) v. Castlegar Minor Hockey Assn. *(1996), 141 D.L.R. (4th) 563 (B.C.S.C.);* Beauchamp v. North Central Predators AAA Hockey Assn. *(2004), 247 D.L.R. (4th) 745 (Ont. S.C.) and* Miramichi Minor Hockey Club Inc. v. New Brunswick Amateur Hockey Association, *[1999] N.B.J. No. 631 (N.B.Q.B.) (QL). None of those cases deals with applications brought under s. 225 of the* Act *or its equivalent in other jurisdictions. They are all cases decided in the context of judicial review applications grounded on factors such as denials of natural justice, the* Charter, *the* Convention on the Rights of the Child *and so forth.*
>
> ***30*** *In my view, it is important not to confuse the statutory concepts of oppression, unfairly prejudicial actions and actions which unfairly disregard interests, as set out in s. 225 of the* Act, *with the various aspects of the common law that typically form the basis of judicial review applications such as the one*

> *considered in the* Walton *case relied on by the Chambers judge. Notions such as the denial of procedural fairness may inform the meaning of s. 225 to some extent in specific contexts and, no doubt, a particular action on the part of a corporation might be both "oppressive", for example, and involve procedures that in appropriate circumstance would amount to a denial of fairness. However, the assessment of an application pursuant to s. 225 of the* Act *must be measured against the concepts of oppression, unfair prejudice and unfair disregard as provided in that section. Administrative law concepts should be imported into that analysis only with considerable care and only for the purpose of giving meaning to the statutory terms found in the section itself.*
>
> ***Mowat v. Canadian Federation of Students*** **[2007] SJ No. 463, PETITIONER'S BOOK OF AUTHORITIES,TAB 41, paras 61-62**

233. While the statement of claim asserts that the alleged biases made the vote unfair, the CFS cannot point to anything that Mr. McCullough did or said, or failed to do or say, that could conceivably had any effect whatever on the Defederation Referendum.

234. The evidence falls far short of establishing an anti-CFS bias. The CFS complaint is based in part on an e-mail dated in April 2007 between Mr. McCullough and a third party who has not sworn an affidavit in these proceedings, in which Mr McCullough appears to have been critical of the CFS. This is hearsay in the mouth of CFS affiant Marne Jensen, and triple hearsay in the mouth of CFS affiant Lucy Watson. It is inadmissible on these proceedings.

235. The CFS also appears to rely on a newspaper article in which Mr. McCullough expressed views critical of the CFS. However, Derrick Harder has attached an article from the Peak Newspaper dated 17 January 2007, in which Mr. McCullough was equally critical of the SFSS. Mr. Harder deposed that he thought Mr. McCullough was suitable to run the Defederation Referendum because he had experience and had remained independent from both organizations.

> **Affidavit of Derrick Harder No. 2, CHAMBERS RECORD VOL. II, TAB 33, para 43 AND Exhibit "Q"**

21. GRADUATE STUDENTS

236. The CFS complains that graduate students voted in the Defederation Referendum when they were not qualified to do so or, in the alternative, did not have a legitimate interest in its outcome.

Statement of Claim, CHAMBERS RECORD, VOL. I,TAB 27, para. 18(h)

237. The answer to this is clear and simple: all members of the SFSS were qualified to vote in the Defederation Referendum, and on voting day all students at SFU were members of the SFSS, whether graduate or undergraduate.

238. The graduate students at SFU created their own association, the Graduate Students Society, in 2007. However, prior to 1 May 2008 they were still members of the SFSS. At the time of the Defederation Referendum, they had paid their CFS fees for the year, were members of the CFS and entitled to vote under the CFS and SFSS Bylaws. Furthermore, they did have interest in the outcome because they were concerned that the CFS would take the position that their split from the SFSS did not affect their individual membership in the CFS.

Affidavit of Michael Letourneau No. 1, CHAMBERS RECORD VOL. III(B), TAB 37, and Exhibit "S", PETITIONER'S BOOK OF DOCUMENTS,TAB 46

239. The CFS suggests that because the graduate students would leaving the SFSS and joining their own society in May 2008 they did not have a legitimate interest in the outcome of the vote. The SFSS submits that the issue is whether the graduate students were qualified to vote under the Bylaws, not whether they had an "interest". The CFS Bylaws do not prohibit graduating students from voting in federation referenda (referenda to join the CFS), even though they would not have to pay the fees resulting the CFS membership or otherwise have an "interest" in it. In short, the changing nature of the student body means that a vote will have a varying impact on different groups of new and graduating students, not to mention students yet to enrol, but that is not the measure of whether a person is qualified to vote.

240. Once again, the CFS was aware that the graduates had formed their own organization and that the Graduate Student Society was intending to split from the SFSS but only raised their objection after the vote was held.

22. THE KAMLOOPS STUDENT

241. The CFS claims that no polling station was set up in Kamloops for students attending a program headquartered in Kamloops, and no steps were taken to enable the Kamloops students to vote.

Statement of Claim, CHAMBERS RECORD, VOL. I,TAB 27, para. 18(i)

242. The SFSS replies as follows:

(a) Under established SFSS policy and practices, off-campus students vote by mail-in ballot, not at polls.

(b) The Kamloops students were off-campus students.

(c) Under these policies and practices, the university provides the IEC with a master e-mail mailing list of off-campus students, including the Kamloops students.

(d) The IEC then sends a mass e-mail to off-campus students with notice of the election and referendum, a website for further information, and an e-mail address of a person who will send a ballot package if the voter wants one.

(e) The CFS was advised of these policies and practices in November 2008, but made no objection. This practice was followed for the Defederation Referendum.

(f) The evidence from the CFS amounts to nothing more than the statement of a single student, who says only that she does not recall receiving "correspondence" she does not say with certainty that she did not receive the email.

(g) If, as the CFS claims, it is the sole authority over the Defederation Referendum to run the election, it was its responsibility, not that of the SFSS, to ensure that potential voters had notice of the Defederation Referendum, and were given the ability to vote. The failure of the CFS or ROC to do its duty cannot disenfranchise the students who did vote.

(h) The IEC complied with SFSS policy and procedures, and the CFS acquiesced in those policies and procedures by not objecting when, four months before the election, it was advised that those procedures would be used.

22.1 FACTS CONCERNING THE KAMLOOPS STUDENT

243. The evidence of the CFS on this point comes from one Kamloops student, Yvonne Coté.

22.1.1 Evidence of Michael Letourneau

244. The affidavit of Ms. Coté is intended in part to respond to the affidavit of Michael Letourneau No. 1. Mr. Letourneau was a graduate student at SFU. He has served on the IEC, assisted in the supervision and management of seven concurrent by-elections of Directors of the

SFSS, as well as a regular election of the entire SFSS Board concurrent with four referendum questions.

Affidavit of Michael Letourneau, CHAMBERS RECORD VOL. III(B), TAB 37 paragraph 3

245. Mr. Letourneau deposed as follows:

> ***85*** *Simon Fraser University does not have a physical campus in Kamloops, although it does offer a program in Kamloops. It is my understanding that polling stations have never been set up in Kamloops because it is far away from the Greater Vancouver area and there are only a small number of students served by the program. During my time on the IEC, no polling stations were ever set up in Kamloops for the events we oversaw, and to my knowledge, no such polling station has ever been set up in Kamloops for general SFSS elections or referenda.*

Affidavit of Michael Letourneau, CHAMBERS RECORD VOL. III(B), TAB 37, p.20 para. 85

(a) Ms. Coté does not refute or contradict this evidence. Ms. Coté does not deny that Kamloops students are considered "off campus" under SFU policies. She merely offers the inadmissible and irrelevant opinion that she "does not believe that Simon Fraser University students at Kamloops *should* be considered 'off-campus'"

Affidavit of Yvonne Coté, CHAMBERS RECORD, VOL. V,TAB 54, para. 3

(b) Mr. Letourneau deposed that polling stations had never been set up in Kamloops, and that the reason is that there are too few students in Kamloops to justify a polling station. Ms. Coté does not dispute this. The clear evidence, therefore, is that the standing practice at SFU that Kamloops students do not vote on SFSS referenda at polling stations. As the president of the Kamloops Student Council, one could expect that Ms. Coté would have been aware of that practice. There is no evidence that she, or any other Kamloops student, ever complained about this practice.

246. Mr. Letourneau further deposed as follows:

> ***86*** *However, this does not mean they did not have an opportunity to vote. SFU has other students who are not be able to vote at any of the campuses, distance-education students who study by mail or over the internet, students pursuing*

advanced qualifications in education who are also employed full-time as school teachers at various locations throughout British Columbia, students attending SFU-organized "field schools" in other countries, and graduate and undergraduate students performing research at other locations. These students are invited to vote by mail. The SFSS Administrative Policy 19, which is attached as pp. 100-103 of Exhibit "C" to Ms. Watson's Affidavit #1 describes the process of voting by mail. The SFSS suggested a similar procedure in its SFSS Draft Procedures.

87 *To the best of my knowledge, these procedures for allowing off-campus students to vote were followed by the IEC with respect to all of the elections and referenda of March, 2008, including the Defederation Referendum.*

Affidavit of Michael Letourneau, CHAMBERS RECORD VOL. III(B), TAB 37, para. 86-87

247. Accordingly, off-campus voters are advised of an upcoming referendum or election by e-mail. If the voter wishes to vote, they request a ballot package, which is sent by mail. The voter votes, and then returns the package.

248. Ms. Coté has not disputed this evidence, nor is there any evidence that she or any other Kamloops student ever complained about the general practice.

22.1.2 Evidence of Mr. Harder

249. On 27 November 2008, Mr. Harder sent the CFS a series of proposed election procedures (discussed further below). In the proposed procedures, Mr. Harder advised the CFS of the ordinary SFSS practices, and proposed that those practices would be used in the Defederation Referendum:

The IEC shall contact all members of the Society designated as "off-campus" for whom it has email addresses to inform them of the election and any referenda, including the Defederation Referendum, and ask them if they intend to participate. The IEC shall send each individual who indicates that he or she intends to vote in the election and/or referendum a copy of the ballots by registered mail no later than four weeks before the date of the Defederation Referendum, with instructions that only those sealed ballots that are returned the chair of the IEC before 7:30 p.m. on 20 March 2008 will be included in the count.

Comment: We have left this task to the IEC since it is required to do it for SFSS elections

Members shall be considered "off campus" if they are registered in courses or programs designated by the University as "off-campus" and are not registered in courses that are held at any campus where a polling station is present.

Affidavit of Derrick Harder No. 2, CHAMBERS RECORD VOL. II, TAB 33, Ex. e"" p. 32

250. The CFS never objected to this procedure. The ROC never objected to this procedure, or even suggested an alternative procedure.

22.1.3 Evidence of J.J. McCullough

251. On 29 February 2008, Mr. McCullough sent an e-mail to all off-campus students inviting them to vote. The e-mail was sent to a mass-mail address provided by the university. The e-mail:

(a) advised the recipient that elections and five referenda were going to be held;

(b) gave the address for the IEC website, which had further information about the elections and the referenda;

(c) advised students that if they wanted to vote they could e-mail a person who would send the ballot material by mail, and included that person's e-mail address.

Affidavit of J.J. McCullough, CHAMBERS RECORD VOL. III(B), TAB 36 para. 22 and Exhibit "F", PETITIONER'S BOOK OF DOCUMENTS,TAB 61

22.1.4 Evidence of Bobbie Grant

252. Bobbie Grant is the Electoral officer with SFU. One of her responsibilities is preparing the membership/electoral lists that the university gives to the SFSS for its elections and referenda. The list includes students on the Burnaby, Vancouver, and Surrey Campuses, as well as the Kamloops students and persons taking courses by distance learning. She gives the list to the IEC on his or her undertaking to use it only for elections and referenda.

Affidavit of Bobbie Grant, CHAMBERS RECORD, VOL. 58 , PARA. 2 AND 3

253. She has further deposed as follows:

> ***2.*** *I am responsible for generating the membership/electoral list we give to the Simon Fraser Student Society ("SFSS") for purposes of the elections, referendums and annual general meetings. The list is generated by a computer program which selects the names and other information for all students, undergraduate and graduate, who are registered in at least one credit course in the semester for which the list is run. This list includes students on the Burnaby campus, SFU Vancouver campus, Surrey campus, Kamloops students and students taking courses by Distance Education.*

> ***3.*** *This list is given to the Independent Electoral Officer on his or her undertaking to only use it for purposes of the elections and referendums.*
>
> ***4.*** *At the request of the SFSS, I also generate a list of the "off-campus students" emails, which would include emails for Kamloops students that are on record. For privacy reasons, I cannot provide individual email addresses to the SFSS. What I provide is a master email address that is created to contain all the individual email addresses. Kamloops student's email addresses would be contained within that master address. When the SFSS sends a message to that master address, it goes to all the emails addresses it contains.*
>
> ***5.*** *I have reviewed the email attached as Exhibit "F" to the Affidavit of John McCullough, sworn 19 November 2008. I have checked my records and can confirm that the master email address for "off campus students" for the 2008 elections and referenda was 1081off-campus@sfu.ca, the address listed in Mr. McCullough's Affidavit.*
>
> ***6.*** *I no longer have a copy of the lists I generated for the 2008 elections and referendums. The University has requested that we not keep mass lists on the system and so it is my practice to delete them at the end of the semester in which the list was generated. If the vote was held in March, 2008, the semester would have ended on 31 April 2008.*
>
> ***Ibid.***

22.1.5 Evidence of Yvonne Coté

254. As noted above, the CFS complaint is based entirely on the evidence of one witness, Ms. Coté, who did not swear an affidavit setting out her complaint until January 2009.

255. Of the five substantive paragraphs in Ms. Coté's affidavit, only one (paragraph 2) is admissible. The rest contain inadmissible and irrelevant opinion and unattributed hearsay.

256. Ms. Coté does not depose that she did not receive the IEC e-mail. Ms. Coté merely deposes that, "I *do not recall* receiving any *correspondence* from anyone, including Simon Fraser Student Society or its Independent Electoral Commission, about such a vote." Ms. Coté did not depose that she did not receive correspondence; she simply says that she did not *recall* receiving correspondence. She did not depose that she did not receive an e-mail. She said she did not receive an *correspondence.* She did not depose that she had given the university a current e-mail address or that she had email or checked her e-mail regularly.

257. There is no evidence from any other Kamloops student deposing that they were unaware of the elections and referenda, or that they did not receive the IEC e-mail. Ms. Coté claims that "to her knowledge" none of the other SFU students at Kamloops receive "correspondence", but she does not state the basis of her "knowledge", or what inquires she made (or did not make). Finally, if she claims to have received such knowledge from other students, it is inadmissible hearsay.

Affidavit of Yvonne Coté, CHAMBERS RECORD, VOL. V, TAB 54, PARA. 4

258. Ms. Coté then says she "certainly" did not receive any kind of mail-in ballot. It is not surprising that Ms. Coté did not receive a mail-in ballot. She would only have received one if she had replied to the IEC e-mail.

***Ibid,* para. 5**

259. Ms. Coté then claims that "to her knowledge" no other students received mail-in ballots. This claim is inadmissible, and is subject to the same criticism as her claim that "to her knowledge" no other students received the IEC e-mail.

Ibid.

260. In paragraph 6 of Yvonne Coté's affidavit she says that she would have voted in favour of the CFS. The person who drafted the affidavit then allowed her to engage in hearsay and speculation about how other students would have voted. It is submitted that this sort of statement has no place in an affidavit for any purpose.

22.1.6 Absence of Other Evidence

261. Although Yvonne Coté claims to have spoken to other students about this issue, it is notable that there are no affidavits from other students.

22.1.7 Notifying Voters and Procedure was Responsibility of CFS

262. The position of the CFS in this litigation is that the right to run the Defederation Referendum was solely within the authority and jurisdiction of the CFS. If that is true, then the responsibility for giving notice to voters, and ensuring that they were able to vote, lay with the CFS. If they did not like the SFSS method of voting, they could have raised the issue. It is

obvious that the CFS had no intention or plan to run a Defederation Referendum at all, much less one that included the Kamloops students. If the fault lies with the ROC, not the CFS, the result is the same. As argued below, the law recognizes that elections will not be invalidated, and the electors disenfranchised, because officers who have a duty fail to fulfill it.

263. The CFS cannot claim ignorance about the Kamloops students. First, if the CFS had sole authority and jurisdiction over the Defederation Referendum, then it had a responsibility of find out who the electors were and where they were located. Second, the evidence of Derrick Harder makes it clear that the CFS had actual knowledge of the policies and practices of the SFSS and IEC regarding votes from off-campus students.

264. A person who has actual knowledge of apparent irregularities, but acquiesces in allowing an election to proceed notwithstanding that knowledge, may not complain about the irregularities after the fact. In the present case, the CFS was put on actual knowledge about how the vote would be conducted among off-campus voters, but made no objection

22.1.8 IEC Followed Established Policies and Practices

265. It is clear that the IEC followed established policies and practices for notifying off-campus voters and that the IEC process was fair.

23. The ROC

266. The CFS claims that:

> *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;*
>
> **Statement of Claim, CHAMBERS RECORD, VOL. I,TAB 27, para. 18(a)**

267. This claim has two elements:

(a) The factual claim that, “the SFSS nevertheless then engaged the SFSS' independent electoral commission (the "IEC") to run the Vote, usurping the jurisdiction of the

Oversight Committee." This implies that the SFSS chose to bypass the ROC, and appointed the IEC in its place. That is not factually true.

(b) The claim that, "an Oversight Committee is to have full jurisdiction and authority over a defederation referendum". This appears to be not just a claim that a ROC has authority over a Defederation Referendum, but that it has sole jurisdiction.

23.1 ROC DEADLOCKED

268. As drafted, the CFS statement of claim implies that the SFSS chose to bypass a functioning ROC, and chose to have the IEC run the referendum in its place. The truth is that the ROC had become deadlocked and was unable or unwilling to perform its duties. In large part this was because the CFS appointees tried to change the dates of the Defederation Referendum, which the ROC did not have authority to do. The SFSS says that the CFS took advantage of the two-two voting structure of the ROC to deliberately create deadlock in order to frustrate the referendum, but whether the CFS contrived to create deadlock, or it was the result of honest differences of opinion, the point is that in late February 2008 the ROC was hopelessly deadlocked. The background leading to the deadlock is as follows.

23.1.1 SFSS Draft Procedures

269. From the start, the SFSS was concerned that the ROC process would be was unworkable. In particular, CFS Bylaw I (6) did not provide any mechanism for resolving disputes or breaking deadlocks on the four person ROC. The SFSS was concerned that the ROC would become deadlocked and that, in the absence of any mechanism for breaking the deadlock, it would not be able to fulfill its responsibilities.

Affidavit of Derrick Harder No. 2, CHAMBERS RECORD VOL. II, TAB 33, para 22-24,

270. The SFSS also wanted to come to an agreement with the CFS concerning procedures sufficiently well in advance of the vote to avoid last minute disputes. Under the SFSS Bylaw 17(2)(4), votes on referenda had to be held at the same time as the SFSS general elections, which are held every spring. The SFSS wanted to work out a procedure where by ROC and the Independent Electoral Commission ("the IEC") who had oversight under the SFSS Bylaws could work together to ensure an efficient and fair voting procedure.

271. To that end, the SFSS sent the CFS a proposed procedure on 5 November 2007, which attempted to address what it saw as the potential difficulties with the CFS process ("the Draft Procedures"). In his covering letter to Amanda Aziz, the National Chairperson of the CFS, Derrick Harder, President of the SFSS, noted that under the SFSS Bylaws, referenda at SFSS must be held at the same time as SFSS general elections, and indicated that it was his hope that a procedure could be worked to allow the two to proceed smoothly. He further expressed his concern about the lack of any mechanism to break deadlocks that might arise and suggested the appointment of a third party arbitrator, as suggested in the Draft Procedures.

> *You have now received both our Petition and our accompanying notarized Notice of Defederation…Acting in compliance with CFS Bylaw 2.4 and the Simon Fraser Student Society bylaws, we have scheduled the referendum for March 18th-20th, at the same time as the SFSS elections. To that end, we have enclosed with this letter a proposed procedure that we hope will allow the election and referendum to take place simultaneously, without the efficacy or integrity of either being compromised.*
>
> …
>
> *One of the key elements of our proposed procedure is a mechanism for resolving disputes that might arise either within the Oversight Committee, or between the OC and the Independent Electoral Commission ("IEC") required under the SFSS bylaws. As matters now stand, there is no procedure in place for resolving deadlocks within the four-person OC, and neither the SFSS nor CFS bylaws address the relationship between the IEC and OC. Amongst other things, our procedure proposes the appointment of a neutral third party arbitrator to be agreed upon by the CFS and SFSS.*
>
> **Affidavit of Derrick Harder No. 2, Exhibit "E", <u>PETITIONER'S BOOK OF DOCUMENTS,TAB 9</u>**

272. Paragraphs 14-16 of the Draft Procedures set out the SFSS proposal with respect to the independent arbitrator:

> *14. On or before 7 January 2008, the OC and IEC shall jointly appoint an Arbitrator who shall have the powers and duties set out in these Procedures. If the OC and IEC have not appointed an Arbitrator by 7 January 20008, the Arbitrator shall be appointed by the Registrar of Simon Fraser University.*
>
> *15. In order to ensure that the elections and Referendum Campaign proceed smoothly, the OC and IEC shall make best efforts to resolve any procedural issue that arise during the Defederation Campaign or vote. Subject to paragraph 16, if*

either the OC or IE are of the opinion that any issue that arises during the campaign or vote cannot be resolved jointly by the OC and the IEC in a timely fashion, that party may refer the issue to the Arbitrator, whose decision shall be binding.

16. At the close of the Referendum, the Arbitrator shall provide the Board with a report concerning any issues he or she considered and decisions he or she made. The Board shall consider the Arbitrator's Report and recommendations of the OC and IEC in determining whether or not to ratify the Defederation Referendum.

Ibid., p. 30

273. While the SFSS did not expect the CFS to accept the whole of its proposal, it did expect that it would lead to discussions and, hopefully, to an agreement on procedure well in advance of the Defederation Referendum.

Affidavit of Derrick Harder No. 2,CHAMBERS RECORD VOL. II, TAB 33 P. 7, PARA. 25

274. Mr. Harder attempted to discuss the procedures with Ms. Aziz, the chair of the CFS, during the fall of 2007 but the only response he received to the SFSS proposal was a letter from Ms. Aziz, dated 3 December 2007, indicating that sole authority to make rules concerning the Defederation Referendum rested with the ROC and that she had forwarded the SFSS letter to the CFS appointees to the ROC, Ben Lewis and Lucy Watson. She did not express any concerns at that time about the dates of the Defederation Referendum or the fact that it was going to be held at the same time as the SFSS elections.

Affidavit of Derrick Harder No. 2, Exhibit "F" , <u>PETITIONER'S BOOK OF DOCUMENTS,TAB 11</u>

275. Mr. Harder wrote another letter to the CFS head office again on 10 January 2008, which remained unanswered, introducing the SFSS appointees to the ROC and once again expressing the SFSS' hope that any differences with respect to procedure could be resolved well before the Defederation Referendum.

It is my sincere hope that one of the first tasks of the Referendum Oversight Committee will be a thorough review of the draft procedures that we submitted to you in November. As I have stated previously, I believe that we both have a since interest in a referendum that is conducted transparently, efficiently, and fairly. The interests of our membership should be paramount through this process, and it is therefore incumbent on us to develop as smooth and transparent a process as possible, that satisfies the relevant bylaws as well as the principles of democracy.

Affidavit of Derrick Harder No. 2, Exhibit G, PETITIONER'S BOOK OF DOCUMENTS,TAB 12

276. The ROC met once a week, for a total of 10 meetings on February 4, 11, 19, 25, 28, and March 3, 11, 12, 17, 28, 2008. Ms. Watson took the Minutes and the ROC approved all of the Minutes except those dated March 28, 2008. Some of the Minutes of this meeting are attached as Exhibit "M" to the Watson Affidavit No.1 and the others as Exhibits "D", "H" and "R" to the Affidavit of Michael Letourneau No. 1.

Minutes of ROC, PETITIONER'S BOOK OF DOCUMENTS,TABS 47-50 AND 52-54

277. All meetings of the ROC meetings were conducted over the telephone. In part, this was because the CFS appointees, who were both from Ontario, were not in British Columbia for the first few meetings and not available otherwise. In part, it appears that the CFS wanted to tape record the meetings. They did not inform the SFSS appointees to the ROC that they had taped their telephone conversations until Lucy Watson's Affidavit No. 2 was delivered in December 2008.

278. When the ROC first met, the CFS appointees claimed they had not seen the Draft Procedures. The SFSS appointees sent another copy to them. The CFS appointees never discussed the Draft Procedures, or provided the SFSS appointees with a draft alternative procedure. Rather, the ROC attempted to deal with issues in a piecemeal fashion as they came up. Indeed, as discussed below, it never reached agreement with respect to the many key procedures.

Affidavit of Michael Letourneau No.1, CHAMBERS RECORD VOL. III(B), TAB 37 para. 33-39

279. Instead, the ROC became bogged down in disputes and, in the absence of any procedure to break the deadlock, was unable to resolve the disputes, which included the following:

(a) As discussed above, CFS Bylaw I(6)(b) specifies that the notice provided to the CFS must set out the dates of the referendum and that failure to do so would invalidate the referendum, a position that was inconsistent with its own Bylaws. The CFS first raised the fact that the Petition did not set out the dates in or around 11 February 2008, six months after the CFS

received the Notice and Petition, and only formally raised the issue in writing on 27 February 2008, five days before the Defederation Referendum campaign was to commence.

Letter from Gowling dated 27 February 2008, Affidavit of Watson No. 1, Exhibit "X:", PETITIONER'S BOOK OF DOCUMENTS,TAB 19

(b) As noted above, the CFS appointees took the position that the Defederation Referendum and SFSS general election could not be being held at the same time as the Defederation Referendum. Once again, they first took this position on 27 February 2008, approximately four months after Mr. Harder wrote the CFS specifically indicating that the two votes were being held together, and after the CFS formally objected in writing on 27 February 2008.

Affidavit of Michael Letourneau, CHAMBERS RECORD VOL. III(B), TAB 37, P. 6, PARA. 26.

(c) As noted above, the CFS appointees objected to what it characterized as "pre-campaigning" by the SFSS. They took the position that the referendum could not proceed on the dates scheduled because it had been tainted by this campaigning and had to be moved a week. Although they claimed this offending materials had been circulated as far back as September 2007, they only raised the issue in February 2008 and did not formally object in until 27 February 2008.

Letter from Gowling dated 27 February 2008, Affidavit of Watson No. 1, Exhibit "X:", PETITIONER'S BOOK OF DOCUMENTS,TAB 19

280. Based on these objections, the CFS appointees took the position that the Defederation Referendum could not go ahead on the dates set out in the Notice. At one point, the CFS wanted to move the dates by a week. The SFSS appointees refused to change the dates. It was and remains the SFSS position that the scheduling of the Defederation Referendum was not within the mandate of the ROC and that the ROC did not have the authority to change the dates. It is the SFSS position that changing the dates would violate the notice provisions under the CFS Bylaws and arguably invalidate the referendum unless it was delayed by at least six months.

Furthermore, it was and remains the CFS position that the issue of "pre-campaigning" was without merit.

281. In addition to this dispute over timing and pre-campaigning, the CFS appointees had objected to the form of question set out in the Notice. Instead, they instead suggested a two-page question that was confusing and biased. While the CFS and SFSS finally agreed on the question, the ROC had to spend time resolving the dispute.

Affidavit of Derrick Harder No. 1 Exhibit "H", PETITIONER'S BOOK OF DOCUMENTS, TAB 16

23.1.2 ROC's Inability to Function

282. On 20 February 2008, Derrick Harder, who was aware of these problems, phoned Amanda Aziz, Chair of the CFS, and expressed concern that disputes over these fundamental issues had developed at such a late date. He followed this conversation with a letter:

> *I understand that a dispute has developed at the Oversight Committee over the dates of the Referendum, despite the fact that the SFSS gave notice of the March 18th,19th,and 20th dates in accordance with the Federations`s Bylaws in August of 2007. There was no defect in the notice as delivered and no concerns were raised by your office until this month. We have every intention of proceeding with a referendum on the dates as stated in our notice.*
>
> *While a similar dispute has been resolved around the question that was submitted with the aforementioned notice in August 2007, the fact remains that the Federation representatives to the Oversight Committee have challenged both the question and the dates of the referendum at a very late date, despite our adherence to the required notice and continued attempts to clarify the process.*
>
> …
>
> *I would note that the Student Society did anticipate these problems, and made attempts through the Fall of 2007 to develop a process for this referendum that would be fair, transparent, faithful to all relevant bylaws, and most importantly conducive to a democratic decision. The Oversight Committee, as currently constituted in the Federation`s own bylaws, has no dispute resolution mechanism, which is obviously problematic where there is an even numbers of members and no "tie-breaker vote". Should the Committee prove unable to come to a consensus on any crucial issue, it is unclear how the Referendum can proceed under the oversight of this structure. As I have stated previously, I believe that we both have a sincere interest in a referendum that is conducted transparently, efficiently and fairly.*

Affidavit of Derrick Harder No.1, Exhibit "I", PETITIONER'S BOOK OF DOCUMENTS,TAB 18

283. In the same letter, Mr. Harder expressed concern that, accordingly to a CFS game plan that had been circulated by email, Lucy Watson was involved in the CFS campaign and that appointing a CFS campaigner to the ROC created a conflict of interest. Finally, he expressed concern that neither of the CFS appointees to the ROC was a member of the CFS –BC.

Ibid.

284. On 27 February 2008, Mr. Harder received a letter from Ms. Aziz. Despite the fact that Ms. Aziz and Mr. Harder had already discussed the Defederation Referendum on a variety of occasions, she took the position that since the Defederation Referendum was "internal" to the CFS, the SFSS had no legitimate interest in it:

> *In your letter, you make reference to a proceeding with a referendum. If you referring to a referendum on continued membership in the Canadian Federation of Students, I must make it clear that the Simon Fraser Student Society does not conduct the referendum; the Federation does.*
>
> *285.* …
>
> *Any problems that arise within the referendum process are internal to the Canadian Federation of Students and will ultimately be dealt with by the members of the Federation represented by their unions.*

Affidavit of Derrick Harder No. 1, Exhibit "K", PETITIONER'S BOOK OF DOCUMENTS,TAB 20,

286. Ms. Aziz denied that Lucy Watson was involved in the campaign and told Mr. Harder to take up his concerns about CFS-BC participation with the CFS-BC. However, other than the bald assertion that Ms. Watson was not involved in the campaign, she did not deny that the task list was an accurate statement of the roles and responsibilities of the CFS members.

287. On 27 February 2008, five days before the two week campaign had to start on 2 March 2008, the CFS through its lawyers, sent the SFSS its threatening letter raising the complaints set out above, as well as other more minor complaints. Although the letter asserted a hope that the ROC could meet again to resolve the issues, it clearly articulated the CFS' position-- that it was

no longer possible to hold a fair referendum --and indicated that it was considering bringing an application:

> *The distribution of campaign materials prior to the campaign period constitutes a violation of both the letter and the spirit of the rules….Again, this activity has made it impossible to have a fair referendum on March 18-20, 2008 and must cease.*
>
> …..
>
> *The CFS does…reserve its right to pursue all possible remedies available to it in these circumstances. If the above matters cannot be resolved, the CFS may well be forced to apply for a court order to ensure that a standards of fairness is maintained.*
>
> **Affidavit of Lucy Watson No. 1, Exhibit "X", BOOK OF DOCUMENTS, TAB 19.**

288. On 29 February 2008, the last working day for the campaign. the SFSS received another threatening letter from Gowlings indicating that the CFS would not accept the results of the Defederation Referendum but nevertheless intended to campaign in the Defederation Referendum.

> *The CFS wishes to make it clear that it will not recognize the validity of this proposed poll which is being conducted outside the procedures set out in the Bylaws.*
>
> *For all 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.*
>
> **Affidavit of Lucy Watson No. 1, Exhibit "X", BOOK OF DOCUMENTS, TAB 21.**

289. The ROC continued to meet, but by this time it there was no question that the ROC could not and, in the case of the ROC appointees, would not be prepared to run the Defederation Referendum.

290. When the SFSS realized that the CFS objected to the Defederation Referendum proceeding and received the letters from Gowlings indicating that the CFS would not accept its result, it had to decide whether to proceed with Defederation Referendum. Mr. Harder, President of the CFS, described why the SFSS chose to proceed:

38. When we realized in February 2008 that the CFS objected to the Defederation Referendum proceeding and received the letters from Gowlings indicating that the CFS would not accept the results of the Defederation Referendum, we had to decide whether to proceed with the Defederation Referendum.

39. We believed that our members had expressed a significant interest in proceeding with the Defederation Referendum, given the vote at Forum, the results of the March 2007 Referendum and the Petition the SFU students signed asking for a referendum, and that we had a duty as their representatives to see the matter through. Given the pending end of the term, the notice provisions under both the CFS and SFSS Bylaws, the structural problems with the ROC, and the amount of work involved in organizing a Defederation Referendum, we concluded that if we did not proceed with the Defederation Referendum as scheduled, it would not be held until sometime in the future, if ever.

40. Furthermore, we had come to the view that the CFS complaints were unfounded and that the CFS was not proceeding in good faith with respect to the Defederation Referendum:

> *(a). We had considered the issue and concluded that there had been nothing defective in our Notice to the CFS. There is no requirement that the Petition set out the dates, and we had provided a notarized document specifically giving notice of the dates, as required under Bylaw I(6), along with the Petition. We were also concerned that the CFS had received the Petition and Notice documents in August 2007 but did not raise any concerns about the adequacy of Notice until February 2008.*
>
> *(b) We considered the issue and concluded that neither the CFS nor the ROC had the authority to set the dates of the Defederation Referendum. The CFS Bylaws specifically state that the Notice provided by the local association must include the dates of the Defederation Referendum. Once again, we were concerned that the CFS did not raise any concerns with respect to the dates of the Defederation Referendum until February 2008, six months after it received notice of the dates*
>
> *(c). We considered the issue and concluded that there was nothing improper about the SFSS passing a resolution giving notice of the Defederation Referendum as required under its Bylaws.*
>
> *(d) We considered the issue and concluded that there was nothing unfair about holding the Defederation Referendum and SFSS elections at the same time. There was no prohibition against it in the CFS Bylaws and it was required under our Bylaws. The only reason the CFS had given us for their objection was that set out in the letter from Gowlings dated 27 February, 2008, namely, that it might confuse students. We did not think that concern had any merit. Referendums had frequently been held at the same time as elections at SFU (and elsewhere) without causing problems.*

> *Once again, we were also concerned that the CFS only raised this objection in February, 2008, four months after we specifically told them that the two votes would be held at the same time.*
>
> *(e) Similarly, we considered the issue and concluded that there was no merit to the complaint about pre-campaigning, whatever that expression means. There is no prohibition against "pre-campaigning" in the CFS Bylaws. Furthermore, the CFS had already distributed materials asserting the benefits of membership in the CFS. Attached as Exhibit "O" is an example of a CFS poster that I recall seeing posted on the SFSS campus and/or at Sky train stations, including Production Way/University, the Sky Train station closest to SFU, at different points starting in May 2007. I believe, but am not certain, that I first saw the Sky Train posters in May 2007 and the other posters in the early fall of 2007. Attached as Exhibit "P" to my Affidavit is a copy of an article in the Peak Newspaper dated May 14th 2007 featuring a photograph of another CFS poster which had been posted as the Production Way Sky Train Station. The CFS also had an "I am cfs" website promoting the merits of association.*
>
> *(f) We were also concerned that the CFS had ignored our November 2007 Draft Procedures, were not willing to work with the IEC with respect to logistics, and were taking what we viewed as unreasonable positions that suggested that they were not interested in seeing the Defederation Referendum proceed.*
>
> *(g)Finally, our representatives to the ROC informed us that the ROC had not made any significant process and that they did not think that it would be ready or willing to run the Defederation Referendum on the dates scheduled.*
>
> *41. We were concerned that the CFS and their lawyers were raising these objections and threatening legal action in an attempt to derail the Defederation Referendum. As noted above, we were strongly of the view that our members were entitled to vote on the issue of membership in the CFS and that it was not in their interests for us to cancel or move the dates of the Defederation Referendum. Accordingly, we determined that the vote should proceed as scheduled.*
>
> **Affidavit of Derrick Harder No. 2, <u>CHAMBERS RECORD VOL. II, TAB 33, PARA 38-41,</u>**

291. As discussed earlier, although the ROC had established rules and timelines for approving campaign materials, the CFS members of the ROC did not observe the time lines, with the effect that materials submitted at the beginning of the campaign were not approved until nearly the end of the campaign, if at all.

23.1.3 ROC and CFS Not Ready, Willing, or Able to Hold Defederation Referendum

292. Paragraph 18(a) of the statement of claim implies that the ROC and the CFS were ready, willing, and able to conduct a Defederation Referendum, but they were pushed aside by the SFSS and the IEC. This is not true.

293. If one assumes for the sake of argument that the complaints expressed by counsel for the CFS in his letters of February 27th and 29th were true, and one assumes that the CFS had the sole "responsibility" for the Defederation Referendum, then it fell to the CFS to hold its own referendum. However, there is no evidence that either the ROC or the CFS had made any effort to arrange the logistics necessary to hold a referendum. There is no evidence that the CFS had made any of the following necessary arrangements:

(a) hiring of poll clerks eligible to work on the SFU campus (poll clerks must be members of CUPE);

(b) obtaining tables and other furniture for polling stations;

(c) obtaining privacy screens;

(d) obtaining ballots;

(e) obtaining an official list of electors;

(f) arranging for the secure storage of ballot boxes;

(g) arranging a location for the ballots to be counted.

294. The inescapable truth is that the CFS was not ready, willing or able to hold a Defederation Referendum in March 2008, or at any later time. If, as the CFS has postured, the referendum at SFU in March 2008 was some sort of parallel process and separate from the CFS Defederation process, that would imply one of two possibilities: (1) the Defederation Referendum process commenced by petition in August 2007 ended prematurely, with no Defederation Referendum; or (2) the process begun in August 2007 is ongoing, and there will be a CFS Defederation Referendum some day. Under the first possibility, the CFS would be in violation of its own bylaws. The second possibility is mere fiction.

295. It is obvious why the CFS has never made any arrangements to hold a Defederation Referendum. It has no intention of allowing one.

23.1.4 Refusal to work with the IEC

296. In the Draft Procedures and covering letter, the SFSS indicated that the Defederation Referendum was to be held at the same time as the SFSS elections and proposed procedures whereby the IEC and ROC could work together on matters of common interest. After the first ROC meeting on February 8, 2008, Mr. Letourneau emailed to Ms. Watson and Mr. Lewis, a description of how the IEC election process works. The CFS refused to have any discussion with the IEC, even on common issues of logistics, such as the location of the polling stations.

Affidait of Michael Letourneau No. 1, Exhibit "F", BOOK OF DOCUMENTS, TAB 15

297. By 25 February 2008, the Board of the SFSS was aware that the CFS appointees were objecting to the Defederation Referendum proceeding as scheduled, that the ROC had accomplished little, that it was unlikely to be in a position to run the Defederation Referendum. Accordingly, it asked John McCullough, the SFSS Independent Electoral Commissioner, to be prepared to run the Defederation Referendum along with the other referenda that were being put to vote that year. When the ROC was unable to provide the necessary oversight, the IEC stepped in and ran the referendum in conjunction with the other referenda and SFSS elections.

298. Mr. McCullough continued to invite the CFS and CFS appointees to the ROC to participate in the process but they refused to do so.

(a) On 4 March 2008, Mr. McCullough, sent an e-mail to the ROC inviting them to meet with the IEC to discuss common issues. The following day, Ms. Watson sent an e-mail back indicating that the CFS appointees would not attend.

Affidavit of J. McCullough, CHAMBERS RECORD, VOL. III(B),TAB 36, P. 3, para 12, and Exhibit "A", Book of Documents, Tab 25

299. On 11 March 2008 the IEC Commissioner, J.J. McCullough, wrote to the CFS. He:

(a) invited the CFS to participate in supervising the polling by sending scrutineers to the polling stations, including the right to interfere to prevent significant irregularities;

(b) invited the chair of the CFS personally, or through a representative, to supervise the official vote count;

(c) clarified that campaigning would be permitted on voting day, as long as it occurred 15 feet or more from the polls;

(d) and asked for a reply at the earliest opportunity (the vote being only one week away).

Affidavit of J. McCullough, CHAMBERS RECORD, VOL. III(B),TAB 36, P. 4 para 16, and Exhibit "C", BOOK OF DOCUMENTS, TAB 28

300. On 15 March 2008, Mr. McCullough sent an e-mail to the ROC and all its members, including Lucy Watson. In it he made the following points:

(a) All poll clerks have been given Mr. McCullough's number to call him in case of problems;

(b) Scrutineers from both sides are permitted, and indeed encouraged to attend.

(c) If a scrutineer believes a serious offence or matter of significant concern has arisen, he or she should bring it to the attention of the poll clerk, and poll clerk will immediately contact Mr. McCullough.

(d) ROC members would have access to the room where the ballots are stored upon request.

(e) ROC members were invited to attend to observe the official count the ballots.

(f) Anyone else may be present, and observe the voting from a viewing gallery.

Affidavit of J. McCullough, CHAMBERS RECORD, VOL. III(B),TAB 36, P. 4 para. 17, and Exhibit "D", BOOK OF DOCUMENTS, TAB 30

301. The CFS' reply to Mr. McCullough came from its lawyers, after the voting had already commenced, on 18 March 2008. Through counsel, the CFS again stated its position that it would not recognize the vote. The CFS asserted that the vote had to be conducted through the ROC (even though it was obvious that the ROC was incapable of reaching consensus on any important decision, largely because the CFS had already decided to reject the results of the vote). The CFS ignored the invitation to act as scrutineers, and ignored the invitation to oversee the official vote count.

Affidavit of J. McCullough, CHAMBERS RECORD, VOL. III(B),TAB 36, P. 4 para. 19, and BOOK OF DOCUMENTS, TAB 25

23.2 LEGAL EFFECT OF ROC'S FAILURE TO ACT

302. It is clear from the foregoing that the ROC was not ready, willing, or able to carry out the "responsibilities" provided by Bylaw I(6)(iii). The question, then, is: what is the legal effect of the ROC's failure to act? This question raises two further questions: (a) Does the failure of the ROC to act create legal nullity; and (b) does the fact that the IEC stepped in when the ROC would not act create a legal nullity?

23.2.1 Bylaw I(6)(ii) "Directory" not "Mandatory"

303. As argued above, under the CFS Bylaws, once the CFS receives a petition in good order, the voters have a right to Defederation Referendum. This is an expression of the fundamental grass-roots democratic principles reflected in Bylaw I(3)(i) and (iii). The same result is reached by examining the legal consequences of the failure of an electoral official to carry out his duties.

304. As noted above, provisions that impose public duties are considered directory and not mandatory. This principles of interpretation avoids the disenfranchising votes on the grounds that officials over whom they have not control have failed in their duties. It also avoids the possibility that officers with public duties will intentionally frustrate the franchise by failing to fulfill their duties.

305. In the present case, this last concern was prescient. The evidence is overwhelming that the CFS exploited the potential for deadlock in the ROC by creating actual deadlock, with the intention of frustrating the Defederation Referendum.

23.3 THE IEC HAS CONCURRENT RESPONSIBILITY AND POWER TO OVERSEE REFERENDUM

306. Since it was clear that the ROC would not or could not hold the Defederation Referendum in March 2008, the next question is whether the fact that IEC oversaw the referendum wrongfully "usurped" the ROC's authority and that, as a result, the Defederation Referendum took place outside of the CFS Bylaws.

307. To answer this question one must first identify what the IEC did, and did not, do. The IEC was not involved in any of the substantive decisions affecting the Defederation Referendum. For example:

(a) The IEC had no role in approving the referendum question to be asked.

(b) The IEC did not set the date for the referendum.

(c) The IEC did not approve or prohibit "early campaigning".

(d) The IEC did not make a decision that the graduate students would be entitled to vote.

308. It is submitted that even if the ROC had carried out its duties, the IEC had a concurrent duty under the SFSS bylaws to ensure that the referendum complied with the SFSS bylaws. The CFS points to the SFSS Board's resolutions on 25 February 2008 giving notice of the Defederation Referendum. In fact, The SFSS Board had a duty to give notice under its own Bylaws and its compliance with that duty did not create any unfairness of breach the CFS Bylaws.

309. The sole function of the IEC was to provide the logistics for the Defederation Referendum; that is, it provide polling stations, polling clerks, and it counted the ballot. It could not reasonably said that the IEC "usurped" the role of the ROC or the CFS in any of these functions. Mr. McCullough went out of his way to encourage the CFS and the ROC to participate in supervising both the vote and the counting of the ballots. They chose not to.

310. It is submitted that it would be more accurate to say that the ROC and the IEC and parallel functions. When it became clear that the ROC would not carry out its duties, the IEC was left to carry out their joint function by itself.

IV. ALLEGED IRREGULARITIES IN MANNER OF POLLING

24. Overview Of Alleged Irregularities

311. The CFS claims that:

> *"the process by which the Vote was held by the IEC was contrary to* **[1]** *the Bylaws and* **[2**] *the practice of the CFS and CFS - S [and CFC-BC as well as* **[3]** *the rules and principles of fairness and natural justice because there were many voting and polling violations including [alleged incidents listed.]*
>
> **Statement of Claim (the CFS), para. 18(j); Statement of Claim (the CFS-BC) para. 17(j) (Numbers added)**

312. The position of the SFSS may be summarized as follows:

(a) The CFS has acquiesced in any alleged irregularities, and cannot rely on them to invalidate the election. The CFS had the opportunity to participate in the election in a number of official capacities, which would have enabled it to prevent the alleged irregularities, to halt irregularities that came to light, and to avoid the recurrence of irregularities. The CFS chose not do so. The clear inference is that the CFS did not wish to avoid irregularities, but instead wished to facilitate them so that it would later have *ex post facto* justification of its decision to ignore the referendum results. Under law governing elections in private societies, if a member is aware of actual or potential voting irregularities, but does not complain in time to ensure a proper vote, the member is deemed to have acquiesced, and cannot later complain about the procedures.

(b) There is insufficient reliable evidence to establish the alleged violations on a balance of probabilities.

(i) The evidence of the CFS about voting day irregularities must be seen in the light of its earlier announcement that it would not accept the results of the Defederation Referendum.

(ii) The evidence of the CFS affiants is vague and unsubstantiated.

(iii) The evidence of partisan CFS operatives is not substantiated by *any* evidence from the IEC or other neutral party.

(iv) There is *no evidence* from any voters at SFU with complaints about *any* of the election procedures.

(c) If there were any irregularities, they were not sufficient to invalidate the election.

(i) The provable irregularities are not individually, or collectively, sufficiently serious to invalidate an election.

(ii) If the IEC did commit errors in overseeing the election, that should not deprive the electors of their franchise, unless the Court is satisfied that the results did not accurately reflect the will of the voters.

(d) Courts are reluctant to adjudicate upon a society's internal disputes when the society has its own internal dispute mechanisms, unless the complainant has first exhausted the internal complaint mechanisms. In the present case, the ROC adopted a complaint policy. The CFS says that the ROC, and only the ROC, has authority over the Defederation Referendum.

However, the CFS never made any complaint to the ROC, much less a complaint at a time when the complaint could be investigated and adjudicated.

24.1 NO EVIDENCE FROM SFU VOTERS

313. The ultimate question in assessing the fairness of the election is whether any of the eligible voters were unfairly prejudiced in their ability to exercise their right to vote. The CFS does not have *any* evidence from *any* SFU voters, who voted at any of the campuses, complaining about how the vote was carried out.

314. The CFS alleges that there were irregularities in the operation of the polling stations. However, the CFS has not tendered *any* affidavits from *any* SFU student voters to support that claim.

(a) The CFS claims that the polls were closed during brief periods. The CFS does not have any evidence from any students who say that they were prevented from voting at any of the polls, or even that the procedures made it difficult to vote.

(b) The CFS claims that for brief periods some polling stations did not have privacy screens for all the voters. The CFS does not have any evidence from any students who say that they felt an absence of privacy constrained their freedom to vote as they wished.

(c) The IEC had a rule that there would be no campaigning within fifteen feet of the polls. This was not a CFS rule. The CFS claims that anti-CFS students "campaigned" inside the no-campaigning zone. The CFS does not have any evidence from any SFU students who say that anyone talked to them about the vote while they were inside the no-campaign zone, that anyone tried to influence their vote while they were in the no-campaign zone, or that anyone actually influenced their vote at any time.

(d) The CFS insinuates that there may have been an opportunity for tampering with the ballot boxes. The CFS has no evidence of any impropriety regarding the security and counting of the ballots, much less any evidence of any actual tampering.

24.2 NO EVIDENCE FROM NEUTRAL OBSERVERS

315. The CFS does not have any evidence from any neutral observers. There is no evidence from any member of the IEC, or any other person who is not affiliated with the CFS, to support any of the CFS claims. The evidence tendered by the CFS consists entirely of affidavits from its

own partisan political operatives, most of who were actively engaged in the referendum campaign. At least one of the CFS affiants was hired and paid for the sole purpose of working on the CFS political campaign

316. Lucy Watson is the Director of Organizing of the CFS and the CFS-S. She is a full time employee of the CFS, and her duties include organizing the CFS campaigns in federation or defederation referenda across Canada. She has been the affiant in prior proceedings concerning the CFS federation and defederation processes. However, in the part of her affidavit where it would be normal to disclose her role and interest in the SFU referendum, she say only:

> *I am the Director of Organising with the CFS. and CFS - S and have been closely· involved with the efforts of the Simon Fraser Student Society (the "SFSS") to defederate from the Canadian Federation of Students and as such have personal knowledge of the matters and facts hereinafter deposed …*
>
> **Affidavit of Lucy Watson No. 1, CHAMBERS RECORD, VOL. IV, TAB 43, PARA. 2**

(a) On its plain reading, these words suggest that she was working on behalf of the SFSS, not the CFS. One can infer from the balance of her Affidavit that she worked for the CFS, but the Affidavit does not disclose the nature or extent of her work. Prior to the start of the campaign, a CFS member inadvertently e-mailed the CFS work-plan to a SFSS member. The work plan reveals that Ms. Watson was one of the key organizers of the CFS campaign, the other being Shamus Reid (discussed below). It is submitted that Ms. Watson should have disclosed this to the Court in her Affidavits.

> **Affidavit of Derrick Harder No. 2, Ex. "J" PETITIONER'S BOOK OF DOCUMENTS,TAB 13**

(b) On 20 February 2008, Mr. Harder wrote to the CFS, expressing the SFSS' concerns that Ms. Watson, who was to play so central a role in the CFS campaign, would also be a member of the ROC. Mr. Harder referred to the work plan the SFSS received. On 27 February 2008 Amanda Aziz, Chair of the CFS, replied with the bald assertion that Ms. Watson was not playing a role in the "*development* of the campaign," carefully chosen words that do not disclose what her role was in the *implementation* of the campaign. Ms. Aziz's assertion must be considered in light of Ms. Watson's admission that she was "closely" involved with the

defederation campaign. Ms. Aziz has not given evidence on this point, nor has anyone from the CFS explained Ms. Watson's name on the work plan, or explained what Ms. Watson's role was, in addition to being on the ROC.

Affidavit of Derrick Harder No. 2, Exs. "I and "K", PETITIONER'S BOOK OF DOCUMENTS,TABS 18 (Harder to Aziz) and 20 (Aziz to Harder)

(c) Ms. Watson's Affidavits do not describe any observations that she personally made on voting day. She refers to observations that others claim to have made, or that other people told them about. These statements are all hearsay, or double and triple hearsay, and should be disregarded in their entirety.

(d) As noted earlier, Ms. Watson's Affidavit purports to attach the Minutes of the ROC meetings, but conspicuously omits one of the most important Minutes, the one setting out the complaint procedures. This raises doubts about the completeness, accuracy, and candour of her evidence.

317. Shamus Reid is the Chair of the CFS-BC.

(a) Mr. Reid was very actively involved in the referendum campaign for the CFS, as evidenced from the number of tasks that were to be assigned to him and Lucy Watson according to the work plan circulated by the CFS prior to the referendum.

Affidavit of Derrick Harder No. 2, Ex. "J" PETITIONER'S BOOK OF DOCUMENTS,TAB 13

(b) However, Mr. Reid's affidavit did not disclose the true extent of his activism for the CFS referendum campaign. He simply describes himself as follows.

> *"I am the Chairperson of the Canadian Federation of Students – British Columbia Component and have been involved with the efforts of the SFSS to defederate from the Canadian Federation of Students …*

(c) On a plain reading, one would again conclude that he was working on behalf of the SFSS, not the CFS. Again, one can infer that he is a CFS partisan from his title, but his description of his role does not disclose how involved he was in organizing the CFS campaign in the Defederation Referendum. Mr. Reid's Affidavit does not disclose why he was on the campus

of SFU on voting day, and what his purpose was in making the observations he claims to have made.

Affidavit of Shamus Reid, para. 1, CHAMBERS RECORD, VOL. V,TAB 47, P1, para. 2

318. Jeremy Salter was the executive director of the York Federation of Students in Toronto, with an address in Toronto. Like the other CFS operatives, Mr. Salter describes himself only as having "*been involved with the efforts of the SFSS to defederate from the Canadian Federation of Students …*". His Affidavit does not disclose his purpose for being in British Columbia at the time of the vote, or for being on the SFU campus on voting day.

Affidavit of Jeremy Salter, CHAMBERS RECORD, VOL. V, TAB 48, para. 1

319. Nora Loreto is an officer of the CFS – Ontario component, also with an address in Toronto. Like the other CFS operatives, she describes herself only as having, "*been involved with the efforts of the SFSS to defederate from the Canadian Federation of Students …*" Ms. Loreto did not disclose to the court what her role was in the CFS referendum campaign, or what her reasons were for being in British Columbia generally, or for observing the vote at SFU in particular.

Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V, TAB 49, para. 1

320. Mike Olson is a member of the CFS-BC, with an address in Lantzville, British Columbia. Like the other CFS operatives, he describes himself only as having, "*been involved with the efforts of the SFSS to defederate from the Canadian Federation of Students …*". Mike Olson did not disclose to the Court what his role was in the CFS referendum campaign, or what his reasons were for being at SFU to observe the vote.

Affidavit of Mike Olson, CHAMBERS RECORD, VOL. V,TAB 50, para. 1

321. Andrew Bratton is from Kamloops. He was not a SFU student but rather was hired by the CFS to work on the CFS campaign from January 2008 to May 2008; that is, the period of the SFSS referendum, and its aftermath. He did not disclose to the Court what his role was during the campaign, or what his purpose was for being on the SFU campus on the day of the vote.

Affidavit of Andrew Bratton, CHAMBERS RECORD, VOL. V, TAB 50, para. 1

322. An affiant's role and interest in the litigation is highly material fact that the Court should be aware of when assessing the credibility of the affiant's evidence. It is submitted that the failure of CFS operatives to disclose the true nature of their role in the CFS campaign or their purpose for being at SFU on 18-20 March 2008, is misleading and should be taken into account when assessing their evidence.

323. By itself, the fact that the CFS operatives were partisan does not mean that their evidence should be given no weight. Many of the SFSS' affiants were also partisan. However, the strong inference that the CFS operatives had an ulterior agenda does mean that the Court should be vigilant when assessing the weight, if any, that can be given to bald conclusory statements and speculation. As noted below, most of the evidence of the CFS operatives consists of assertions about things they saw or heard, without the background evidence that would allow the Court to draw its own inferences as to the affiant's ability to see what they assert they saw. Given that the goal of the CFS was to find grounds to reject the election, it would not be surprising if its operatives consciously or unconsciously interpreted their observations in a way that met that objective.

24.3 EVIDENCE UNRELIABLE; INSUFFICIENT FOUNDATION

324. Most of the evidence of the CFS operatives consists of assertions about what they could see or hear. It is commonplace that before witnesses gives evidence about what they claim to have seen or heard they must give evidence about the physical circumstances that made it possible for them to see or hear the incident. Without that evidence, the trier of fact cannot assess the reliability of their observations. None of the CFS Affidavits describe where the affiants were located when they claim to have made observations, how far they were from what they were observing, whether the sight lines were clear or obstructed, or how long they had observed the event in question. Similarly, the CFS operatives claim to have over heard things, but none has advised the Court where they were in relation to the speakers, how they were able to overhear private conversations, or the actual words the speakers purportedly used.

325. It is submitted that their evidence concerning what they purportedly saw or heard, in the absence of evidence about their opportunity to see and hear, lacks a sufficient basis to permit the

Court to draw any inference about the reliability of the evidence. Such claims should be given little or no weight.

326. In the vast majority of cases where a CFS operative claims to have observed a “No” side representative talking to another student, the operative gives no description of either the “No” side representative, or the other student. This is so, even in cases where the CFS operative says that the “No” side representative was wearing a nametag, or was otherwise readily identifiable. In the rare cases where a CFS operative identifies a "No" side representative, the "No" side representative has clarified his or her conduct in an Affidavit filed in these proceedings. In those cases, it is clear that the CFS operative’s speculation and assertions were simply wrong.

24.4 ACQUIESCENCE

24.4.1 CFS Chooses Not To Supervise Defederation Referendum

327. As noted above, on more than one occasion the IEC invited the CFS to participate in overseeing the vote, and in counting the vote. The CFS declined that opportunity. If the CFS has participated in overseeing the vote they would have had the opportunity to prevent or halt all of the irregularities its operatives claim to have observed.

24.4.2 ROC Complaint Procedure

328. As discussed earlier, the members of the ROC were not able to agree on many issues relating to the referendum. They were, however, able to agree on the appropriate complaint procedure. Lucy Watson prepared all the minutes of the ROC meetings, including the minutes of a meeting on March 17th 2008, which include the following:

> ***Complaints--Decision****: All alleged violations of the Bylaws or referendum rules shall be investigated and ruled upon by the Oversight Committee. The complaint must include the following:*
>
> *- the specific Bylaw or referendum rule that is alleged to have been violated;*
>
> *- the specific campaign or individual that is alleged to be in violation;*
>
> *- the specific facts which constitute the alleged violation;*
>
> *- the evidence of these facts; and the name and contact information including e-mail address and telephone number for the complainant.*

No complaint will be considered by the Oversight Committee unless it is submitted to the cfs.sfss.roc@gmail.com email address and is received within 24 hours of the alleged violation.

Where a complaint is received and found to be complete, the Oversight Committee shall investigate the facts and shall, within 24 hours, either dismiss the complaint or schedule a meeting of the Committee where the complaint will be heard. Such a meeting will be scheduled within one week, and the Committee shall schedule it so that both the complainant and the alleged violator(s) may make representations. If a hearing is scheduled a complete copy of the violation report shall be sent to the alleged violator along with any specific information the Committee may require from them.

Affidavit of Michael Letourneau No. 1, Ex. "D", BOOK OF DOCUMENTS, TAB 53A

329. Ms. Watson did not include these minutes in the package of minutes attached as Exhibit "M" to her Affidavit, although she did attach minutes of the final meeting after the vote, which consist of little more than a self-serving statement by the CFS, and had not been approved at any subsequent meeting. The SFSS respectfully submits that this marked omission raises issues with respect to the credibility of her Affidavits.

Affidavit of Lucy Watson No. 1, CHAMBERS RECORD, VOL. IV, TAB 43 PARA. 27 AND EX. "M"

330. The rules established by the ROC have three main components:

331. (1) there are time limits: (i) 24 hours to lodge a complaint, (ii) a further 24 hours for the ROC to dismiss the complaint or schedule a hearing; and (iii) and one week to hold a hearing;

332. (2) complaints must contain sufficient detail so that they may be subject to investigation and adjudication; and

333. (3) the alleged violator must be given notice of the complaint, and a right to reply.

334. In the present case, the CFS insists that the ROC had jurisdiction to oversee the referendum. If that was correct, then the CFS was bound by the complaint procedures set out above.

335. However, the CFS never lodged a complaint with the ROC.

24.4.3 No Complaints Lodged With IEC Until After the Vote

336. The CFS has never lodged a complaint with the IEC. However, there is some evidence that a person associated with the CFS did lodge complaints with the IEC, but only after it was too late to verify the complaints, remedy any harm that may have occurred, or prevent their recurrence.

337. The only evidence of any report of alleged irregularities observed by the CFS operatives is from a series of e-mails from Andrew Fergusson, who collected and summarized the allegations of the CFS operatives. However, these complaints were not made contemporaneously. After 5:00 p.m. on March 20th, at the end of the three day voting period, Mr. Fergusson first raised complaints about observations that occurred two days earlier, on March 18th. No one raised the complaints as the events were unfolding on March 18th. Then, on March 23th, Mr. Fergusson sent another e-mail, this time containing complaints about observations that were supposedly made on March 19th. Again, no one complained about the events as they were unfolding. Finally, on March 23rd Mr. Fergusson sent an e-mail outline observations that were supposedly made on March 20th. Once again, no one made complaints as the events were unfolding.

Affidavit of Lucy Watson No. 1, CHAMBERS RECORD, VOL. IV(B), TAB 43, SUB TAB HH, p. 314; p. 322, and 328

338. It was obviously too late to correct any improper practices, and it was also too late to prevent their recurrence. If Mr. Fergusson had brought the CFS complaints to the IEC on March 18th, or even March 19th, the IEC would have been put on notice and would no doubt have taken steps to rectify the errors and prevent their recurrence on March 19th and 20th.

339. If the CFS operatives had promptly lodged their alleged complaints with the IEC and the ROC during the three day vote, there would have been an opportunity to investigate the alleged complaints and prevent them from continuing. For example, if irregularities had been committed on March 18th , there would have been an opportunity to prevent similar regularities on the 19th and 20th. Further, if the CFS had lodged complaints with the detail required by the ROC rules (which merely codify common sense in these matters), there would have been an opportunity for

the IEC ROC members to investigate the facts and prevent repetitions (if they were well-founded).

340. In his affidavit, Mr. McCullough deposes:

> *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 cease immediately. At no time did I have cause to.*
>
> **Affidavit of J.J. McCullough, CHAMBERS RECORD VOL. III(B), TAB 36, para. 25**

341. It is submitted that the decision by the CFS operatives not to lodge complaints with the ROC, the IEC, or the poll clerks, but to wait many months to bring them forward, supports the inference that the CFS wanted to avoid an independent investigation, and preferred complaining about irregularities to preventing them.

24.4.4 Acquiescence in Law

342. It is submitted that the failure of the CFS to observe the complaint procedures of the ROC is sufficient cause to dismiss all the complaints about voting irregularities.

343. In law, if a person who is aware of a potential irregularity during a vote acquiesces in the vote, the person may not later complain that the vote was tainted by the alleged irregularity. In *Schierbeck v. Danish Community Centre of Vancouver* there was a controversy whether "corporate" members, or only individual members, were allowed to vote in elections. A member was aware that corporate members were voting during the election, and did nothing about it, but later complained. The court described the concept of acquiescence as follows:

> ***6*** *Further, and in any event, however, it seemed to me that the petitioner's acquiescence in the voting as it had occurred was the determinative factor here. Despite Mr. Kroll's cross-examination under oath of Kristensen, it was made to appear that no objection had ever been taken at an annual meeting of the Society to the right of a person present to vote as the representative of a company, society or association which was considered to be a member of the Society and paid an annual membership fee (see Exhibit E to Kristensen's affidavit sworn July 9th, 1979) and, more importantly, I think, that no objection came from the petitioner on February 15th, 1979, to the voting by representative of some of those entities at the meeting held on that date.*

> ***7*** *I was referred in argument to (a) The King v. Slyth (1827) 6 Barnewell & Cresswell 238; 108 E.R. 441, where it was held that a person who had attended and voted at a meeting for the election of officers of a borough could not become a relator in quo warranto to impeach the titles of the persons there elected on account of an objection to the title of the presiding officer unless he showed that at the time he was ignorant of the objection; (b) Re Sturmer and Town of Beaverton (1911) 24 O.L.R. 65 where, at p. 76, Boyd, C. said "... the doctrine of laches and acquiescence applies to protect the outcome of de facto elections"; and to Re Canadian Temple Cathedral of the Universal Christian Apostolic Church (1971) 21 D.L.R. (3d) 193, where Hinkson, J., as he then was, quoted from De Bussche v. Alt (1878) 8 Ch.D. 286 at p. 314, where it was said that, in a certain sense, "'acquiescence' ... may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it," and held that the defence of acquiescence applied there. In my view those authorities are directly applicable here and support the view that I have already expressed, namely, that the petitioner's quiescence at the annual meeting held on February 15th 1979 [the meeting then in dispute], and at the earlier similar meetings amounted to acquiescence in what was done there.*
>
> ***Schierbeck v. Danish Community Centre of Vancouver*** **[1979] B.C.J. No. 1294, PETITIONER'S BOOK OF AUTHORITIES,TAB 21, PARA. 6-7**

344. In *Clark v. Teamsters Local Union No. 464* a vote was considered irregular because balloting was by transparent envelopes that had been numbered, which would have allowed people to determine who voters had voted. The union who held the election said that the complainants had acquiesced because they did not complain about the ballots when they cast them. The Court dismissed that argument because there was no evidence that the complainants were aware that the combination of transparent envelopes and the numbering would allow the identification of individual voters' votes:

> ***38*** *In my view, for there to be a finding of acquiescence, the Court must find that there was either knowledge on the part of the party acquiescing or an ability to obtain that knowledge. On the evidence before me I cannot conclude that the respondent has established that the petitioners acquiesced in an election process which I have found was substantially irregular. It is only after the ballot envelopes are received and the counting process begins that the combination of a two envelope system with translucent envelopes and unexplained handwritten control numbers became evident. The petitioners can hardly be taken to fall within the classic definition of quiescence set out in Re Canadian Temple Cathedral of the Universal Christian Apostolic Church, supra. As for the argument that three of the petitioners waited until the internal appeal process had been exhausted before joining with Clark, it is my view that they were entitled to await the outcome of that process and participate in any successful outcome and cannot thereby be taken to have acquiesced in the irregular election process.*

***Clark v. Teamsters Local Union No. 464*, [1997] B.C.J. No. 2878, PETITIONER'S BOOK OF AUTHORITIES,TAB 22, P. 9**

345. Similarly, in *Leroux v. Molgat* an election was held without providing a means of privacy to those who wished it. There were several complaints about the lack of privacy. The union that held the election argued that the voters had acquiesced in the manner of voting by voting. The court held that the defence of acquiescence was negated by the complaints that the complainants made at the time of the vote.

***Leroux v. Molgat* [1985] B.C.J. No. 45, PETITIONER'S BOOK OF AUTHORITIES,TAB 23, P. 4, PARA 10-11 AND P. 8 PARA. 46**

346. In the case at bar, the CFS was well aware of the alleged irregularities, and had the means to stop and prevent them, if they occurred, by accepting the invitation to supervise the voting and vote counting. The CFS waited until several days after each voting day to complain, rather than complaining when the vote was in progress. The CFS also was expressly made aware that if they had any complaints they could bring them to the direct attention of the commissioner of the IEC, who had promised to address them immediately.

347. It is submitted that in all the circumstances, the CFS did not merely acquiesce in the alleged irregularities, through its silence and refusal to supervise the vote it encouraged errors and gaffes so that it would later be able to justify its earlier decision to ignore the referendum.

24.5 FAILURE TO EXHAUST INTERNAL REMEDIES

348. In *Leroux v. Molgat* the court noted that one of the considerations a court will consider when hearing an application to nullify an election is whether the complainant exhausted the society's internal remedies before coming to court. In that case, the complainant lodged complaints, and in fact had proceeded through the appeal process. However, the court found that his complaints were met with "delay and inaction." The court ruled as follows:

> ***52*** *In the case at bar the plaintiff's failure to exhaust his internal remedies before pursuing this action should not count heavily against him. He has attempted to do so, but has been met by delay and inaction. To ask him to wait years more while the union at its leisurely pace considers his case would be unjust. Apart from all else, there would be a great risk that the matter might never be capable of being properly determined in the Courts due to the unavailability of witnesses or their inability to recall evidence. If organizations wish to rely on*

> *clauses such as this, they must ensure that their internal procedures operate fairly and with reasonable dispatch.*
>
> ***Leroux v. Molgat, supra,* para. 51**

349. In the case at bar, the CFS has never made a complaint to either the ROC, under its own Bylaws, or the IEC. It is submitted that in the case at bar the CFS has no excuse for avoiding the ROC's complaint process, and the court should decline to consider its complaint now.

350. The court's ruling is also relevant to the question of whether the present applications should be determined summarily. The concern of the court in that case – that, "there would be a great risk that the matter might never be capable of being properly determined in the Courts due to the unavailability of witnesses or their inability to recall evidence" – applies equally here.

351. As noted earlier, in *Mowat* the Saskatchewan Court of Appeal considered the effect of a decision by the student society to ignore its own rule that made its election board the final arbiter of the validity of the federation referendum. The Court of Appeal held that the refusal of the student society to follow its own procedures was strong evidence of bad faith. The court held:

> ***61*** *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?*
>
> ***62*** *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.*
>
> ***Mowat v. Canadian Federation of Students* [2007] SJ No. 463, PETITIONER'S BOOK OF AUTHORITIES,TAB 41, paras 61-62**

352. In the present case, it is submitted that the CFS chose not to follow its own ROC's complaint rules because that would require the CFS to submit complaints with sufficient detail that would allow them to be investigated and result in a speedy resolution to the complaints. The strategy of the CFS throughout, including in the present litigation, has been to make vague allegations, and cause delay.

353. It will be argued below that the decision of the CFS-BC to ignore the results of the referendum despite the fact that the ROC has never ruled that any of its complaints are valid, is oppressive and unfairly prejudicial, and calls for an order pursuant to s. 200 of the *Company Act.*

24.6 SUMMARY

354. In summary, it is submitted that the assertions of the CFS operatives about irregularities they claim to have seen or heard should be given little or no weight.

(a) The ultimate question is whether the irregularities affected the ability of the SFU votes to exercise their franchise. There is no affidavit evidence from any SFU voters at any of the polling stations complaining that their rights were abridged.

(b) The observations of the CFS operatives have not been corroborated by any neutral observer. They chose not to make their complaints known at a time when they could be verified and remedied, despite express invitations to participate in overseeing the voting and the vote counting.

(c) The CFS operatives have not established a foundation to their evidence by giving evidence about their capacity to see and hear what they claim to see and hear.

25. SPECIFIC ALLEGATIONS OF IRREGULARITIES

355. The Statement of Claim of both the CFS and the CFS-BC claim that,

> 356. *the Vote was held by the IEC was contrary to the Bylaws and the practice of the CFS and CFS - S [and CFC-BC] as well as the rules and principles of fairness and natural justice.*
>
> **Statement of Claim (the CFS), para. 18(j); Statement of Claim (the CFS-BC) para. 17(j)**

357. The first questions to ask are whether there are in fact bylaws of the CFS or the CFS-BC governing the alleged violation. If there is no such violation, the next question is whether there is evidence that establishes a practice of the CFS-BC or the CFS that would be binding on the SFSS. If the answer to both those questions is “No”, then one must ask whether the violation infringes the common law rules governing elections.

25.1 DIRECTION TO POLL CLERKS

358. The CFS alleges that:

> *(i) poll clerks and others who ran the Vote took direction regarding process and procedure from the SFSS, one of the proponents;*
>
> **Statement of Claim of CFS, para 18(j)(i), and Statement of Claim of CFS-BC para. 17(j)(i)**

359. The evidence on this allegation is based on the affidavits of Shamus Reid (paragraphs 3 and 4) and Jeremy Salter. They claim they saw a female poll clerk approach individuals named Garth Yule, and Mike Letourneau.

360. Mr. Reid deposes that, "*It appeared that* Mr. Yule" was providing directions to the poll clerk. That is mere speculation. Mr. Reid does not say what any of the three persons were actually doing or saying that led him to the conclusion that Mr. Yule was providing direction. It is impossible for the Court to reach its own conclusion on the basis of Mr. Reid's bald, conclusory statement. Accordingly, this evidence should be given no weight. Mr. Salter's evidence is nearly identical, and should be given no weight for the same reasons.

361. Neither Mr. Reid nor Mr. Salter say what directions Mr. Yule gave to the poll clerk, so it is impossible to say whether such directions were permissible or impermissible.

362. Mr. Letourneau was not a SFSS staff person as alleged in the Affidavits. He was a member of the ROC. There is no rule or reason that would prevent a member of the ROC from conversing with poll clerks.

363. Mr. Letourneau has deposed that on the one occasion when he and Mr. Yule were together at voting station on voting day, Mr. Yule did not give direction to a polling clerk. (This does not contradict the evidence of Mr. Reid or Mr. Salter. Rather, it supplements it. Therefore, this additional evidence cannot reasonably be said to be grounds for requiring a full trial.)

> **Affidavit of Michael Letourneau No. 1, CHAMBERS RECORD VOL. III(B), TAB 37, p. 22, para. 37**

25.2 "EXTENSIVE" CAMPAIGNING IN NO CAMPAIGN ZONE

364. The CFS alleges that:

(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;

Statement of Claim of CFS, para 18(j)(ii), and Statement of Claim of CFS-BC para. 17(j)(ii

365. There is no rule in the CFS Bylaws that creates "no campaigning zones", and there is no evidence of an established CFS practice in that regard that would be binding on the SFSS. That rule was created by the IEC.

366. The question, then, is whether the CFS evidence has established a significantly serious breach of the rules governing elections and referenda generally that would justify overturning the election. It is submitted the evidence falls far short of that standard.

25.2.1 Evidence of Shamus Reid

367. Shamus Reid claims he saw Andrea Sandau "loitering" near a polling station on March 18th. He claims he overheard Ms. Sandau refer to the referendum on one occasion. He does not say what she said, so one may infer that he did not hear what she said.

368. Ms. Sandau has deposed as follows:

3 In response to paragraph 8 of Shamus Reid's Affidavit #1, Mr. Reid appears to be implying that I was campaigning in the vicinity of the polling station. That is not true. I was talking to a friend. We were in the vicinity of the polling station because he was planning vote and we had walked over together. We were discussing a school project we were working on together and other personal matters. At one point, he asked me a question about the voting process and I answered. I do not recall the precise question but know that it was procedural. We did not discuss how he should vote or the merits of the referendum.

4 I then ran into Brian Jones, who was an acquaintance of mine, and spoke to him for about five minutes. I do not recall him being with me when I was talking to my friend. Mr. Jones and I did not discuss anything to do with the CFS referendum, but rather a controversy that had arisen between two of the candidates in the SFSS elections.

5. I know Shamus Reid and was aware that he was standing near me listening to what I said to my friend and Mr. Jones. I also knew he was there as a representative of the CFS and thought that he was probably looking for grounds to complain if the CFS lost the referendum. Because of that, I was particularly aware of what I was saying in his presence.

> *6. I campaigned in support of the "No" side for one day early in the campaign. I did not campaign other than that because it was the end of term and I was pre-occupied with finishing my courses and taking exams.*
>
> **Affidavit of Andrea Sandau No. 1, CHAMBERS RECORD, VOL. III(B),TAB 38 paras 3-6.**

369. This does not contradict the evidence of Mr. Reid. Rather, it supplements it. Therefore, this additional evidence could not reasonably be suggested as grounds for requiring a full trial.

370. Therefore, there is no evidence that Ms. Sandau campaigned at all, much less "extensively" within the no-campaigning zone.

25.2.2 Evidence of Jeremy Salter

371. Jeremy Salter's affidavit contains many assertions that people in the voting line-ups talked to other people in the voting line ups. The mere fact that people are talking to one-another is not a breach of CFS rules or practices, or the rules governing elections generally. There is no rule that prohibits voters from discussing their vote with other voters. Such conversation does not amount to "campaigning".

372. Salter claims to have observed people "campaigning" within the no-campaign zone. He does not, however, define what he means by "campaigning", so it is impossible for the court to determine whether this activity was impermissible.

373. Salter also claims that on some occasions he heard people saying to other people that they should vote "No", or that voters were "encouraged" to vote No. On almost all of these occasions Salter does not give any identifying description of the speaker or the person being spoken to, so the allegations cannot be verified or refuted. The exceptional cases where he identifies a person are noted below.

374. In none of Salter's evidence does he explain to the court where he was standing in relation to the people whose conversations he was listening to, so that the court would be able to draw its own conclusion about the reliability of the asserted observations.

375. Salter does not once depose as to the actual words the speakers used. On most occasions he simply says there was discussion. In some cases he says that someone was telling someone else to "vote no," but on those occasions Salter does not use the speaker's actual words.

Therefore, it is impossible for the Court to judge whether Mr. Salter heard correctly, or whether the words he heard conveyed the meaning he claims.

376. Salter also claims that music "associated with the No Campaign" was audible from within the voting area. However, he does not say what music he heard, why he associates it with the "No" campaign, or why voters would associate it with the No Campaign. Accordingly, this evidence should be given no weight.

377. *Alleged Observation of Jason Tockman* Salter claims that he observed Jason Tockman "actively campaigning" and encouraging students to "vote no."

Affidavit of Jeremy Salter No. 1, CHAMBERS RECORD, VOL. V,TAB 48para. 6

(a) As with Salter's other evidence, he does not way where he was in relation to Tockman's location, so the court is unable to determine whether it is reasonable to accept that he was able to see what he says he saw, or that that he was able to hear what he says Tockman said.

(b) He does not record the actual words Tockman used, so the court cannot draw its own conclusions about the effect of his words.

(c) There is no evidence from any of the many voters Salter claims to have seen talking to Tockman, saying that Tockman tried to influence their vote.

(d) Salter did not complain to the poll clerks so there is no independent corroboration of his assertions.

(e) Mr. Tockman has deposed that he did not campaign while he was scrutineering. He deposed as follows:

> ***4*** *In response to paragraphs 6 and 7 of the affidavit of Jeremy Salter sworn on 9 July 2008, I did not tell any students how to vote or otherwise campaign for the "no" side in the Polling Zone, as alleged by Mr. Salter. I did volunteer as a scrutineer for the SFSS for two or three hours on March 19, 2008. However, I did not do any campaigning during that period, or otherwise do or say anything that might be interpreted as an attempt to influence the voters, and was careful not to have any campaign materials on me, including buttons.*
>
> ***5.*** *In further response to Mr. Salter's Affidavit, I did not view anyone from the "no" side campaigning inside the Polling Zone or otherwise conducting themselves improperly.*

Affidavit of Brian Tockman No. 1, CHAMBERS RECORD, VOL. III(B),TAB 39 paras. 4 & 5

(f) While there are inconsistencies between what Salter claims he saw, and what Tockman says he was (or was not) doing, it is submitted that these are not outright conflicts. Since Salter does not disclose to the Court what Tockman was actually doing that Salter characterized as "actively campaigning" or "encouraging students to vote no", Salters's evidence really goes no further than describing what Salter believed Tockman was doing. Evidently, Salter misinterpreted what he saw. Even if there is conflict between the evidence of Tockman and Salter, it is extremely unlikely that live testimony from either would provide a definitive resolution to the inconsistencies.

378. *Alleged Observation of Derrick Harder* Salter claims that he saw Derrick Harder inside the no campaign zone with a "No" sign.

Affidavit of Jeremy Salter No. 1, CHAMBERS RECORD, VOL. V,TAB 48, para. 11

(a) Salter does not disclose where he was in relation Harder, so the Court is unable to conclude whether Salter was able to see what he says he saw.

(b) Salter does not say how long Harder was inside the zone, so it may have been for mere moments. That would not amount to "extensive campaigning".

(c) If Harder was present in the no campaigning zone with a sign, there is no evidence (including from Salter) that there were voters in the voting area at the time. Therefore, there is no evidence that any voters may have been influenced, nor is there evidence of an attempt to influence voters.

(d) Harder has deposed as follows:

> ***50*** *In response to paragraph 11 of the Affidavit of Jeremy Salter, sworn 9 July 2008, I spent several days with a poster on my back. However, I went to great length to avoid passing through any of the "buffer zones" around the polling booths while I was wearing it. This was especially difficult in the southeast Academic Quadrangle polling location, as the buffer zone took up the entire corridor. It is possible that I passed through the rear of the buffer zone while carrying a poster at my side, but I was careful to not to actively display it within the buffer zone. I did not intentionally try to sway opinion inside the buffer zones during polling.*

Affidavit of Derrick Harder No. 2, CHAMBERS RECORD VOL. II, TAB 33,P. 16 para. 50.

(e) This does not contradict the evidence of Salter. Rather, it supplements it. Once again, this additional evidence cannot reasonably be said to be grounds for a full trial.

379. *Alleged Observation of Titus Gregory:* Salter claims that he saw Titus Gregory, who was not an SFU student or a member of the SFSS, talking to poll clerks, and later talking to J.J. McCullough, the chair of the IEC

Affidavit of Jeremy Salter No. 1, CHAMBERS RECORD, VOL. V,TAB 48, p. 3. para.14-15

(a) Salter does not say what Gregory said to the poll clerk or to McCullough, the reasonable inference being that Salter did not hear what was said.

(b) Gregory has deposed as follows:

> *2. On 19 March 2008, Laura Anderson, then Director of External Affairs of the KSA asked me to attend Simon Fraser University ("SFU") to observe the balloting. The KSA was scheduled to hold its Defederation Referendum later that month and we were interested observing what happened at SFU.*
>
> *3. When I got to SFU, someone informed me that the Simon Fraser Student Society's ("SFSS"') scrutineer assigned to work at one of the polling stations was unable to attend that afternoon and asked me if I would be willing to do so. I believe that the person I spoke to was James Papadopolous, who was the Research and Policy Coordinator with the SFSS, but I am not entirely sure. I then spoke to Derrick Harder, who agreed that I act as scrutineer at that polling station.*
>
> *4. I went to the polling clerk in question and indicated that I would be the scrutineer for that station. The polling clerk was of the view that I was not allowed to act as a scrutineer. I went to ask JJ. McCullough, who was the Chief Commissioner of the Independent Electoral Commission, for his views on whether I could act as scrutineer. He indicated that I could. He then returned with me to the polling station and informed the clerk that I was permitted to act as scrutineer. That was the only conversation I had with Mr. McCullough and the polling clerk and, accordingly, I assume that is the conversation that Mr. Salter was referring to in paragraphs 14 of his Affidavit sworn on 9 July 2008.*
>
> *5. I did not see anyone campaigning within the polling zone or otherwise acting improperly when I was acting as a scrutineer.*

Affidavit of Titus Gregory No. 2, CHAMBERS RECORD, VOL. III(B) ,TAB 35, paras. 2-5

(c) Once again, this does not contradict the evidence of Salter. Rather, it supplements it and could not reasonably be said to be grounds for requiring a full trial.

25.2.3 Evidence of Nora Loreto

380. Nora Loreto claims to have observed conversations between various persons inside the no-campaign zone. Loreto does not say where she was located when she made any of the observations she claims she made, so it is impossible for the Court to draw any conclusion about the reliability of her evidence. Similarly, Loreto does not say where she was when she claims she overheard conversations, so it is impossible for the Court to draw the conclusion that she was able to hear what she claims she heard.

381. In most cases, Loreto gives no description of the people she says she saw speaking, so it is impossible to verify or dismiss her claims.

382. On some occasions, Loreto makes allegations about persons with name tags, or who were "clearly identified" as "No" campaigners. Loreto does not identify the persons, notwithstanding that they had nametags, or indicate how they were "clearly" identified as "No" campaigners.

383. Loreto claims that she saw "friends" of "Vote candidates" inside the polling zone. Loreto does not explain what she means by a "Vote candidate". In any event, she does not describe the friends doing anything other than standing in the polling zone. The fact that friends of campaigners are in the polling zone could not reasonably be considered campaigning. Therefore, it is submitted that this evidence should be given no weight.

Affidavit of Nora Loreto No. 1, <u>CHAMBERS RECORD, VOL. V,TAB 49, para 10</u>

384. Loreto claims that person with "No buttons" on their hats remained in the no-polling zone, while persons with Yes flyers were asked to leave.

Ibid. **para. 9**

(a) Regarding the persons with No, buttons, Loreto did not describe where she was in relation to those persons, so it is impossible for the court to assess the reliability of this asserted observation. Loreto claims that the persons with buttons talked to other persons. She does not say that those persons said, so the court can draw no adverse inference. Furthermore, Mr. Harder

has deposed, in his Affidavit, that "No" buttons were distributed to students during the campaign, so the fact that they were wearing "No" buttons does not mean that they were campaigners.

(b) Regarding the persons with the "Yes" flyers, Loreto claims that those persons were asked to leave the no-polling zone. However, she does not say where she was in relation to the speakers, so it is impossible for the Court to draw any conclusion about the reliability of that assertion. Once Loreto did not use the exact words of the speaker, so it is fair to infer that she did not hear them. Further, even assuming the persons with the "Yes" flyers were asked to leave the no-polling zone, Loreto is unable to say why they were asked to leave. One cannot simply speculate that it was because they had "Yes" flyers. Finally, it is significant that none of the people who were supposedly asked to leave, who would have been CFS supporters, have sworn an affidavit. Therefore, it is submitted that this evidence should be given no weight.

(c) *Alleged Observations of Candidate Nadison* Loreto claims that she saw a candidate in the election named Nadison talking to people in the area of the polling booths. There is no indication of the subject matter of the discussion, therefore there is no indication that they were talking about the Defederation Referendum. The conversation could just have easily been about a topic unconnected with the election or referendum, or Nadison could have been talking about his or her own election campaign.

Affidavit of Nora Loreto, i*bid.* para. 34

385. *Alleged Observations of Bryan Ottho:* Ms. Loreto claims that she saw Brian Ottho "canvassing" individuals in a line up that that stretching outside the Polling Zone talking to an IEC member called Steve. She does not say where she was when she observed this, what if anything she overheard, what she meant by "canvassing", or how she knew that Ottho was a "No" supporter.

Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V, TAB 49, p. 3, para. 7

386. Mr. Ottho has deposed to the following:

> ***2.*** *In response to paragraph 7 of Nora Loreto's Affidavit sworn 10 July 2008, I was involved in the "No" side campaign as well as being a candidate in the elections. I was in the polling area on March 18, 2008, because I wanted to ask Steve, who was one of the*

> *Independent Electoral Officers, how the voting process was going and, in particular, what he thought of the turnout.*
>
> ***3.*** *I did not talk to anyone about the referendum (or elections) in the no-campaign zone other than to make that inquiry of Steve. The Surry Campus is relatively small and I know most students at the campus to one degree or another and would greet them if they greeted me. However, if someone asked me about the referendum or elections while I was in the no-campaign zone, I told them I could not discuss those issues. I did not canvas people in the no-campaign zone and was particularly cautious not to engage voters in conversation about the referendum or elections while in the zone. I have worked for Elections Canada as an Electoral Officer and I am aware of polling protocol. I have also been involved in three SFSS elections and am aware and observant of the rules concerning polling zones.*
>
> **Affidavit of Bryan Ottho No. 1, CHAMBERS RECORD, VOL. III(B),TAB 41, para. 2,3**

387. In paragraph 10 of her Affidavit, Loreto says that she observed persons she"verily believed" to friends of Mr. Ottho and Ms. Nadison inside the Polling Zone. She also says she saw people marked as no campaigner in side the zone. Mr. Otthos response is as follows:

> *In response to paragraph 10 of Nora Loretta's Affidavit, I do not know who Ms. Loreto is referring to or why she thinks they were my friends. I can say that the "No" side handed out large quantities of "No" buttons to Simon Fraser students as part of the campaign and that they were worn by student voters as well as campaigners. I can also say that the polling zone in question was in the Great Hall, which is the only entrance to the campus. Students had to pass through the polling station area to get to one of the large lecture theatres at the University and it is an area where students traditionally meet before going to class. The fact that people were standing there may have had nothing to do with the referendum or election.*
>
> **Affidavit of Brian Ottho, *ibid.* para. 4**

Once again, Mr. Ottho's Affidavit clarifies Ms. Loreto's speculative evidence, it does not contradict it and it cannot reasonably be grounds for justifying a full trial.

25.2.4 Evidence of Michael Olson

388. Michael Olson claims that he made the same observations as described by Ms. Loreto in paragraphs 18-40 of her affidavit. These observations have the same frailties as those of Ms. Loreto, and should also be given little or no weight.

389. Further, it is submitted that in a matter for final determination it is totally unsatisfactory for a witness simply to adopt the evidence of another witness. That would not be permitted in live witnesses, and it should not be permitted with witnesses providing their evidence by affidavit. Ms. Loreto's evidence is inherently unreliable in many cases because she did not disclose to the Court where she was located in relation to the events she claims to have observed and heard, so the Court is unable to draw its own conclusions about what actually occurred. Mr. Olson's evidence ads another level of obscurity. Ms. Loreto did not say in her evidence that she was in the company of Mr. Olson when she made her observations, so one must infer that she was not. Similarly, Mr. Olson does not say that he was in the company of Ms. Loreto when he made the observations he claims to have observed. The natural inference is that they were not together, and therefore could not see or hear the same things from the same vantage point. It is submitted that this makes it even more difficult for the Court simply to accept at face value Mr. Olson's adoption of Ms. Loreto's evidence and undermines the credibility of both.

25.2.5 Evidence of Andrew Bratton

390. Andrew Bratton claims that he saw an unidentified balding male who identified himself as part of the "No" campaign talking to an unidentified male who had a ballot his hand.

(a) Mr. Bratton does not describe the facts that support the inference that the balding male identified himself as part of the "No" campaign. Mr. Bratton does not say what the balding male said to the voter, so there is no basis for speculation that he may have said anything improper.

(b) Mr. Bratton then claims that the balding male made "negative comments" to a "Yes" campaigner in an "aggressive manner." Mr. Bratton did not disclose what the "negative comments were" or what he meant by "an aggressive manner." There is no affidavit from this campaigner, who must have been a CFS supporter. Therefore, it is impossible for the Court to conclude that the comments were improper or unwarranted.

Affidavit of Andrew Bratton, CHAMBERS RECORD, VOL. V,TAB 51, para. 11

25.2.6 Summary of "Extensive Campaigning"

391. In summary, there is no reliable evidence from the CFS about any campaigning in the polling zone, much less extensive campaigning. There is no evidence whatever from any SFU student who says that anyone from the "No" side made any attempt to influence his or her vote while in the polling zone. The CFS choice not to lodge complaints with the ROC, the IEC or the poll clerks appears to be a deliberate tactic to ensure that their complaints would not be subject to verification; and, if there were any actual cases of improper campaigning, they would continue so the CFS would have something to complain about after they lost the referendum.

25.3 SCRUTINEERS CAMPAIGNING

392. The CFS alleges that:

> *(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;*
>
> **Statement of Claim of CFS, para 18(j)(iii), and Statement of Claim of CFS-BC para. 17(j)(iii)**

393. There is no CFS Bylaw (or other rule) that prohibits scrutineers from campaigning for one side or the other so long as they do not do so while working as a scrutineer. In most elections, scrutineers are partisans of one side or another, who observe the voting on behalf of their side to ensure that there are no irregularities. Therefore, the mere fact that a scrutineer may also campaign during an election campaign is not in and of itself objectionable.

394. Mr. McCullough advised the CFS and the SFSS that he was going to implement a policy that scrutineers could not campaign inside the campaign zone, or try to influence voters while they were voting. This is not a CFS or SFSS bylaw, but it is a sensible rule. The question, then, is whether there is reliable evidence that anyone campaigned for one side or another while they were acting as scrutineers within the polling zone. The fact that a person may have campaigned at one point in time, and acted as a scrutineer at another point, does not constitute a violation of a CFS bylaw, the SFU voting procedures, or a general rule governing elections.

395.

25.3.1 Evidence of Jeremy Salter

396. *Alleged Observation of Rachel Paling*

397. Salter claims that he saw a person named "Rachel" (known to be Rachel Paling), "engaging" people in discussion.

Affidavit of Jeremy Salter No. 1, CHAMBERS RECORD, VOL. V,TAB 48 para. 8

(a) Salter does not say what Paling said, so one may infer he did not hear what she said.

(b) Paling has deposed as follows:

> *In response to paragraph 8 of Jeremy Salter's Affidavit sworn 9 July 2008, I do not know why Mr. Salter could not see my identification. To the best of my recollection, I had it on at all times when acting as a scrutineer.*
>
> *In further response to Mr. Salter's affidavit, I did not discuss the merits of the defederation referendum with potential voters or otherwise attempt to influence votes while I was working as a scrutineer. I was not a student at Simon Fraser University but I knew quite a few students there and would have greeted them when I saw them. I do not know whom Mr. Salter saw me talking to but I know we were not talking about the merits of the referendum or how to vote.*

Affidavit of Rachel Paling, CHAMBERS RECORD, VOL. III(B),TAB 40, paras. 2-3.

(c) This does not contradict the evidence of Salter. Rather, it supplements it. Once again, this evidence cannot reasonably be said to constitute grounds for requiring a full trial.

25.3.2 Evidence of Nora Loreto

398. Ms. Loreto claims that for most of March 19, 2008, she observed a scrutineer who was wearing a nametag campaigning for the "No" side within the polling zone. However, her description of that person's activities include pulling people who were outside the polling zone towards the polling zone, so her evidence is confused as to whether this individual was acting inside or outside the polling zone.

399. Ms. Loreto admits that this person had a name tag on, but Loreto has not disclosed the name of this person to the Court. That makes it impossible to objectively verify her evidence.

Loreto claims that the person was "actively campaigning", without saying that that means to her or what the person was doing, which was necessary for the Court to draw its own conclusion as to whether the activity in question constituted improper campaigning. Mr. Loreto does not say where she was when she made the alleged observations, so the court cannot determine whether she was in a position to see what she claims she saw.

400. Mr. Loreto also claims that the scrutineer talked to three people who appeared to be his friends in the polling zone. She does not record what the scrutineer said to his friends, if they were his friends, so it is impossible to conclude that what he said was improper.

401. Ms. Loreto claims she observed this objectionable behaviour for most of the day on March 19th. This begs the question why she did nothing to bring her complaint to the attention of the poll clerk or the IEC. The natural inference is that if the conduct was improper, Ms. Loreto preferred to see it continue so the CFS would have something to complain about, rather than taking steps to halt the conduct to prevent the alleged unfairness.

25.4 EVIDENCE OF MICHAEL OLSON

402. Mr. Olson claims that on March 20th he saw a scrutineer with a nametag "actively campaigning" for the "No" side. Mr. Olson did not say that the person was campaigning in the polling zone. As noted above, there was no rule that prevented a person from acting as a scrutineer at the polling station, and also as a campaigner outside the polling station.

Affidavit of Michael Olson, CHAMBERS RECORD, VOL. V,TAB 50, para. 6

(a) Although Mr. Olson admits that the person in question had a nametag, he did not disclose the name, which would have made it possible to objectively verify or dismiss the allegation.

(b) Mr. Olson complains that the poll clerks did not ask the person to stop. However, Mr. Olson chose not to make a complaint to the poll clerks, the IEC, or the ROC.

25.5 IEC MEMBERS CAMPAIGNING

403. The CFS claims that:

(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;

Statement of Claim of CFS, para 18(j)(iv), and Statement of Claim of CFS-BC para. 17(j)(iv)

25.5.1 Evidence of Nora Loreto

(a) *Independent Election Officer "Steve"*. Ms. Loreto claims that on March 18th she saw an Independent Election Officer she described as "Steve" "talking with" unidentified individuals who were waiting to vote, or who were in the vicinity of the polling station. She does not say what Steve was saying to these individuals, so it is impossible to conclude that he was saying anything improper. He may simply have been telling people how to vote.

Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V,TAB 49 para. 7, 13, 14, 20, 25, 26

(b) Ms. Loreto claims that on one occasion she saw Steve pointing to the "No" box on a ballot. Ms. Loreto does not say where she was in relation to Steve, so the court is unable to draw its own conclusion about whether she would be able to see which of the many referendum ballots Steve was pointing at (if indeed he was pointing at a referendum ballot), much less whether Loreto was actually capable of saying that Steve was pointing at the "No" box, as opposed to pointing to the ballot generally.

Affidavit of Nora Loreto, *ibid.* para. 13

(c) Ms. Loreto also claims that she heard Steve "soliciting people to vote." It is submitted that there is nothing wrong with an independent election watchdog encouraging people to vote, if this in fact happened. In Canadian general elections, Elections Canada often runs print and broadcast ads encouraging people to vote, and advising them where the polling stations are located. Loreto complaints that a majority of the people who were solicited appeared to be "No" supporters. She does not say why it appeared that these persons were "No" supporters, or why it should have been apparent to Steve that they were "No" supporters. There is no evidence to support the inference that Steve was selecting "No" supporters. She says that the majority of individuals who appeared to be "No" supporters. That would not be surprising, because the vote results show that a large majority of voters in fact voted "No". Therefore, any random selection of potential voters would likely have a majority of "No "supporters. Loreto also claims that

some of the people Steven apparently solicited had campaigned for the "No" side earlier in the election. The reasonable inference is that such people were going to vote in any event, and were going to vote "No". Therefore, Steve's solicitations (if there were any) would have no practical effect on these people.

Affidavit of Nora Loreto, *ibid.* para. 7.

(d) Loreto did not make a complaint to the poll clerks, to the ROC, or to Mr. McCullough. As a consequence, there was no independent verification of her complaint, and it is impossible to obtain independent verification now. There is no reason to believe that a trial would provide additional reliable evidence.

25.5.2 Evidence of Michael Olson

404. Michael Olson claims that he saw Steve Anas (apparently the "Steve" of Ms. Loreto's observations) removing a CFS poster. According to Olson's version, Mr. Anas said he believed that he had the power or obligation to remove the materials in accordance with SFU and election rules. Mr. Olson chose not to make a complaint to Mr. McCullough (even though Mr. McCullough had invited the CFS to direct complaints to him), or to the ROC. As a result, Mr. Anas was not given notice of the complaint, and has not had an opportunity to reply.

Affidavit of Michael Olson, CHAMBERS RECORD, VOL. V,TAB 5, para. 5

(a) It is submitted that on the basis of the evidence of Olson it is impossible for the court to conclude that Mr. Anas' decision was incorrect, much less that it was in bad faith.

(b) There is no evidence whatever that the removal of the posters, halfway through the last day of voting, had any effect on any voters' decision.

25.6 PERSONS LOITERING IN POLLING ZONES

405. The CFS claims that:

> *(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;*

Statement of Claim of CFS, para 18(j)(v), and Statement of Claim of CFS-BC para. 17(j)(v)

406. There is no rule of the CFS that prohibits "loitering" in area of the polling stations, whatever that may be. As noted in Affidavits of Andrea Sandau, Derrick Harder and Brian Ottho, the voting booths took place in areas frequented by students. Absent an indication that a person was improperly campaigning while loitering, merely loitering in the area of a polling station is unobjectionable. Indeed, it appears that the CFS operatives were themselves loitering the area of the voting booths.

25.7 DISPLAYING BALLOTS AND VOTING OUTSIDE ZONE

407. The CFS claims that:

> *(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*
>
> **Statement of Claim of CFS, para 18(j)(vi), and Statement of Claim of CFS-BC para. 17(j)(vi)**

408. There is no CFS bylaw, or general principle of elections, that prohibits the display of ballots. It would be not be unusual to display ballots so that voters would know what kind of ballots they will receive so they may ask questions about how to vote.

409. Loreto claims that she saw unidentified individuals taking "Ballot Materials" away from the polling station and bringing them back. In none of those cases did she describe where she was in relation to the voter, so the court would be able to judge whether she was able to actually see what the voter took away, or what the voter returned with. Loreto did not provide a description of any of the voters that would make it possible to verify the evidence.

> **Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V,TAB 49, paras. 3, 4, 5, 43**

410. There is no evidence that any of the CFS operatives saw anyone take ballot material to photocopiers or other facilities that would enable them to create duplicate ballots. There is no evidence that anyone did duplicate ballot materials and vote with them.

411. In no case did a CFS operative complain or intervene to prevent the voter from taking materials out of the polling area.. If the CFS operatives believed that voters removing ballot material created a risk to the fairness of the election, they should have brought that to the attention of the poll clerks in time to prevent the voters from leaving.

25.8 UNATTENDED BALLOT BOXES

412. The CFS claims that:

> *(vii) there was improper and unsupervised sealing, transportation, storage and disposal of ballots and ballot boxes;*
>
> **Statement of Claim of CFS, para 18(j)(viii), and Statement of Claim of CFS-BC para. 17(j)(viii)**

413. There is no evidence that anyone opened or had custody of a ballot box, other than those who were entitled to do so.

25.8.1 Evidence of Shamus Reid

414. Shamus Reid claims that at approximately 7:30 pm he saw three ballot boxes being transferred to the offices of the SFSS. The SFSS offices have glass front so that the offices are clearly visible to anyone passing by. Reid says he saw people "other than poll clerks" in the office at 7:40, shortly before the boxes were brought in. However, Reid does not say where he was when he observed the boxes being taken to the SFSS office, so the court is unable to say whether he would have had an opportunity to make the observation he claims to have made, or how reliable his observation was capable of being, given his distance and any obstacles to his sight lines. It is notable that Mr. Reid did not say he saw anyone doing anything that appeared to be tampering. Mr. Reid claims that he was concerned that the SFSS office might not be a secure location, but he did not bring that concern to the attention of the ROC or the IEC at a time when his concerns might be addressed. It will be recalled that Mr. McCullough had given the CFS and the ROC members his cell number to facilitate quick contact.

> **Affidavit of Shamus Reid, <u>CHAMBERS RECORD, VOL. V,TAB 47, para. 9</u>**

415. Michael Letourneau, a member of the ROC, has replied to this aspect of Mr. Reid's affidavit:

> *In response to paragraph 9, of Mr. Reid's Affidavit, he is mistaken in his observations. Mr. McCullough and I personally oversaw the storage of the ballot boxes, which were stored in a secure location and no ballot boxes for the Defederation Referendum were stored or left in the SFSS office. Every day when the polling was done, the ballot boxes were returned to the lEC office where they were monitored either by myself or another IEC member. When all of the boxes were turned in, Mr. McCullough and I moved them to a secure storage area. Furthermore,*

> *I never saw any ballot boxes that showed signs of being tampered with or that were otherwise compromised.*
>
> **Affidavit of Michael Letourneau, CHAMBERS RECORD, VOL. III(B),TAB 37, p. 22, para. 9**

25.8.2 Evidence of Nora Loreto

416. Nora Loreto claims that she saw a polling clerk sitting on the floor sorting or counting Ballot Material. There is no evidence that this was improper in any way. There is no evidence that the materials the person was working with were ballots that had already been cast. Given that there were a number of referenda, as well as the election, being held on the same day, it is likely that the poll clerk was simply organizing the ballots into packages to give to the voters.

> **Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V,TAB 49, para. 30**

417. Ms. Loreto claims that she observed ballot boxes placed on tables behind the polling stations, and that they were readily accessible to candidates, scrutineers, and others. She did not describe the placement of the boxes in sufficient detail to allow the court to draw its own conclusion about whether the boxes were actually accessible to others. Further, there is no evidence that anyone could have accessed the boxes unseen, much less that anyone actually did access the boxes. Given the length of Ms. Loreto's surveillance of the polling station, if there had been any activity around those boxes that might have been consistent with tampering, she would have been able to observe it. She made no such observations.

> **Affidavit of Nora Loreto, *ibid.* para. 35**

418. Ms. Loreto also claims to have seen a person she knows as a "No" campaigner helping a member of the IEC construct a ballot box. There is nothing improper in that, if it is true.

> **Affidavit of Nora Loreto, *ibid.* para. 36**

25.9 POLLS HAVE ONE CLERK FOR SOME PERIODS.

419. The CFS complains that:

> *(viii) there were many incidences of failure to have the requisite two poll clerks at polling stations during voting hours.*

Statement of Claim of CFS, para 18(j)(viii), and Statement of Claim of CFS-BC para. 17(j)(viii)

420. There is no CFS bylaw or rule of elections generally that requires two poll clerks at polling stations at all times. There is no evidence of any occasion when there were no poll clerks.

25.9.1 Evidence of Nora Loreto

421. Nora Loreto claims that at a number of times on March 19th she saw one of two poll clerks leaving a polling station. The clerks were generally away for five to 10 minutes, although in one case she claims a poll clerk was absent for about half an hour. The natural inference is that the poll clerks were taking washroom or lunch breaks. There is no evidence that there were any voters waiting to vote when there was only one poll clerk, much less that any voters' ability to vote was denied or delayed.

Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V,TAB 49, paras. 18, 19, 20

25.9.2 Evidence of Andrew Bratton

422. Andrew Bratton claims that on one of the mornings of the vote he saw one polling station with one poll clerk until about noon. . There is no evidence that there were any voters waiting to vote when there was only one poll clerk, much less that any voters' ability to vote was denied or delayed.

Affidavit of Andrew Bratton, CHAMBERS RECORD, VOL. v,TAB 51, para. 5

25.10 POLLING STATIONS CLOSED OR RAN OUT OF BALLOTS.

423. The CFS claims that:

> *[P]olling stations closed or ran out of ballots during voting hours;*

Statement of Claim of CFS, para 18(j)(viii), and Statement of Claim of CFS-BC para. 17(j)(viii)

424. There is no evidence from any SFU students saying that they were prevented from voting, or even that their right to vote was delayed, because a polling station was closed or did not have ballots.

425. There is no admissible evidence from anyone that any student was unable to vote because a polling station had run out of ballots.

25.10.1 Hearsay Allegation from Jeremy Salter

426. Jeremy Salter claims that several students told him that they had been turned away from a polling station because it was out of "Ballot Material." This is unattributed hearsay that is not admissible on any application, whether interlocutory or final. While hearsay is admissible on some interlocutory matters, the affiant must identify the source, and say why he or she believes the hearsay to be true. Here, Salter did not identify the persons who, he says, told him they had been turned away. Further, it appears that Salter made no effort to verify whether it was true that a polling station had run out of ballots or even find out their names. It is submitted that it is improper to include obvious, inadmissible hearsay of this kind in an affidavit for any purpose.

Affidavit of Jeremy Salter, CHAMBERS RECORD, VOL. V,TAB 50, para. 16

427. Salter also claims that the same polling station was out of Ballot Material for ten minutes later in the day. Salter does not say what the source of his belief, whether this was the result of a personal observation, or was based on another hearsay statement. Finally, there is no evidence that any voters were unable to vote if the polling station ran out of ballots for a ten-minute period. Accordingly, this evidence should be given no weight.

Affidavit of Jeremy Salter, *ibid.* para. 17

25.10.2 Evidence of Nora Loreto

428. Loreto claims that one polling station was closed between 11:50am and 12:45pm. However, even if this was true, there is no evidence that she observed any voters who were unable to vote because the polling station was closed during that interval. There is no evidence of any SFU voter who says that he or she was able to vote only during that interval, and could not vote because the polling station was closed.

Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V, TAB 49 para. 40

25.10.3 Evidence of Andrew Bratton

429. Andrew Bratton claims that one of the polling stations opened 17 minutes late on one day. However, Bratton does not say what time he expected the poll to open, or what time the

poll actually opened, so it is impossible for the Court to conclude that the polling station actually opened late. Further, there is no evidence that there were any voters who wished to vote before the polling station opened, but could not. If there had been such disappointed voters, one would expect that Bratton would mention them.

Evidence of Andrew Bratton, CHAMBERS RECORD, VOL. V,TAB 52, para. 4

25.11 STUDENTS TURNED AWAY

430. CFS claims that:

> *(ix) SFU students were turned away although presenting valid student identification;*

Statement of Claim of CFS, para 18(j)(ix), and Statement of Claim of CFS-BC para. 17(j)(ix)

431. There is no admissible evidence to support this claim. As noted earlier, Jeremy Salter claims some students told him that they had been turned away from a voting station because it had run out of ballots, but that is hearsay from Salter's mouth. There is no evidence from any SFU student saying he or she was turned away from a polling station. If Mr. Salter did in fact have this conversation with students, one would have expected that he would have obtained their names and telephone numbers, so his allegations could be confirmed. He did not.

25.12 PRIVACY SCREENS

432. The CFS claims that:

> *(x)* [1] *there was not a privacy screen at all polling stations at all times so as to ensure secrecy of voting and,* [2] *further, where there was a privacy screen, not all voters used the privacy screen*

Statement of Claim of CFS, para 18(j)(x), and Statement of Claim of CFS-BC para. 17(j)(x)

433. Some CFS operatives have claimed that for periods of time there were too few privacy screens at polling stations. This evidence is not confirmed by photograph, or any contemporaneous complaint that could have been verified. There is no evidence from even one voter who says he or she was compelled to vote without a privacy screen. It is evident from even the CFS operatives' evidence that there was no systematic denial of privacy. Rather, even taking

the CFS evidence at face value, it appears that privacy screens may have been absent or in short supply for brief periods.

434. Assuming privacy screens were absent for some periods, it does not establish that any voters lacked privacy to vote. The use of privacy screens is not the only way to enable private voting. There is no evidence that voters had to vote right in front of the poll clerks or scrutineers. It would appear that the arrangement was for the voters to take their voting material to a table where, ideally, there would be a voting screen. However, if the voting table is removed from the table where the votes are handed out, the voter may have complete privacy. In other circumstances, the voter's own body may provide a screen from observers. There is certainly no evidence from any SFU voter saying that he or she felt there was insufficient privacy to vote, much less that he or she did not feel free to vote as she or she wished because of a lack of privacy. There is no evidence from anyone, including the CFS operatives, that anyone was able to see the marks that any voter made on his or her ballot.

435. The CFS also complains that some voters did not use privacy screens. The fact that voters chose to vote without a privacy screen when there was one available cannot be considered misconduct by anyone. The privacy screen is for the benefit of the voter. If a voter does not feel it is necessary to use a privacy screen even though one is available, no harm is one to anyone.

25.12.1 Evidence of Jeremy Salter

436. Salter claims that between 9:30 and 10:00 there was only one privacy screen at a polling station.

Affidavit of Jeremy Salter No. 1, CHAMBERS RECORD, VOL. V,TAB 48, para. 5

(a) If there was only one privacy screen, for a half hour, that would not violate any rules. At worst, it would mean that for a half-hour period voters might have had to wait on line a little longer if they wished to have a privacy screen when they voted. Line-ups are common in voting, and do not constitute an infringement of the right to vote. There is no indication that any voters had to vote without a privacy screen, or forego the right to vote.

(b) Salter claims that voters had to vote "in plain sight" of other voters. The fact that a person may be seen voting is not a denial of the right to privacy. At an ordinary general

election all voters are clearly visible waiting to vote, and are partially visible behind the privacy screens. The question is whether it would be possible to see how a person was voting. Salter does not say that it was possible to see how voters were voting.

(c) There is no evidence from any voter that others were able to see how they voted, or were concerned about such a possibility.

25.12.2 Evidence of Andrew Bratton

437. Andrew Bratton claims that, on March 19th "for nearly one hour" there was no privacy screen at a polling station. Bratton does not specify which hour, so his claim is impossible to verify or refute. Bratton also says that he saw voters voting without a privacy screen. However, he does not say that in the absence of a privacy screen it was possible for others to see how the voter was voting. Again, there is no evidence from any SFU voter complaining of a lack of privacy.

Affidavit of Andrew Bratton No. 1, CHAMBERS RECORD, VOL. V,TAB 51, para. 6

438. Bratton also claims that on March 20th one polling station had no privacy screens to eight hours. If indeed that was the case, this is an egregious case of acquiescence. If this was a real concern to the CFS, there were many avenues to correct it. However, Bratton does not testify that it was possible for others to see how the voters were voting notwithstanding the lack of privacy screens, which may explain the lack of complaint.

Affidavit of Andrew Bratton No. 1, *ibid.,* para. 9.

439. Bratton claims that a voter mentioned the lack of privacy screens to pro-CFS campaigner. This is double hearsay, and has no place in an affidavit for any purpose.

Affidavit of Andrew Bratton No. 1, *ibid.* para. 10

440. CFS claims that:

In other cases, more than one voter went behind a privacy screen at one time.

Statement of Claim of CFS, para 18(j)(x), and Statement of Claim of CFS-BC para. 17(j)(x)

441. There is no evidence of any voter who wished to be alone behind a privacy screen having another voter intrude on them. Nor is there any evidence of a person being obliged to go and vote behind a privacy screen with another voter who was already there. It would appear that on the occasions when more than one voter went behind a privacy screen (if there were any such occasions) the voters chose to do so. There is certainly no evidence to the contrary. The point of allowing voters to go behind the privacy screens one by one is to give them privacy. If a voter is content to vote in the presence of another voter, no harm is done.

25.12.3 Evidence of Shamus Reid

442. Shamus Reid claims that at he observed four students completing their ballots on the windowsill outside the library of the Burnaby Campus, with no privacy screen. He says that students inside and outside the library "would have been able to see the voting students marking their ballots." He then says, "I verily believe that this situation persisted throughout the day as the library polling station was a busy one."

Affidavit of Shamus Reid, CHAMBERS RECORD, VOL. V,TAB 47, para. 11

(a) While Reid claims that other "would have" been able to see the students marking their ballots, he does not give the court any facts on which to assess this assertion. Mr. Reid has not given the court any evidence about the physical features inside or outside the library that "would have" permitted others to see the students marking their ballots." Even if there were positions inside or outside the library that would have afforded an opportunity to see a student marking his or her ballot, Mr. Reid has not provided any evidence that there were in fact any students in those locations when the votes were being cast. Further, there is a difference between being able to observe someone in the act of marking a ballot, and being able to see which boxes the voter selected. Even if passers-by would have been able to see a student marking his or her ballot, that does not mean the passerby would have been able to see the voter's actual votes. In such circumstances the voter's privacy would not be threatened.

(b) Mr. Reid's statement that he "verily believes" the situation persisted throughout the day is inadmissible speculation. Mr. Reid has not set out the reasons for his belief, so the court is unable to form its own judgment about how long the "situation persisted."

443. CFS claims that:

> *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.*
>
> **Statement of Claim of CFS, para 18(j)(x), and Statement of Claim of CFS-BC para. 17(j)(x)**

444. Nora Loreto claims that she observed a "No" campaigner actively "engaging in conversation" with people who were entering the polling zone to vote. She does not say what she means by "engaging in conversation" (i.e., is this simply saying hello, or are these extended conversations). She also claims that she saw a "No" campaigner conversing with individuals who were voting behind a privacy screen. Again, Ms. Loreto did not give any description of the nature, length, or extent of these "conversations". It is impossible for the court to conclude that the conversation was improper in any way.

> **Affidavit of Nora Loreto, CHAMBERS RECORD, VOL. V,TAB 49, para. 11**

445. Nora Loreto claims that on one occasion she saw students distributing a "newsletter" to individuals with Ballot Material inside the polling zone. She does not say where the recipients were inside the polling zone. There is no evidence that they were in the process of voting. There is also no evidence that the newsletter said anything about the election, or the referendum.

> **Affidavit of Nora Loreto, *ibid.* para. 12**

446. Nora Loreto claims that she saw a member of the independent elections commission ("IEO") speaking with voters, including voters who were behind the privacy screen. She says that the IEO was talking about the Ballot Material with voters. Ms. Loreto does not say where she was in relation to the IEO and the voters so that the Court can draw its own conclusion about whether she was actually capable of hearing their conversation. In any event, Ms. Loreto does not say what the IEO said to the voter. It would not be surprising for the IEO to explain to the voters the mechanics of casting their vote, how many which ballots they are entitled to mark, etc.

> **Affidavit of Nora Loreto, *ibid.* para. 14**

447. It is notable that no SFU student has complained that an IEO (or anyone else) tried to influence their vote while they were voting, or overheard an IEO trying to persuade anyone else how to vote.

448. Ms. Loreto claims to have made several observations of an IEO telling people "how to vote". It would appear that this refers to the mechanics of voting. Again, there is nothing wrong with an IEO telling people how to vote, in the sense of how to fill out the ballots, which ballots to fill out, etc. There is no evidence that would support a different interpretation of the phrase "how to vote."

25.12.4 Law

449. The case of *Leroux v. Molgat* provides a useful discussion of the circumstances in which the lack of privacy screens may constitute an irregularity. The court described the circumstances as follows:

> ***10*** *The plaintiff testified that at a number of advance 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 complaints were made in this regard****. Mr. Stoliker did not deny the lack of partitions; his defence was that there was 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: Re Hickey and Town of Orillia (1908), 17 O.L.R. 317 (Div. Ct.) at p. 328; Giesbrecht et al. v. District of Chilliwack. supra, at p. 36.* ***Moreover, it was required by the Local Union's constitution, except where there was only one candidate for the office in question: Article 12, Sec.*** *6. 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 Article 12, sec. 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.*
>
> ***Leroux v. Molgat, supra,*** **PETITIONER'S BOOK OF AUTHORITIES,TAB 23, P. 4**

450. In *Leroux* the bylaws provided that *elections* had to be held by secret ballot. In the case at bar, the vote was not an election, but simply a referendum on whether the SFSS would remain part of another organization. If there is a general rule that union elections must be held by secret ballot, that rule would not apply here. The concern about ensuring privacy in union elections

would not apply to a simple vote about membership in another student association. In a union setting there was a historical concern about retaliation by employer or the union in a way that could affect the member's livelihood. There is no similar peril in the case at bar. Under the CFS bylaws a Defederation vote could be conducted by referendum, but it could also be conducted by holding a general meeting. Votes at general meetings are often by show of hands. In such a case there is no privacy.

451. In *Leroux*, a union dispute, there was a complete absence of privacy screens. It is evident that that the union made no real attempt to provide privacy, even though their bylaw required it. In the case at bar, if the observations of the CFS operatives are accurate, it would appear that the vote was intended to be by secret ballot, but for brief periods partitions were not available. The absence of privacy screens was exceptional. There is no evidence of how many voters were affected during those exceptional periods.

452. In *Leroux* the court found that it was possible for others to see that actual marks the voters made on their ballot; that is, whom they cast their vote for. While the CFS operatives claim they could see voters in the act of voting – that is, that they were marking ballots – there is no evidence that anyone could see the marks the voters made, or could say whether they voted pro-or anti-CFS.

453. Finally, and most significantly, in *Leroux* voters complained about the lack of privacy. This is relevant for two reasons. First, it cannot be said that the voters acquiesced in the lack of privacy. In this case, the only entity that appears to have had an objection about how the voting occurred – the CFS – chose not to bring its complaints to the attention of the IEC at a time when the IEC would have been able to remedy the problem, if indeed there was a problem.

454. Second, this constitutes evidence that the voters in fact perceived that they lacked privacy. In the case at bar there is not even one complaint from one voter about lack of privacy. This is strong evidence that the voters were able to vote in private in the sense that no one was able to see their vote, unless the voter was content to have the other person see their vote. (The double hearsay from Andrew Bratton about a voter mentioning the lack of privacy screen to an unnamed CFS campaigner is not an exception to this evidence.)

25.13 NO INVESTIGATION BY IEC

455. The CFS claims that:

> *(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;*
>
> **Statement of Claim of CFS, para 18(j)(xi), and Statement of Claim of CFS-BC para. 17(j)(xi)**

456. This has two aspects: (1) the IEC did not act; and (2) it did not explain its failure to act.

457. The only evidence of a complaint to the IEC is the hearsay evidence in the affidavit of Lucy Watson that a person named Andrew Fergusson made the complaints to the IEC discussed above. It is clear that the IEC did act on the complaint. It dismissed the complaint. Therefore, there is no "failure to act" for anyone to explain.

> **Affidavit of Lucy Watson No. 1, CHAMBERS RECORD, VOL. IV, TAB 43, p. 336,**

26. APPLICATION OF RULE 18A

458. In a summary trial, as in an ordinary trial, the court is entitled to accept some, all, or none of the evidence of affiants. The law does not require the court to accept affiants' assertions at face value, without considering whether the assertions have a proper foundation in the facts. Nor is the court obliged to accept assertions merely because the other side has not refuted them. This is particularly so in case like the present, where the claims are incapable of being verified or refuted because the CFS chose not to make the complaints at a time when they could be investigated.

459. It is therefore submitted that the CFS has failed to lead cogent evidence to establish the voting irregularities it claims, on proof on a balance of probabilities.

460. As Mr. Justice Smart noted in *Samra, supra*¸ the fact that the evidence on a summary trial leaves the court in state of some uncertainty does not, by itself, justify having a full trial. Uncertainties often remain even after *viva voce* evidence. The question here is whether the CFS has demonstrated, through evidence on this application, that new and better evidence concerning these irregularities would be available on a full trial that is not available to it now. It is submitted

that there is no such evidence. Given the transitory nature of the events that the CFS operatives claim to have observed, there is no realistic possibility that a trial would reveal new or better evidence from sources other than the affiants.

461. It is anticipated that the CFS may argue that if the evidence of its affiants is incomplete or unclear, it should have the opportunity to provide further and better evidence to supplement the evidence outlined above, and that a trial of the matter would provide that opportunity. The following comments from the Court of Appeal address such an argument:

> ***17*** *Mr. Shpak has been involved in litigious matters for quite some time now with the Institute and with the offshoots of the Institute's proceedings as they have been dealt with in the courts of this province. He must know that it is incumbent upon him on an application before the Court to present his evidence, and that this Court does not hear litigation in slices, if I can use that phrase, in the sense that we will hear some of the evidence, and if it is not enough we will send the parties away to get more. We simply do not do business that way, and I am sure Mr. Shpak knows that. He had an opportunity to place before the Court today evidence to satisfy the Court that he has sufficient assets to protect the Institute's position should the Institute be successful on appeal. He has not done so. I am not satisfied on the evidence that the money is at risk if it should be paid to Mr. Shpak without some terms to look after its repayment in the event that the appeal should succeed.*
>
> ***Shpak v. Institute of Chartered Accountants of British Columbia*** **[2002] B.C.J. No. 1704, PETITIONER'S BOOK OF AUTHORITIES,TAB 24, P. 4**

V. BYLAW I(7)

462. The CFS takes the position that the Defederation Referendum is also invalid because the SFSS failed to comply with Bylaw I (7), which provides that upon receipt of a written application to withdraw from the CFS, the CFS Executive will review the application to see if it is in order. If so, it can make recommendations to the members of the CFS, who vote on the application at the next AGM.

463. The SFSS has two answers: (1) the SFSS does not accept that Bylaw I (7) is duly enacted, and has put the CFS - National and the CFS-BC to the strict proof of proving the bylaw; (2) even if Bylaw I (7) was validly adopted, it does not have the meaning the CFS ascribes to it.

26.1 NO PROOF OF BYLAW

464. The SFSS does not have the burden or proving the asserted bylaws are invalid; rather, the onus falls on the party relying on the bylaws to prove they were validly adopted:

> ***Schroeder v. Saskatchewan (Attorney General),*** **[1976] S.J. No. 141 (Q.B.), PETITIONER'S BOOK OF AUTHORITIES,TAB 25**
>
> ***North West Battery Ltd. v. Hargrave,*** **[1913] M. J. No. 37 (Man. Q.B.) PETITIONER'S BOOK OF AUTHORITIES,TAB 26**

465. Under ss. 1 and 23 of the *Society Act*, the CFS- BC can only amend its Bylaws be special resolution, which is a resolution of not less the an 75% of the voters of a society who, being entitled to do so, vote in person or proxy, and the resolution must be filed with the Registrar of Companies. There is no evidence before this Court that this was ever done. All the CFS-BC has provided is a document, which it purports to be its Bylaws attached to an affidavit of a legal assistant.

466. The document the CFS-BC has provided indicates in its margins when various sections were amended. There is no indication for the date when the provisions governing Defederation were amended, yet it is clear that they were not part of the original bylaws.

467. There is no evidence before this Court to prove that the CFS National Bylaws were properly enacted. In fact, there is evidence that they were not.

468. Bylaws I (6) and (7), were purportedly enacted at the 1995 CFS AGM which was held on 28-30 May 1995 in St. Boniface, Manitoba. However, the AGM did not have quorum when the amendments were purportedly passed. Bylaw II (6) of the CFS Bylaws, which governed quorum in 1995, stated the following:

> ***Quorum at General Meetings***
>
> *A quorum for the transaction of business at any meeting of any voting members shall consist of not less than one-half of the members of the Federation having voting rights at the time in person or by proxy.*
>
> **Affidavit of Titus Gregory, Exhibit A (F), PETITIONER'S BOOK OF BYLAWS, TAB 5, P. 268**

469. There were 66 voting members in 1997, making quorum 33. When the plenary session of the GM commenced on 28 May 1995, 50 voting members were present.

Gregory Affidavit, Exhibit "H"` PETITIONER'S BOOK OF BYLAWS, TAB 6, pp. 478-80, and 491-4

470. However, voting members left during the course of the AGM. The following day, 29 May 1995, there were only 31 members present, two voting members short of quorum. When the issue of quorum was raised from the floor, the Chair took the position that while the AGM had to achieve a quorum of voting members on the first day (33 members), quorum for subsequent days was 50% of the members present when the GM commenced (i.e., 25 members). This was patently unreasonable, and not supportable on any reasonable interpretation of Bylaw (II)(6). When members raised objections with respect to this interpretation of quorum, the Chair overruled them and proceeded with the meeting.

Gregory Affidavit, Exhibit "H"` PETITIONER'S BOOK OF BYLAWS, TAB 6, pp. 478-80, and 491-4; see esp. p. 491 (roll taken on Day 2, only 31 members present)

471. The next day, 30 May 1995, when Bylaw I (6) and (7) were purportedly enacted, the Chair did not conduct a roll call and there is no record of the number of voting members present. It is submitted that the failure of the chair to call the roll, when it was evidently the practice to call the roll at the beginning of each day, raises doubts not only about the existence of quorum, but also about the good faith of the chair in trying to proceed notwithstanding a lack of quorum. The Meeting proceeded and at some point near the end of the last day of the general meeting, the two Bylaws in question were voted on. In the absence of any evidence that the voting members who left returned, the only reasonable inference is that there were less then the 33 members required for quorum present when the vote occurred.

Gregory Affidavit, Exhibit H, PETITIONER'S BOOK OF BYLAWS, TAB 6, p. 565 (No roll-call taken on third day); p. 585-587 (vote on impugned bylaws)

472. The onus is not on the SFSS to establish that the vote was improper; the onus is on the CFS to establish, on evidence, that all procedures were followed.

473. As noted in *Roberts Rules of Order*, which were incorporated into the CFS Bylaws by Bylaw II (7), any proceedings conducted in the absence of quorum are null and void.

Roberts Rules of Order, PETITIONER'S BOOK OF AUTHORITIES,TAB 40, p. 336.

474. "The prohibition against transacting business in the absence of quorum cannot be waived even by unanimous consent".

Roberts Rules of Order, PETITIONER'S BOOK OF AUTHORITIES,TAB 40, p. 337

475. The requirement to have quorum is clearly a continuing requirement: if the number of members present changes, quorum may be lost if the remaining member fall below quorum:

Roberts Rules of Order, PETITIONER'S BOOK OF AUTHORITIES,TAB 40, p. 338.

476. Prior to 1995, Bylaw I (2)(a)(iii) left the oversight of the Defederation Referendum and was concerned primarily with the adequacy of notices:

> *A full member local association may only withdraw from the Federation through a referendum subject to the following rules and procedure:*
>
> > *(a) Notice of withdrawal referendum must be delivered by registered mail to the head office of the Federation no less than six (6) months prior to any referendum voting including advance polls.*
> >
> > *(b) Notice of a withdrawal referendum must include exact dates of the referendum, rules of the referendum and a referendum question to be used.*
> >
> > …
> >
> > *(d) Quorum for a withdrawal referendum shall be that of the member local association or five percent (5%) of the member local association or five percent (5%) of the individual members of the member local association, whichever is higher.*

Gregory No. 1, Exhibit A, "F"`, PETITIONER'S BOOK OF BYLAWS, TAB 5, p. 263-264,

26.2 LACHES

477. It is anticipated that the CFS will argue that the bylaws are valid, on the basis of the doctrine of laches.

478. The principle of laches may apply where an irregularity in procedure, or a deviation from bylaws, has been condoned by the person against whom the defence of laches is raised.

However, the defence of laches cannot retroactively enact a provision that was not properly enacted in the first place.

479. Second, the principle of laches applies only where there has been no complaint about the irregular practice. The record demonstrates that there was objection to the loss of quorum at the time of the May 1995 meeting. The decade-long litigation between the Acadia University Students Society and the CFS illustrates that there has not been universal acceptance among the CFS members that the bylaws were validly adopted.

480. Third, there is no evidence that SFSS ever accepted the amendments as valid. The fact that the SFSS has not challenged the purported amendment until now is irrelevant. There is no obligation on SFSS to challenge an amendment that was invalid. The SFSS has not had an interest in determining whether Bylaws I (6) and (7) were valid until now.

481. Fourth, the defence of laches is based on the concept of detrimental reliance: it would be unjust for one party to allow another party to change its position to its detriment on the basis of its belief that a rule or agreement is in force, and then later rely on the rule or agreement. In the present case, there is no evidence that the CFS would have or could have acted differently between August 2008 and the Defederation referendum if the SFSS had raised its objection to the validity of Bylaw I (6).

482. Finally, the doctrine of laches requires evidence the party alleged to have waived or delayed in asserting right did so with full knowledge of what was being waived. Here, there is no such evidence.

26.3 INTERPRETATION OF THE BYLAW

483. The SFSS submits that the CFS interpretation of Bylaw I (7) would lead to an unjust and absurd result; namely, that the CFS could unilaterally reject the results of a referendum on membership commenced under Bylaw I (6). The SFSS submits that the only reasonable interpretation of the CFS Bylaws is that I (7) and I (6) were intended to provide alternatives routes for leaving the CFS. Both are found under Bylaw I, which sets out the Bylaws governing membership including the various routes by which membership can cease.

(a) Bylaw I (5), which is titled “Suspension and Expulsion of Members” outlines the procedure, which are to be followed where members are either suspended or expelled, for example, due to non-payment of fees.

(b) Bylaw I (6) which is titled “Vote on Defederating” outlines the procedure for defederating.

(c) Bylaw I(7) which is titled “Procedure for Application for Withdrawal” outlines the alternative procedure for withdrawing.

484. Bylaw I (3)(a) provides that individual members have the sole right to make decisions through referendum on matters of membership and to initiate the process through petition. Once the individual members have initiated the process, they can either proceed by the Defederation or Withdrawal process.

(a) Under the withdrawal process, they would have a referendum according to their own procedures, bound of course by principles of procedural fairness and natural justice. If the students vote to leave the CFS, the local association submits its application for the CFS Executives review. That process is simpler, less timing consuming and less onerous then the Defederation process, but any local association who pursue it risks the likelihood of the CFS not approving the application.

(b) Under the defederation referendum, the local association proceeds by way of the CFS Bylaws, which ensure that the CFS participates in the process and its interests are safeguarded. However, if the students vote in favour of defederating under Bylaw I(6), the results are binding, subject to any application to Court.

485. The alternative interpretation would lead to an unjust and unreasonable result. It would mean that the CFS could veto the results after the members expended the time, energy and resources of circulating a Petition, giving notice, participating on the ROC and campaigning, and after the students entitled to cast their votes did so. It would make a mockery of the democratic process.

486. Furthermore, there is no equivalent provision under the CFS-BC Bylaws, which would lead to the anomalous result that the SFSS and its members had defederated from the local branch, but not the national.

487. In the alternative, if it was a term of the Agreement between the parties that the SFSS submit its application to withdraw from the CFS, then the SFSS says that it was clear by February 2008 that the CFS would not accept the results of the Defederation Referendum and that the CFS Executive simply reject any application the SFSS brought pursuant to Bylaw I(7). The SFSS says that this amounted to an anticipatory breach of the CFS`s obligations under the Agreement, thereby relieving the SFSS of any further obligation to comply with the Agreement.

***Shen v. Pulvers*, [1990] B.C.J. No. 463 (C.A.) PETITIONER'S BOOK OF AUTHORITIES,TAB 27**

VI. OPPRESSION

488. The oppression remedies set out in sections 272 and 200 of the *Company Act* are available to societies in British Columbia by virtue of section 71 of the *Society Act* which states:

> *71(1) Despite the repeal of the Company Act R.S.B.C. 1996, Part 9 of that Act continues to apply to a society and an extraprovincial society as though Part 9 of that Act had not been repealed.*
>
> ***Society Act*, s. 71, PETITIONER'S BOOK OF AUTHORITIES,TAB 35**

489. Section 272 of the *Company Act*, which is found in Part 9 of that *Act*, incorporates s. 200 of the *Act*.

> *272. If an application for an order to wind up a company is made by a member on the ground that it is just and equitable, the court, if it is of the opinion that the applicant is entitled to relief either by winding up the company or under section 200, either may make and order for winding up or make an order under section 200 as the court consider appropriate.*
>
> **PETITIONER'S BOOK OF AUTHORITIES,TAB 36**

490. Section 200 of the *Company Act* states the following:

> *200 (1) A member of a company may apply to the court for an order on the ground*
>
> > *(a) that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including the applicant, or*
> >
> > *(b) that some act of the company has been done, or is threatened, or that some resolution of the members or any class of members has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including the applicant.*
>
> *(2) On an application under subsection (1), the court may, with a view to bringing to an end or to remedying the matters complained of, make an interim or final order it considers appropriate, and, without limiting the generality of the foregoing, the court may*
>
> > *(a) direct or prohibit any act or cancel or vary any transaction or resolution,*

….

(j) direct rectification of any record of the company.

Company Act, ibid., **s. 200, 272,**

491. Applications under s. 272 and 200 of the Company Act are to be commenced by originating application.

492. The oppression remedy is available when the society or Board treats a member or members in a manner that is oppressive or unduly prejudicial to them, thereby affecting their rights, interest or expectations as members. The procedure is open to past members of the society as well as current members. Section 200(6) of the *Ac*t states that the term "member" includes to any person who "in the discretion of the court is a proper person to make the application". In *Buckley v. British Columbia Teacher Federation (BCTF), [1990] B.C.J. No. 491 (S.C.)* the Court held that former members of the BCTF had standing to commence oppression proceedings against the BCTF.

Buckley v. British Columbia Teacher Federation (BCTF), **[1990] B.C.J. No. 491 (S.C.), PETITIONER'S BOOK OF AUTHORITIES,TAB 2**

See also, ***Lee v. Lee's Benevolent Assn. of Canada,*** **[2007] B.C.J. No. 1212 (S.C.), PETITIONER'S BOOK OF AUTHORITIES,TAB 28**

493. The oppression remedy is concerned with the manner in which the majority has conducted itself and whether the members have been dealt with honestly and fairly, and not simply whether it has violated the Articles of Association or Bylaws.

> *[I] reject the contention of the respondents that equitable considerations such as fairness to not enter into an inquiry whether there has been oppression. The court is concerned not only with the narrow question whether there has been a breach of the provisions of the Companies Act or of the Articles of Association of the company, but with the wider question whether the majority had dealt honestly and fairly with the minority in conducting the affairs of the company, or in exercising the powers of the directors.*

Paley v. Leduc, **[2002] B.C.J. No. 2845 (S.C.), citing** ***O'Neill v. Dunsmuir Holdings (New Westminster) Ltd.*** **[1980] B.C.J. No. 47 (S.C.), PETITIONER'S BOOK OF AUTHORITIES,TAB 29, P. 23**

494. The oppression remedies set out in the Company Act and are remedial in nature. As such they should be given a generous and flexible interpretation.

495. In *BCE Ltd. Inc. v 1976 Debentureholders*, the Supreme Court of Canada noted that any consideration of the oppression remedies should start with the concept of reasonable expectation.

> ***56*** *In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.*
>
> ***57*** *We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.*
>
> ***58*** *First, oppression is an equitable remedy. It seeks to ensure fairness - what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: Wright v. Donald S. Montgomery Holdings Ltd. (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; Re Keho Holdings Ltd. and Noble (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: Scottish Co-operative Wholesale Society, at p. 343.*
>
> ***59*** *Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.*
>
> ***BCE Ltd. Inc. v 1976 Debentureholders*** **[2008] S.C.J. No. 3, PETITIONER'S BOOK OF AUTHORITIES,TAB 31, P. 18, para 56-59,**

496. The first step is to identify the applicant's reasonable expectation. The reasonableness of expectation must be assessed in the context of the surrounding circumstances:

> *61 Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the CBCA. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.*
>
> *62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to*

> *the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.*
>
> ***B.C.E. supra,* at p. 19, para 61-62**

497. If the Court finds that the reasonable expectation of the member has been breached, it must then consider whether the society's conduct was oppressive or unduly prejudicial. Oppressive conduct have been defined as conduct that is "burdensome, harsh and wrongful" or which "lacks probity and fair dealing" in the affairs of a company to the prejudice of some portion of its members.

> ***Diligenti v. RWMD Operations Kelowna Ltd.*, [1976] B.C.J. No. 38 (B.C.S.C.), PETITIONER'S BOOK OF AUTHORITIES,TAB 32**

498. "Oppressive" conduct does not require a finding of bad faith. In most cases of oppressive conduct, however, the Society or Board will either have acted in bad faith or committed an unauthorized act. In other words, if the action of the Board or Society was authorized under its Bylaws, the applicant must show some degree of bad faith or improper purpose. Where the act was not authorized under the Bylaws, the applicant need not prove bad faith to establish oppressive conduct, simply that the conduct was burdensome, harsh or wrongful.

> *Some courts have taken the phrase "oppressive conduct" to require proof of a "lack of probity", or an element of mala fides, on the part of those conducting the company's affairs, whilst others have concluded that these are not necessary elements: see Low and Anderson v. Ascot Jockey Club Ltd. (1986), 1 B.C.L.R. (2d) 123 (B.C.S.C.), a decision of Southin, J. (as she then was); Eiserman v. Ara Farms Ltd. et al. (1988), 52 D.L.R. (4th) 498 (Sask. C.A.); Nystad v. Harcrest Apartments Ltd., supra, at 46; and Lyall v. Duke, supra, [1993] B.C.J. No. 874, all of which were discussed by Harvey, J. of this Court recently in Safarik v. Ocean Fisheries Ltd., [1993] B.C.J. No. 1816 (Vancouver Registry No. A902591, dated September 7, 1993) at 104-116. The latter view seems to me more consistent with the wording of s. 224 and with its purpose as a solution to the inadequate or unwieldy protections previously afforded to minority shareholders by the older "fraud on the minority" cases and the "just and equitable" winding-up remedy.*
>
> ***35** The question of mala fides is in any event usually academic, since where the conduct complained of can be described as "burdensome, harsh and wrongful", a finding of lack of good faith or lack of probity follows fairly easily*
>
> **Starcom International Optix Corp. v. MacDonald, [1994] BCJ No. 33, PETITIONER'S BOOK OF AUTHORITIES,TAB 33, para 34**

499. The second branch of s. 200, the notion of unfair prejudice is broader than oppression and expands the Court's jurisdiction to grant relief in cases where the circumstances have unduly prejudiced the applicant but cannot be said to be oppressive.

> ***Starcom, supra*, at p. para 31.**

500. Unfairly prejudicial refers to conduct in which a member's rights, interests or reasonable expectations as members are disregarded to the member's detriment.

> *Whereas the focus with regard to "oppression" is on the character of the conduct complained of, it is apparent from the judgment of Lord Wilberforce [in Ebrahimi v. Westbourne Galleries, [1972] 2 All E.R. 492 (H.L.)] that the focus with regard to the "just and equitable" provision (in our Act "unfairly prejudicial") is on the effect of the injured shareholder of the impugned conduct.*
>
> ***Nystad v. Harcrest Apt. Ltd* (1986), 3 B.C.L.R. (2d) 39 (B.C.S.C), cited in *Paley v. Leduc*, PETITIONER'S BOOK OF AUTHORITIES,TAB 29, P. 8, para 32**

501. It is the SFSS' position that the CFS refusal to respect and implement the results of the Defederation Referendum and demanding continued payment of fees from SFU students was oppressive, being both in bad faith and not authorized under its own Bylaws. It is also the SFSS' position that the CFS' conduct was unfairly prejudicial to the Petitioners rights and expectations. As members, they an expectation that the CFS would respect their democratic right to decide on membership by way of referendum and, in doing so, to no longer be associated with the Respondent organization; more specifically:

(a) acting in bad faith in relation to the Defederation Referendum;

(b) acting in relation to the Defederation Referendum a manner calculated to infringe the Constitution, Bylaws, rules and historic practices of the Petitioner concerning referenda;

(c) refusing to recognize the results of the Defederation Referendum; and

(d) refusing or neglecting to rectify its records to reflect the fact that the Petitioner and its members are no longer members of the Respondents.

502. The *Mowat* case, *supra*¸ was an oppression case. As noted earlier, the Court of Appeal was highly critical of the student society, which "when faced with a result (rendered by a procedure which it had specifically established for the referendum) which was not consistent with its wishes ... simply ignored its own rules and imposed its own preordained outcome."

503. It is submitted that there is a close analogy in the present case. The ROC established under the CFS bylaws adopted a rule that only the ROC could receive, investigate, and adjudicate complaints. When the ROC adopted that rule it necessarily followed that, absent a ruling from the ROC that a complaint was valid, and that irregularities required the nullification of the referendum, the CFS would abide by the results. The CFS, which throughout has maintained that the ROC had the sole authority to govern the referendum, cannot now be heard to say otherwise.

504. The ROC did not, of course, rule in the CFS' favour on any of the complaints, much less has it ruled that the referendum was a nullity. The CFS ignored the ROC's time limits, again for apparently ulterior purposes. It is now too late for the CFS to lodge a complaint. Accordingly, under its own rules, the absence of a decision from the ROC nullifying the referendum is final. The CFS is obliged to honour the results of the Defederation Referendum. The CFS-BC, however, has chosen to ignore that fact and "imposed its own preordained outcome." It is submitted that, as in *Mowat*, the CFS-BC's refusal to abide by its own rules is oppressive and unfairly prejudicial.

505. It is submitted that the proper remedy is to require the CFS-BC to abide by the consequences of the fact that the ROC has not found any irregularities in the process, nor found the referendum as a whole to be invalid, and accept the results of the referendum.

VII. ORDER SOUGHT

506. For all the above reasons, the SFSS asks for the following Orders.

(a) That the claims of all three CFS entities be dismissed, with costs.

(b) That CFS BC be ordered to remove the SFSS and its individual members from its membership list and rectify its documents to reflect that the SFSS and its individual members are no longer members of the CFS.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

_____

Counsel for the SFSS