

DIE BOARD RULING 2018-10

Hearing Details:

Style of Cause: *Cutarm v Students' Council (Speaker)*

Hearing Date: March 13, 2019

DIE Board Panel Members: Karamveer Lalh, Chief Tribune (Chair)

Gil Miciak, Tribune

Christian Zukowski, Tribune

Appearing for the Applicant: Deirdra Cutarm

Witness: Levi Flaman, Board of Governors Representative

Appearing for the Respondent: Reed Larsen, SU President

Jonathan Barraclough, Student's Council Speaker

Ilyas Gora, Chief Returning Officer

Emma Ripka, Agent for Michelle Kim

Intervenor(s): Rhiannon Arcand

Colin Mulholland

The reasons of Chief Tribune K. Lalh and Tribune G. Miciak are delivered by Chief Tribune K. Lalh.

FACTS

[1] The applicant, Councillor Cutarm, submitted her application to this Board on March 7, 2019.

[2] Cutarm claimed that the Students' Council (*SC*) were in breach of Bylaw, with regard to their approval of plebiscite concerning the fee collected by Student Legal Services (*the plebiscite*), and the approval of the referendum concerning the Aboriginal Students Council (*the referendum*).

[3] The applicant alleged that the plebiscite question was in contravention of Bylaw 6100 Section 3.5, as the ballot question did not satisfy all the requirements of 3.5. Section 3.5 of Bylaw 6100 is reproduced below:

The Bylaw Committee shall approve within thirty (30) days from receiving the proposal, a petition question that reflects the original intent of the proposal and outlines the following:

- a. The purpose of the fee;
- b. The amount, per student, per term, of the fee;
- c. The composition of the committee or board overseeing administration of the fee;
- d. A provision for the appointment of minimum one Students' Council member by Students' Council to the board or committee overseeing administration of the fee, as a voting member;
- e. How the fee is administered to part time, Augustana, and off campus students;
- f. Whether or not the fee applies to the Spring and Summer terms;
- g. If any portion of the fee is for a University facility or service, a provision to guarantee access by any Students' Union member to that facility or service; and
- h. If students may opt out of paying the fee, a provision for them to do so online, provided by the Students' Union

[4] Cutarm suggested that in drafting the ballot question, the Bylaw committee only adhered to subsections a and b. The applicant states that in the CJSR-FM plebiscite question passed by Bylaw committee this year, subsections a through h were satisfied.

[5] Cutarm further states that the referendum question was also approved erroneously, again citing a breach in Bylaw 6100 section 3.5. This time, in breach of sections c, d, e, and h.

[6] Cutarm drew attention to Bylaw 2200 section 6.6 and 6.7 which state:

6. Students' Council shall have the authority to call a plebiscite or referendum without a petition.
7. Prior to being approved by Council, all plebiscite and referendum questions must be drafted by the Bylaw Committee.

Cutarm states that at no point during the proceedings were a motion made to override the requirements of 2200 6.(6-7). She told this Panel that as there was no petition circulated with the ballot question, the two pathways in which a ballot question could have been approved were invalid.

[7] Cutarm stated that she did not believe overturning the results of the plebiscite, and the referendum would be a just outcome, she did hope that this board would deliver some reprimand against the Students' Council, and the CRO for passing and approving a ballot question via a process that amounted to "flagrant negligence" and "adhering to Bylaws...[only when] it is convenient for [the respondents]."

[8] Cutarm called on her witness, Governor Flaman, to speak to the issue of interpretation of the Bylaws in question. Flaman drew on the Discover Governance (DG) manual and excerpts from Bylaw. These issues are outlined in Cutarm's response to the respondents' arguments. To summarize, Flaman states that the Bylaws are drafted in such a way that they must be taken

together and in context. Flaman supports this interpretation with reference to the DG manual. The DG document headed “Referendums and Plebiscites at the U of A Students’ Union” outlines a process that the SU must follow in adding ballot questions. Flaman suggests that this document demonstrates that Bylaw 6100 should be interpreted as a series of steps that need to be followed.

[9] Flaman stated that the defense that the respondents would use would centre on Bylaw 2200 6.6 referenced above. He says however that this statement should be interpreted with regard to the statutory context: that is the Students’ Union can only use this process (i.e., not circulating a petition) if they wish to conduct their own (first party) referendum. That is, student groups are not exempt from this process, and one cannot infer that the process was designed to allow for the Students’ Union to conduct a third-party referendum on behalf of said student group.

[10] Flaman continued by saying that Students Union can exempt the petition process under 6100 3.10. However this process has not been satisfied. 6100 3.10(b) specifically states that 3.5 must be fully satisfied for 3.10(b) to apply.

[11] For the respondents, President Larsen, Speaker Barraclough, Vice President Ripka (speaking as a proxy for Councillor Kim), and Chief Returning Officer Gora each spoke to the claims made by the applicant.

[12] President Larsen argued in his statement that the decisions made by Bylaw committee in approving the referendum are saved by Bylaw 2200 6.(6-7), as stated above in para 6, that the SC can call a plebiscite without a referendum. He believed that both the referendum and plebiscites were deliberated in good faith, were reviewed by Bylaw committee, and were approved appropriately.

[13] Larsen also wished to say that a distinction exists between a plebiscite and referendum. A plebiscite is meant to inform SC of the “mood” of students to inform future decisions. A referendum is a legally binding question put to students following a successful petition. This allows a student member to put forward a legally binding vote that may not be supported by SC. The authority to petition for a referendum is granted by the *Post-Secondary Learning Act* SA 2003, c P-19.5, s 147.

[14] Vice President Ripka (proxy for Councillor Kim) echoed the comments by President Larsen. She also stated that the plebiscite question was drafted largely in the same manner as years prior due to the lack of submissions from SLS with regard to how their fee would be spent.

[15] Ripka reiterated that it was the understanding of Bylaw committee that under Bylaw 2200 6.6, the SC had the authority to call both the plebiscite and the referendum, and there was no contravention of Bylaw. Kim provided links to the council meetings supporting this assertion.

[16] Speaker Barraclough was also in agreement with the testimony of Larsen and Ripka. He noted that his responsibility is not to police the individual committees, rather trust that they are conducted in adherence with Bylaw.

[17] Chief Returning Officer Gora stated that his office did their due diligence and took particular exception to the wording of the applicant in claiming his office was in any way negligent during the process. He stated his office is only in control of the last step of the referendum and plebiscite process and he trusts the previous steps to be conducted correctly.

[18] This panel did hear further remarks from the Native Studies Faculty Association, represented by Ms. Arcand and Mr. Mulholland, and received statements from the Aboriginal Students' Council represented by Mr. Nathan Sunday and Ms. Katherine Belcourt. Their statements spoke to the experiences of the applicant, and the impact on the Aboriginal Students' Council respectively.

ISSUES

[19] The issues before this Board are as follows:

1. *Did the plebiscite on funding for Student Legal Services comply with the Bylaws? If not, what is the remedy?*
2. *Did the referendum concerning the Aboriginal Students Council comply with the Bylaws? If not, what is the remedy?*

ANALYSIS

1. Did the plebiscite on funding for Student Legal Services comply with the Bylaws?

[20] Bylaw 6100 s 4.1 requires that Dedicated Fee Units must be re-evaluated by plebiscite at least every five years. It is important to note that a plebiscite is not binding on the Students' Council. Thus, the Bylaw needs Students' Council to hold a valid plebiscite, but that is where their obligation ends. They need not substantively review the DFU, nor heed the outcome of the plebiscite.

[21] We draw specific attention to section 4.2 of Bylaw 6100. It requires plebiscite questions to be drafted "in the same manner as the original petition question, as outlined in Section 3.5 of this Bylaw." Section 3.5 in turn, contains a number of requirements that a petition question must outline to create a DFU:

- (a) The purpose of the fee;
- (b) The amount, per student, per term, of the fee;
- (c) The composition of the committee or board overseeing administration of the fee;
- (d) A provision for the appointment of minimum one Students' Council member by Students' Council to the board or committee overseeing administration of the fee, as a voting member;
- (e) How the fee is administered to part time, Augustana, and off campus students;
- (f) Whether or not the fee applies to the Spring and Summer terms;
- (g) If any portion of the fee is for a University facility or service, a provision to guarantee access by any Students' Union member to that facility or service; and
- (h) If students may opt out of paying the fee, a provision for them to do so online, provided by the Students' Union.

[22] There is no great mystery here, nor any ambiguous language, and it is clear to this panel that this Bylaw is intended to serve as a checklist for SC. A review plebiscite must contain all of the information listed above. Absent this information; the question does not follow the Bylaws.

[23] The question used in this case was:

Would you be willing to contribute \$0.75 per term to Student Legal Services (a free legal clinic operated by law students) so that they can continue to provide free legal assistance and public legal education to the students at the University of Alberta and the community at large?

[24] The question did not address requirements section 3.5(c) through (h). Thus, it was drafted in breach of Bylaw 6100 section 4.2.

What is the appropriate remedy?

[25] There are a range of remedies available to the Board. In deciding a remedy, the Board “may make any order proscribing or prescribing any remedy it considers appropriate and just in the circumstances.” (Bylaw 1500 section 31) The scope of this provision has been considered in *Sunday v Students’ Council (Speaker)*, DIE Board Ruling 2018-02 and need not be repeated here.

[26] In this case, the possible remedies include declaring the plebiscite invalid and taking no action other than to declare the breach. We consider the following factors in determining a proper remedy:

1. Student Legal Services is a pre-existing and long-standing organization, and the details omitted from the question are more likely to be at least somewhat familiar to the electorate,
2. This is the first time this issue has come before the DIE Board for determination, and
3. Students’ Council would not bound to follow or even consider the results of a new plebiscite.

[27] Given these factors, we do not believe that invalidating the plebiscite is necessary in this specific case. Student’s Council certainly breached the Bylaw, but the effect of that breach is minimal, and would likely have no effect on the outcome of the funding for Student Legal Services. Therefore, the DIE Board takes note of the breach but decides to uphold the results of the plebiscite. It should be made clear that an identical breach at some future time may not be treated in the same way.

2. Did the referendum concerning the Aboriginal Students Council comply with the Bylaws?

[28] Bylaw 6100 section 3.1 is clear that a Dedicated Fee Unit may only be created with a successful referendum. A referendum may be held in one of two ways. The first is provided by Bylaw 2200 section 6.6:

“Students’ Council shall have the authority to call a plebiscite or referendum without a petition.”

The second is a more complex process that only applies to entities other than the Students’ Council. That process is governed by Bylaw 6100 section 3.

[29] The central issue in this application is whether these routes are mutually exclusive, or whether they are options that Students' Council can access at their leisure. In our case, the process under Bylaw 6100 section 3 was abandoned partway through, and Students' Council relied on the general procedure under Bylaw 2200 to hold a referendum without following the remainder of Bylaw 6100 section 3. In our view, this was impermissible.

[30] The statutory interpretation question here is straightforward. *Scott v Chief Returning Officer* DIE Board Ruling 2016-01, although not binding on us, lays out the proper test for statutory interpretation. In this case, the following principles are at play: first, the provisions have to be read in context of the entire body of rules; second, each provision should be given meaning, the Bylaws should not be read in a way that makes some provisions meaningless; and third, the specific overrides the general.

[31] Context of the provisions is important. A referendum held by Students' Council is quite different than a referendum held at the urging of another group with the goal of creating a Dedicated Fee Unit. Bylaw 6100 section 3 sets out a process that is more stringent in the second case because the referendum impacts fees that are not administered by the Students' Council. More protections are needed against mismanagement or the misdirection of fees. Students' Council has an obligation to ensure those funds are used properly, and Bylaw 6100 is designed to help them ensure they fulfill this obligation. The arm's length nature of a Dedicated Fee Unit needs more scrutiny under the Bylaws, and that is what Bylaw 6100 is set up to provide.

[32] Bylaw 6100 must be given full meaning. For this panel to decide that Students' Council can simply hold a referendum despite non-compliance with the Bylaw, relegates it to the status of a mere suggestion. The specific requirements in section 3.2 and 3.3 would be made meaningless.

[33] Finally, the specific overrides the general. Although Bylaw 2200 creates a general ability for Student's Council to hold a referendum at their behest, in the specific case where an outside entity wants to create a Dedicated Fee Unit, the more specific Procedure in Bylaw 6100 section 3 must apply.

[34] Applying these concepts, although Students' Council can hold a referendum on their own volition and with no other specific procedure, if an outside entity wishes to create a Dedicated Fee Unit, they must follow Bylaw 6100 section 3. Student's Council cannot step in part way through that process and decide that they are going to hold the referendum despite the process. It is clear to this panel that this is what happened here.

[35] Therefore, we find that Bylaw 6100 was breached by Students Council by approving the referendum held to create the Dedicated Fee Unit for the Aboriginal Students Council.

What is the appropriate remedy?

[36] A finding of the breach is not the end of our analysis. We must decide on the proper remedy. We find the case of *Canadian Federation of Students v. Mowat*, 2007 SKCA 90 to be helpful in this regard. While we are not strictly bound by the common law, we often resort to their wisdom to guide our analysis.

[37] *Canadian Federation of Students v. Mowat* deals with a remarkably similar issue over a referendum held by the University of Saskatchewan Students' Union. The Chambers judge outlined the following test, which was endorsed by the Court of Appeal: "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?... The question is, has the organization acted in a fashion that meets the legitimate expectations of a fair-minded observer?" We find that this is the proper standard to assess the remedy for this breach.

[38] On the whole, this panel does not believe that a reasonable, right-thinking student expects Students' Council to maintain perfect adherence to the often Byzantine and confusing Bylaw, but they do expect Students' Council to make a reasonably good faith effort to adhere to the Bylaws.

[39] In this case, we believe that although the referendum was fundamentally flawed on a correct interpretation of the Bylaws, a fair-minded observer would be satisfied that it complied with the basics of how the referendum should be conducted. Specifically, Students' Council took all the procedural steps they believed were required, and the result was a flawed but not objectionable referendum.

[40] A key factor in this analysis is that this issue has not come before the DIE Board before. In a sense, the Students' Council was flying blind in terms of how these provisions interact. Chiefly for that reason, the referendum and the action of Students' Council meet the test articulated above. Our remedy is to declare that the Students' Council breached the Bylaws but take no further action.

HEARING CONDUCT AND COMMENCING DOCUMENTS

[41] We feel compelled to address two irregularities that arose in this application. The first is a question posed by Vice President Ripka in the oral hearing, and the second is the language used by Councillor Cutarm in her initial application.

Comments by Vice President Ripka and Abuse of Process

[42] During the hearing, Vice President Ripka appeared as a proxy for Councillor Kim. During the hearing, the Panel gave the parties a chance to ask questions. Vice President Ripka used this opportunity to directly question Councillor Cutarm's motives for bringing this application before the Board.

[43] As a caveat to what is to follow, we acknowledge that it is possible that certain applications to this Board may be filed in bad faith or with improper motives. Such applications could constitute an abuse of the Board's process. We address the proper procedure for making such an allegation below.

[44] In this case, Vice President Ripka's comments were particularly inappropriate for the following three reasons.

[45] First, the tone and implication of that question implied that Councillor Cutarm should not have filed this application. This is problematic because it discourages concerned councilors from accessing the exact remedy that they are supposed to in the face of a possible breach of Bylaws. Such an implication coming from a member of Council is concerning.

[46] Second, this application clearly had merit. A meritorious application should not be criticized by those charged with upholding and following the Bylaws — even if the application is inconvenient for certain members of the Students' Council. This is especially true given the comments made by Tribune C. Zukowski below in his concurring reasons.

[47] Third, this inquiry amounts to a collateral attack on the application. Instead of arguing the application on its merits, Vice President Ripka's question sought to ambush the Applicant and sought to rely on arguments that were not disclosed in the application. This had the potential to create much prejudice against the Applicant's arguments in the hearing.

[48] For those reasons, we condemn Vice President Ripka's question and the implication that went along with it: that Councilor Cutarm should not have filed this application. Because Vice President Ripka was a proxy for Councilor Kim, we are unable to say whether that question was asked on Councilor Kim's behalf, or by Vice President Ripka on her behalf. Regardless, it was improper and should not be repeated. Members of the Students' Council should not be discouraging others from holding them accountable.

[49] When a party has a good faith basis for believing that an application is brought in bad faith, they should say so in the responding documents. They should also explicitly set out their basis for this allegation. At that time, it will be up to the Panel to proceed with a joint hearing of the issues or hold a separate hearing on the abuse of process question. We acknowledge that applications are not invitations to a tea party. When parties appear before the DIE Board, they are opposed to one another: they should present their arguments firmly and should feel free to push those arguments to their legitimate strength. However, *all* the issues and allegations should be disclosed in the commencing documents. This is a matter of fundamental fairness to the parties, and fairness to the Tribunes who will hear the application. This allows all involved to marshal evidence and prepare arguments to rebut the allegations against them.

Councilor Cutarm's Application

[50] Councilor Cutarm's application to the DIE Board that included the following statement:

In either case, this shows a complete and utter disregard for the undergraduate student population who elected our representatives to ensure everything is done right and not what is easy. So even if the plebiscite

and referendum results are allowed to stand, I still feel that the members of the Bylaw Committee, the members of Students' Council and the Chief Returning Officer all need to be held accountable and/or reprimanded somehow for their flagrant negligence in regards to adhering to our Bylaws all of the time and not just [when] it is convenient for them.

We spoke above about the importance of notice in the commencing documents as a fundamental part of fairness to the parties and the Panel. In this respect, the above quote fulfills this role. The parties named above knew that "flagrant negligence" was an allegation that they should be prepared to answer. However, we also said above that arguments should be pushed to their *legitimate* strength. In this respect, the above allegation went too far. Specifically, including Chief Returning Officer Gora went beyond the legitimate strength of Councilor Cutarm's case.

[51] An allegation of "flagrant negligence" against Mr. Gora is unreasonable and inappropriate because his role *could not* have included ensuring that Students' Council complied with the Bylaws. It is not the substance of the allegation that is inherently improper: it is that Mr. Gora was improperly included in those that could have possibly been exhibiting flagrant negligence.

[52] By contrast, although we do not agree that members of the Bylaw Committee and Students' Council exhibited "flagrant negligence," these allegations were not improper. There was a legitimate argument that the breaches discussed above *did* amount to flagrant negligence. In this context, Councilor Cutarm was free to make those claims, present evidence, and argue as to why they were true. The *legitimate possibility* that we might have agreed with the allegation means that the good faith basis requirement was fulfilled.

[53] To be clear, allegations like the one above are permissible in an application to this Board. However, the complainant must be careful in making them. They must be prepared to back up the allegations with evidence or argument that can support the allegations. Just like an allegation of abuse of process, an allegation of negligence (or recklessness, or malice) must be made with a good faith basis. In the present case, it was *impossible* to argue that these allegations against Mr. Gora were true.

[54] As a final note, the evidence before the Panel is that Chief Returning Officer Gora went above and beyond the requirements of his role to ensure that the plebiscite and referendum questions discussed above were properly placed on the ballot. He checked his authority for doing so under the Bylaws and ensured that the meeting minutes properly authorized him to insert the questions. These are the actions of a diligent administrator and are he is to be commended.

CONCLUSION

[55] In conclusion, this panel finds that the Students' Council was indeed in breach of Bylaw with regard to their conduct in advancing both the referendum and the plebiscite, and the DIE Board condemns this breach.

[56] This session of Students' Council has had some complaints where the Students' Union was found in contravention of its own Bylaws, and this is a cause for concern for this Board and should be a concern for Students' Council, and the Students' Union. This Board has made some specific targeted recommendations for the SC to amend its Bylaws, but this hearing has suggested that broader commentary is warranted.

[57] This panel deliberated heavily about the appropriate remedy and drew consideration from the testimony and statements of the interveners. Their testimony pointed to larger concerns that were beyond the scope of this decision, and as such, we believe they are proper for this panel to discuss here.

[58] Councillor Cutarm stated that the entire process within Students' Council and the application to the DIE Board were inaccessible and there was not an environment within council conducive to her asking questions and bringing up concerns about procedure. Indeed, the respondents directly suggested that there was no public dissent towards the referendum and plebiscite questions as posed. This panel notes that SC votes are not conducted by secret ballot, and councilors' votes are recorded.

[58] As part of our analysis, with specific reference to the above-cited decision in *CFS v Mowat*, we considered if there was any ill intent regarding SCs conduct in advancing the referendum on behalf of ASC. This panel did not believe that any of those individuals speaking on behalf of the respondents were acting in a way that would somehow bolster their personal political position. Instead, it appears that they received concerned statements from the ASC who did not wish to engage in the petition process, the Bylaw committee deliberated, found a provision within their Bylaw that they felt granted them an exception to normal process, and proceeded accordingly.

[59] Indeed, the almost arrogant singlemindedness of the respondents suggests that this is the case. They were so adamant that their interpretation was correct, they appeared unwilling even to consider the testimony brought forward by the applicant. It is somewhat ironic then that this confidence in an incorrect application of Bylaw played a part in saving the referendum.

[60] This panel would like to note that Discover Governance did have a document, as presented by Councillor Cutarm, that illustrates the correct interpretation of Bylaw. This panel wonders why the Bylaw committee decided to invoke their own interpretation of Bylaw to advance the ASC referendum. Was there no awareness of the Discover Governance resources? Did the Bylaw committee choose to ignore those recommendations? We do not know the answer to those questions, but we urge the Students' Council to consider them for their own sake. The resources provided by Discover Governance exist to provide clarity and guidance for councilors, and these should be consulted wherever there is confusion or lack of clarity in the Bylaws.

[61] This panel does not believe it to be appropriate to comment on the relationship dynamics between the ASC, the Native Studies Students' Association, and the Students' Council within the context of this decision.

[62] Lastly, we wish to comment on statutory interpretation and the morality of the actions taken by the Students' Council. The DIE Board has found that a source of confusion that results in these sorts of applications appears to be a misinterpretation of Bylaw. A helpful guide for Students' Council is to also consider the overall purpose of those sections of Bylaw. Students' Council appears to focus on small subsections and use those subsections to justify a decision they wish to undertake. Bylaw was not intended to be used in this way. This panel suggests to SC that when they conduct reviews of their Bylaws to draft them in such a way that keeps that principle in mind, and ensure councilors and executives are aware of this. We also suggest SC work with Discover Governance and this Board in furthering that goal.

[63] To some extent, Bylaw is a reflection of morality. It indicates what is, and is not allowed, in a way that reinforces the common everyday understanding of a fair-minded student. If we were to imagine a scenario where Bylaw 6100 and 2100 did not exist and then considers the action taken by Bylaw committee, we find those actions reasonable, and we believe a fair-minded student would too. A group approached the Students' Council with a proposal for a Dedicated Fee Unit, the SC investigated the merits of the proposal and put the proposal to a vote. This is on the surface a reasonable procedure to approve a DFU, but according to the bylaw, the way the SC conducted the referendum was not. Bylaw, and law in general should reflect the morality of society. If this is not the case, the Students' Council has the power to alter their Bylaws to be a better reflection of morality and public opinion.

[64] The majority of this panel, therefore, believes that the correct remedy is merely to reprimand Students' Council for their improper application of Bylaw and encourage them to take the remedial steps outlined in this conclusion.

DISPOSITION

[65] The questions posed to the DIE Board, and the answers to those questions are as follows:

1. *Did the plebiscite on funding for Student Legal Services comply with the Bylaws? If not, what is the remedy?*

The plebiscite did not comply with Bylaw. However, this Board takes no action other than ruling that a contravention occurred.

2. *Did the referendum concerning the Aboriginal Students Council comply with the Bylaws? If not, what is the remedy?*

The referendum did not comply with Bylaw. However, this Board takes no action other than ruling that a contravention occurred.

Application 2018-10.

Reasons for the Concurring Decision of Tribune C. Zukowski.

ANALYSIS

[1] Having had the opportunity of reading the majority's decision, I agree with their analysis and conclusion on the first issue before this Board. Concerning the second issue, while I have reached the same conclusion, I have taken a somewhat different analytic approach in reaching that conclusion. I tend to agree with the majority's analysis of *whether* there is a contravention of Bylaw and how Council breached Bylaw. Where I depart from the majority is concerning their analysis of an appropriate remedy.

[2] I commend the majority's dedication to the Canadian common law in formulating their ruling. *Canadian Federation of Students v Mowat*, 2007 SKCA 90 is certainly instructive in overturning the results of a referendum conducted by a University Students' Union. However, this Board is not bound by the common law and should not feel constrained by it when conducting analyses.

[3] While I tend to support the extensive use of common law precedent in Board proceedings, as it provides a consistent standard by which this Board operates, in certain circumstances, the Board must depart from relying on the common law. I believe this to be such a circumstance.

[4] For reference, this is the tenth hearing held by this Board in its 2018 year (which runs identical to the terms of Students' Council). Troublingly, this is the third hearing in which the primary issue is Council (or a body that has been delegated authority by Council) contravening its own Bylaws. If we only consider panels of first instance for the 2018 year (of which there are nine), a third of this Board's caseload has dealt with Council contravening its own Bylaws.

[5] While this Board ruled in *Sunday v Students' Council (Speaker)* that Council may reasonably contravene Bylaw in certain situations, this has not formed part of any of the respondent's arguments in this case. In fact, there has been no recognition of a contravention by any of the respondents.

[6] Infringements of Bylaw, in general, should trouble students, as Students' Union legislation is the institution which ensures that the Students' Union operates functionally and in a manner that is procedurally fair. When legislation is contravened by the body that develops it, there is extra cause for concern, particularly if there are repeated contraventions as is the case here.

[7] For these reasons, I am satisfied departing from the common law and, instead, balancing what is an adequate remedy to ensure there are no further contraventions of Bylaw and what is fair to the Aboriginal Students' Council which had no fault in this process.

[8] At the most punitive spectrum of remedies, this Board could set aside the referendum and order that the Students' Union pay the Aboriginal Students' Council the lost revenue resulting from the contravention. This would result in, at most, the Students' Union being required to transfer \$92,659.50 to the Aboriginal Students' Council.

[9] Alternatively, this Board could, despite the contravention, rule the referendum valid and make no further orders.

[10] While in terms of the referendum this Board can only order it set aside or not, the Board could make additional orders in conjunction with its holding on the referendum. It must also be noted that this Board has not yet taken action designed to prevent further Bylaw contraventions by Council. As such, it is my opinion that any such ruling should not be drastic or excessively punitive.

[11] This case is also distinct from previous contraventions of Bylaw by Council in that there does not seem to be a *prime facie* intent on behalf of any individual or Students' Union body to contravene legislation. Instead, there appears to have been an improper interpretation of Bylaw by Council resulting in the contravention at issue.

[12] In light of this, I would make no additional orders regarding the contravention and not set aside the referendum results. However, the Council must be cautioned that further *intentional* violations of Bylaw would likely result in more directed action towards Council.

[13] I must, however, pose the question, what has caused these repeated contraventions of Bylaw? It seems to me that the answer must either be systemic dysfunction, a lack of understanding of Bylaw, or a disregard for the function of this organization (or a combination thereof). I am not a Councillor and, therefore, am not competent to answer such a question. However, I suggest the Council takes seriously the fact that it needs to be asked and its implications for the functioning of the Students' Union.

DISPOSITION

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1. *Did the plebiscite on funding for Student Legal Services comply with the Bylaws? If not, what is the remedy?*

The plebiscite did not comply with Bylaw. However, I would make no rulings other than ruling that a contravention occurred.

2. *Did the referendum concerning the Aboriginal Students Council comply with the Bylaws? If not, what is the remedy?*

The referendum did not comply with Bylaw. However, I would make no rulings other than ruling that a contravention occurred.