Justice Centre
for Constitutional Freedoms

March 18, 2013

Andrew Petter
President, Simon Fraser University
8888 University Drive
Burnaby, B.C. V5A 1S6

Dear Professor Petter,

We act for Vanessa Zarbl and SFU Lifeline, a registered SFU campus club.

We understand from Ms. Zarbl, president of SFU Lifeline, that in late January or early February, and in any event more than one month ago, SFU Lifeline applied to use space on campus on March 18 and 19, 2013, for a pro-life display which has been on SFU's campus numerous times since 2001. This request was approved by SFU. SFU Lifeline's event is an educational display called the Genocide Awareness Project (hereafter "GAP"), consisting of billboards which graphically compare the victims of abortion to victims of various historical genocides.

Since 2001, each time that GAP has been on campus at SFU, the display has generated respectful debate, with all students at liberty to view the display or to avert their gaze. UBC and other universities across Canada have hosted this same display on numerous occasions, and we applaud those universities which have honoured their own stated commitment to the free expression of all views on campus.

This past Friday, March 15, 2013, Peg Johnsen of Student Services contacted Ms. Zarbl to inform her that SFU Lifeline could not proceed with its already-approved display on March 18 and 19. Ms. Zarbl was told that SFU Lifeline could not proceed with its event because Ms. Johnsen's office had received complaints about the content of the display. In addition to cancelling the event without the consent of SFU Lifeline, Ms. Johnsen has insisted on meeting with Ms. Zarbl tomorrow (March 19) to discuss the imposition of restrictions, such as setting up the display with its signs facing inwards, so that no passers-by can see the display.

This sudden cancellation of SFU Lifeline's approved event, as well as Ms. Johnsen's proposed imposition of restrictions on your students' expression, are an illegal breach of contract. They are also contrary to your own public statement on respectful debate, which I reprint here for your ease of reference:

> We are an open, inclusive university whose foundation is intellectual and academic freedom…. we celebrate discovery, diversity and dialogue.

Public universities play a unique role in Canadian society: they are places in which people should feel free to exchange ideas, beliefs and opinions. Controversy, conflict, and criticism are inherent to this role.

Yet universities also aspire to foster an environment that promotes civility and respects human dignity. So what position should a university take when one person's speech offends another person's sense of human dignity? Should the university seek to curtail such speech? As tempting as it might be to do so, I believe such action would be misguided in principle and counterproductive in practice.

Universities operate on the principle that freedom of speech is a core component of intellectual enquiry and is central to the pursuit of knowledge. The value universities place on free expression does not imply their endorsement of views that are expressed. On the contrary, it is understood that all ideas, beliefs and opinions are subject to analysis and criticism that may result in their modification or rejection. Critics may themselves face criticism. The expression of provocative, uninformed or distasteful views must be tolerated so their inadequacies can be debated and exposed.

In practical terms, efforts to curtail offensive speech often result in such speech being given greater attention and its purveyors gaining greater prominence than would otherwise be the case. Thus attempts to reduce the influence of offensive speech through regulation are liable to produce the opposite effect.

For these reasons, when disputes arise in our university around major social and political issues, we should err on the side of tolerating free speech. Provided such speech does not overstep legal boundaries, it should not be censored even though it may be provocative or offensive.

This does not relieve us of our responsibility to try to foster an environment of civility and mutual respect. On the contrary, the broad rights of free expression we enjoy oblige all of us to work harder to promote such an environment. Nor does it permit us to disregard the chilling effects that provocative and offensive speech can have on members of our community. These effects are real and we need to show understanding and support to those who suffer them.

I therefore urge all members of the university community to redouble their efforts to create a culture that celebrates robust and vigorous debate within an academic milieu characterized by reason, tolerance, and mutual respect. Freedom of speech is a precious right and, as such, we have a duty to do all we can to ensure that is exercised responsibly and with civility.

Earlier this month, media coverage in The Province, Global News and other sources about a controversial vaccine forum at SFU indicated that you allowed the conference to go forward, notwithstanding complaints, on grounds that freedom of expression should be upheld. You were quoted as follows: "We have a very clear policy on freedom of expression. The best way to discredit views that are wrongheaded is to allow freedom of expression of those views so they can be countered."

The Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, held that Section 2(b) of the *Canadian Charter of Rights and Freedoms* protects all non-violent expressive

activity, without discrimination based on content, however unpopular, distasteful, or contrary to the mainstream. In *R. v. Zundel*, [1992] 2 SCR 731, the Court held that the purpose of freedom of expression serves to protect minority beliefs which the majority regard as wrong or false. The view of the majority has no need of constitutional protection, because it is tolerated in any event.

SFU is not legally authorized to censor, whether fully or partially, the content of a club's display simply because the display is controversial, or because individuals complain about the display's content. Protection of controversial speech is the essence of the protection for freedom of expression. Controversial and unpopular speech, by its very nature, needs protection and provides impetus for democratic discourse.

It is only by allowing dissent and debate that institutions of higher learning can provide the rich soil needed for intellectual growth. Universities should be supporting free speech and vigorous debate, not attempting to muzzle it. As John Stuart Mill stated "To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility".

In *Young v. Bella*, [2006] 1 S.C.R. 108, the Supreme Court of Canada held that a contractual relationship exists between a student and a university. Numerous other court decisions have held that the terms of the contract between a student and her university can be found in the university's calendar, mission, vision, principles, and academic policies. The principle of freedom of expression is clearly articulated as foundational to SFU, and is enforceable under the law of contract.

As tuition-paying students, Ms. Zarbl and other members of SFU Lifeline enjoy a contractual right to express their views on campus, regardless of how popular or unpopular such views may be. This is a legal right. This is not a privilege which SFU has discretion to grant or deny. The sudden cancellation of SFU Lifeline's March 18 and 19 event, approved by SFU more than one month ago, is illegal because it breaches the contract between SFU and tuition-paying students. A refusal on the part of SFU to re-schedule this event, or an attempt to censor the display by demanding its signs be turned inwards (as proposed by Ms. Johnsen) are illegal.

Further, SFU operates under the authority of *University Act,* R.S.B.C. 1996, c. 468. As a public body exercising statutory authority to carry out a public function, SFU has a legal obligation to serve all students fairly, without discrimination based on a student's views, opinions, beliefs or philosophy. SFU also has an obligation to act in harmony with the *Canadian Charter of Rights and Freedoms*, which protects the students' right to freedom of expression.

In *Roncarelli v. Duplessis*, [1959] SCR 121, the Supreme Court of Canada made it abundantly clear that administrative decision-makers must exercise their statutory discretion according to the purpose of the statute, not arbitrarily or based on irrelevant considerations. In *Roncarelli*, the Court held that the Commission's discretion under Quebec's *Alcoholic Liquor Act* could not be used to revoke the liquor licence of the restaurant of a Jehovah's Witness because he had assisted his unpopular co-religionists with their legal troubles. At page 140, Rand J stated:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be

> taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

SFU has a duty to deal in good faith, without discriminating against a campus club on the basis of its beliefs, opinions or philosophy. The University cannot exercise its statutory discretion through the last-minute cancellation of an approved event, or by censoring SFU Lifeline by demanding that this club – and no other club on campus – set up its display with signs facing inwards, such that passers-by cannot view the display. The *University Act* does not authorize this arbitrary and inappropriate use of power.

Members of SFU Lifeline merely seek to exercise the same right that other students and other clubs at SFU enjoy: the right to express their beliefs and opinions on campus in a peaceful manner, as has been done on numerous occasions since 2001. This right does not depend on how popular or unpopular one's opinions may be.

We hereby request, on behalf of SFU Lifeline, that its planned display on campus be re-scheduled immediately. We further request that you instruct SFU administrators and staff as to their legal obligation to refrain from discriminating against SFU Lifeline in any manner.

If SFU does not reverse its decision to cancel SFU Lifeline's space booking, or if SFU insists on censoring the students' display by demanding that it be set up with signs facing inwards to hide the display from view, we will have no alternative but to commence court proceedings against SFU, seeking an injunction and costs, without further warning or notice.

Yours truly,

John Carpay, B.A., LL.B

cc. Vanessa Zarbl, President, SFU Lifeline
Dr. John Dixon, B.C. Civil Liberties Association
Dr. Clive Seligman, Society for Academic Freedom and Scholarship
Peg Johnsen, SFU Student Services