IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Federation of Students v. Simon Fraser Student Society,* 2010 BCSC 1816

Date: 20101217
Docket: S089144
Registry: Vancouver

Between:

Canadian Federation of Students and Canadian Federation of Students-Services

Plaintiffs

And

Simon Fraser Student Society

Defendant

- AND -

Docket: S090331
Registry: Vancouver

Between:

Canadian Federation of Students-British Columbia Component

Plaintiff

And

Simon Fraser Student Society

Defendant

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for Canadian Federation of Students and Canadian Federation of Students - Services:	M. Palleson
Counsel for Canadian Federation of Students – British Columbia Component:	M. Underhill
Counsel for the Defendant:	S. Coristine M. Jackson
Place and Date of Hearing:	Vancouver, B.C. October 1, 2010
Place and Date of Judgment:	Vancouver, B.C. December 17, 2010

INTRODUCTION

[1] The plaintiffs are national associations of Canadian university students and student societies. They are connected organizations, and I will refer to them henceforth collectively as "the Federation". The applications before me arise out of an action in which they seek to recover from one of their member societies, the Simon Fraser Student Society ("SFSS"), membership fees that they say are owed by the Simon Fraser students for the years from 2008 onwards, and which were not remitted to the Federation. These fees are in the amount of approximately $215,000 per year.

[2] The SFSS resists, maintaining that pursuant to a vote by its students it ceased to be a member of the Federation in March of 2008. The Federation says that the SFSS's membership was not properly terminated because the vote, or referendum, was not carried out in accordance with the Federation's bylaws, and was conducted in a manner that was contrary to the principles of natural justice.

[3] The pleadings were initially closed on December 30, 2008, but the defendant added substantially to its pleading when it filed an amended statement of defence on May 3, 2010. The plaintiffs now apply for an order striking out most of those amendments.

[4] The trial of this action is presently scheduled for 30 days (six weeks) commencing February 13, 2012.

[5] Similar disputes, I am given to understand, are being litigated in several other provinces against other local student societies. Those students headed for careers in the law should be able to find plenty to do.

PROCEDURAL BACKGROUND

[6] As noted, the vote in question took place in March of 2008. There was a significant disagreement between the Federation and the SFSS concerning the

manner in which the vote was organized and conducted. The Federation took the position that it was not a binding or effective "defederation referendum" because it had not been carried out in accordance with Federation bylaws, which were binding on the SFSS. Accordingly, the Federation maintained that the SFSS remained a member, from which it would follow that the SFSS was obliged to remit ongoing membership fees.

[7] In response to this position, the SFSS commenced a petition in this Court on April 16, 2008, alleging that the Federation was acting in a manner that was oppressive and unfairly prejudicial in refusing to remove the SFSS from its list of members. The hearing was set for January of 2009.

[8] The Federation struck back by commencing this action on December 19, 2008, while the Canadian Federation of Students-British Columbia Component ("CFSBC") commenced a similar action on January 15, 2009. The SFSS then applied for orders dismissing those claims by way of summary trial, while the Federation applied for an order requiring the SFSS to continue collecting the fees pending resolution of the claims.

[9] The hearing of these applications was scheduled for January 28-30, 2009, which had been reserved for the hearing of the SFSS's petition. By that time, the parties had agreed that the three proceedings would all be heard together.

[10] The applications came on for hearing before the Honourable Mr. Justice Blair. The hearing occupied a total of five days, extending into May of 2009. In reasons for judgment issued August 10, 2009, indexed as 2009 BCSC 1081, Blair J. concluded that the issues raised by the parties were not suitable for determination by way of summary trial, as it was not possible by that process to fairly find the facts necessary to reach judgment. The litigation was accordingly remitted to the trial list.

[11] Nearly nine months later, the defendant filed its amended statement of defence.

THE PLEADINGS

A. The Statement of Claim

[12] In paragraph 4 of their statement of claim, the plaintiffs describe themselves as national student associations.

[13] In paragraphs 5 and 6 of their statement of claim, filed December 19, 2008, the plaintiffs plead that the SFSS was a founding member of the Federation as of October, 1981, and that the student members of the SFSS approved full membership by majority vote in 1982. They maintain that the SFSS has been a voting member of the Federation ever since, and as such is bound by the Federation bylaws.

[14] In paragraph 7, the plaintiffs refer to their membership bylaw, Bylaw I, which includes the following provision in subparagraph I(2-a.)(v):

> A local association's application for membership, once accepted by the Federation, shall constitute a binding contract to collect and remit to the Federation full membership fees for the duration of the membership.

[15] In paragraphs 8, the plaintiffs refer to a Fee Agreement which they allege the parties entered into as of July 20, 1987, and which remains in force. That agreement provides for the local association member to collect, either directly or by arrangement with Simon Fraser University, the Federation's membership fees from students at SFU, and to hold them in trust for the Federation until paid over.

[16] In paragraphs 11, 12 and 13, the plaintiffs say that, pursuant to the bylaws and the Fee Agreement, the SFSS remains obliged to collect and remit the membership fees, and did so from 1982 until the 2008 summer session. They allege that in breach of the bylaws and the Fee Agreement, the SFSS has not remitted fees with respect to the SFU 2008 summer and fall sessions [and, it follows, all sessions since].

[17] In paragraph 17, the plaintiffs note that on or about March 18-20, 2008, the SFSS organized and held a vote of SFU students regarding membership in the Canadian Federation of Students.

[18] In paragraph 18, the plaintiffs plead that the vote was not effective to remove the SFSS from the Federation because it was not held in accordance with the bylaws, and was in any event carried out in an unfair manner, contrary to the rules and principles of natural justice. Numerous particulars are provided, including the following:

a) usurping the jurisdiction of the Federation's Oversight Committee which pursuant to Bylaw I(6) was to have sole jurisdiction and authority over any defederation referendum;

b) commencing its campaign early, without authority or approval of the Oversight Committee, resulting in an unfair vote;

c) producing inaccurate and defamatory campaign materials without the authority or approval of the Oversight Committee and contrary to the bylaws, resulting in an unfair vote.

d) insisting that the vote be held over the same time as the SFSS's general elections, without the authority or approval of the Oversight Committee, resulting in an unfair vote;

e) adding a biased and unfair second question to the ballot, concerning what should be done with the former Federation semesterly membership fee;

f) failing to maintain confidentiality;

g) using a Chief Returning Officer who held an anti-Federation bias;

h) allowing many polling and voting violations and irregularities when the vote was conducted; and

i) failing to follow the correct post-vote ratification procedure required by Bylaw I(7)

[19] On the basis of these allegations, the plaintiffs seek declarations that the vote was invalid and ineffective, either pursuant to the bylaws or otherwise, for the purpose of accomplishing defederation, and that the SFSS remains a voting member of the Federation. The plaintiffs also seek an accounting with respect to the amount

and whereabouts of unremitted fees, a declaration that such unremitted fees remain trust funds held in trust for the benefit of the plaintiffs, and an order that they be paid over forthwith to the plaintiffs. In addition, the plaintiffs seek judgment against the defendant in the amount of the total fees owing, damages for breach of trust, and other corollary relief.

[20] The plaintiffs submit that the principal issue between the parties is clearly whether the vote was valid, and the effect of the vote, if any, on the defendant's defederation efforts. The merits of membership in the Federation ought not, they assert, to be on trial.

B. The Statement of Defence

[21] The SFSS filed its statement of defence on December 30, 2008. In response to the plaintiffs' contractual assertions concerning the bylaws and 1987 Fee Agreement, the defendant pleads that it was an express or implied term of its membership in the Federation that it would abide by the Federation bylaws only in so far as they did not conflict with the SFSS's bylaws and constitution. The defendant further alleges that there was a 1982 membership agreement that provided, in part, that the defendant must conduct all referenda (votes) required by the Federation bylaws in the same manner as any other referenda it may conduct. The defendant then says that when it entered into the 1987 Fee Agreement, it did not intend to and did not have the capacity to commit itself to any conflict with its own bylaws or constitution, or to delegate or cede to the Federation the power to amend or override its own bylaws and constitution on electoral matters.

[22] In short, the SFSS pleads that its contractual agreement with the Federation consisted of the 1982 agreement, the 1987 Fee Agreement, and the constitutions and validly enacted bylaws of both the Federation and the SFSS.

[23] In paragraphs 7, the defendant sets out what it says are the express or implied terms of the agreement as follows:

a) individual members [such as the SFSS] had the right to decide whether to remain members in the Federation, and could terminate their memberships if the majority voted in favour of doing so in a referendum;

b) the Federation would respect the right of individual members to decide issues of membership, and would respond to a membership referendum in good faith, in accordance with principles of democracy, Federation bylaws and the SFSS bylaws and constitution;

c) the Federation would not unreasonably prevents individual members from exercising their right to vote on membership;

d) the Federation would interpret their bylaws in a manner consistent with the rights of individual members to decide on issues of membership, and with the principles of democracy;

e) the Federation would respect the defendant's bylaws and practices concerning defederation votes, and interpret its own bylaws in a manner that did not conflict with the defendant's bylaws; and

f) the CFS would either respect the outcome of any referendum held on membership, or seek a court ruling setting aside the results.

[24] In paragraphs 8 and 9, the SFSS asserts that there was no express or implied term of the agreement that permitted the Federation unilaterally to determine whether the results of a vote were valid or binding, and that its obligation to remit fees under the agreement was contingent upon the SFSS remaining a member.

[25] In paragraph 11, the defendant pleads that it ceased being a member of the Federation as the result of a vote held on March 18-20, 2008, and that its obligation and authority to remit fees to the Federation thereby ended.

[26] In paragraphs 13 and 14, the defendant states that the vote was fair and valid and held in accordance with applicable bylaws. It then asserts that the Federation's bylaw I(6) governing defederation referenda was not properly passed and was of no force and effect, but was complied with in any event; and in the alternative, any breach by the defendant of the agreement was not a fundamental breach that invalidated the results of the vote.

[27] With respect to Federation bylaw I(7), the defendant pleads again that it was of no force and effect or, alternatively, that it provided an alternative process to the defederation referendum process set out in bylaw I(6) and therefore did not need to be followed.

[28] In paragraph 17, the SFSS alleges that the Federation had already unequivocally informed it that they would not respect the results of the defederation referendum, indicating an intention to breach its contractual obligation of good faith. The SFSS maintained that it chose to accept this anticipated breach of their agreement and to terminate it in anticipation thereof.

[29] Finally, in paragraph 18, the SFSS pleads that if there was any omission, defect, error or irregularity in the vote that resulted in any default in compliance with the Federation or SFSS bylaws, then the defendant seeks an order pursuant to s. 85 of the *Society Act*, R.S.B.C. 1996, c. 433, rectifying the omission, defect, error or irregularity and validating the vote.

C. The Amended Statement of Defence

[30] The defendant filed an amended statement of defence on May 3, 2010. In this pleading, it added a new paragraph 4 purportedly responding to paragraph 4 of the statement of claim, saying:

> ... although the CFS [the Federation] has an elected Board of Directors and National Executive, its operations are run by professional staff ("the Professional Staff"), many of whom are former members of the National (and Provincial) Executives and whose salaries are paid from fees collected from student members across the country.

This is the first of the paragraphs which the plaintiffs seek to have struck.

[31] To its recitation of the express or implied terms of its agreement with the Federation, the defendant added the following, to which the plaintiffs also object:

> (g) the Federation would use the money collected from its individual members to promote those members' interests.

[32] The defendant then added the following new paragraphs 21 through 28:

Breach of Agreement to Act in Good Faith

21. In response to the whole of the Statement of Claim, the Defendant says that, in breach of the Agreement, the CFS acted unreasonably and in bad faith with respect to the Defederation Referendum. It did so with the intention of preventing the Defederation Referendum from proceeding or, if it was unable to prevent it from proceeding, creating unfounded grounds upon which it could refuse to accept the results of the vote if the CFS lost. It took these steps because it wanted the Individual Members to remain members of the CFS so it could continue to have the benefit of their membership fees.

22. The particulars of the CFS's unreasonable conduct, bad faith and breach of the Agreement include, but are not limited to, the following:

    (a) failing to respond to the Defendant's request that the CFS and Defendant develop a process which would avoid the procedural problems that were likely to arise and, in particular, a process for resolving any deadlocks that might arise on the four person ROC;

    (b) appointing individuals to the ROC with the intention that they would prevent or undermine the Defederation Referendum by

        (i) failing or refusing to fulfill their responsibility to organize the Defederation Referendum;

        (ii) failing or refusing to develop written procedures and rules for the Defederation Referendum and unreasonably rejecting or failing to consider those proposed by the Defendant;

        (iii) taking unreasonable positions at ROC meetings with the intention of creating a deadlock on the ROC in order to prevent the Defederation Referendum from proceeding;

    (c) raising unreasonable objections to the Defederation Referendum process and the fairness of the vote when it was too late to resolve them without cancelling the Defederation Referendum;

    (d) fabricating grounds upon which to reject the results of the Defederation Referendum if the CFS lost, including flying volunteer and paid staff from across the country and paying for them to stay in British Columbia for that purpose; and

    (e) other conduct that is known to the Plaintiffs but not the Defendants.

23. The Defendant says that the CFS's attempt to undermine the Defederation Referendum was consistent with and part of a general campaign agreed to and furthered by the CFS Executive, its Professional Staff, and its Provincial components aimed at preventing students across Canada from exercising a meaningful right to leave the CFS and stop paying CFS membership fees.

24. The Defendant further says that the CFS' efforts to prevent the Individual Members from exercising their right to vote on continued membership in the CFS, and refusal to accept the outcome of the Defederation Referendum after it lost the vote, was in furtherance of this agreement and consistent with the CFS approach to membership votes held at other campuses across the country both prior to and subsequent to the Defederation Referendum including, but not limited to, those held at:

(a) Acadia University

(b) Cariboo College

(c) Cape Breton University

(d) Carleton University

(e) Concordia University

(f) Guelph University

(g) Kwantlen College

(h) McGill University

(i) Mount St. Vincent University

(j) University of Calgary

(k) University of Saskatchewan

(l) Trent University

Breach of Agreement Concerning Fees

25. The Defendant says that the CFS committed a fundamental breach of the Agreement by refusing or failing to use the fees collected from the Individual Members to further the interests of university students in general and the Individual Members in particular.

26. The Defendant says that the CFS has instead used the fees to pay salaries, expenses and benefits to its Professional Staff and/or National Executive and to fund its campaign to prevent the Individual Members and other student members from exercising their right to vote on continued membership in the CFS. The funding of this campaign included, but was not limited to:

(a) Appointing out-of-province employees and National Executive members to sit on the ROC at SFU and other campuses rather than using local members, thereby incurring the unnecessary expense of travel, salaries and/or accommodations for these out-of-province ROC appointees;

(b) Flying out-of-province employees and other supporters to British Columbia and other provinces to oppose the Defederation Referendum at SFU and other campuses rather than using local members, thereby incurring the unnecessary expense of travel, salaries and/or accommodations for these out-of-province supporters;

(c) Flying out-of-province employees and other supporters to British Columbia and other provinces for the purpose of creating unfounded allegations of wrongdoing upon which the CFS could rely as grounds for refusing to accept the results of the Defederation Referendum at SFU and other campuses if it lost.

(d) Other expenses and expenditures that are known to the CFS but not known to the Defendant.

27. The Defendant submits that the CFS's conduct in the Defederation Referendum and use of student fees constituted a fundamental breach of the Agreement, thereby relieving the Defendant of any obligations it may have had under the Agreement.

28. The Defendant submits that the Plaintiffs' conduct towards the Defendant and its membership has been reprehensible and malicious.

[33] Of those new paragraphs, the plaintiffs seek to strike out 23 through 26, and the words "and the use of student fees" in paragraph 27.

DISCUSSION

[34] The plaintiffs raise three principal objections to these amendments. They maintain first that the impugned amendments are vexatious and embarrassing and should not be allowed; second, that they offend the principle of proportionality incorporated into the *Supreme Court Civil Rules* by Rule 1-3; and third, that they constitute an abuse of process, being put forward for an improper purpose; one that is political, rather than legal. They rely on Rule 9-5(1), which provides as follows:

> (1) At any stage of the proceeding, the court may order to be struck out or amended the whole or any part of the pleading ... on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be state or dismissed and may order the costs of the application to be paid as special costs.

[35] Rule 1-3 states in subrule (1) that the object of the rules is "to secure the just, speedy and inexpensive determination of every proceeding on its merits". It goes on to provide in subrule (2) as follows:

> (2) Securing the just, speedy and inexpensive determination of the proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[36] With respect to the concept of proportionality, I observe that the amount involved in this proceeding is substantial, the issues in dispute would appear to be of considerable importance not only to the parties, which is inevitable, but to a number of other universities and colleges in British Columbia and across Canada, and the proceeding is at least sufficiently complex to render a summary trial impracticable.

[37] But setting that aside, I am unable to accept that a pleading that is not susceptible of being struck out on the grounds enumerated in Rule 9-5 may nevertheless be successfully attacked as disproportionate within the contemplation of Rule 1-3. If an amendment pleads an additional defence that is known to law and relevant to the claim, then it should be allowed to stand no matter how little is at stake, how unimportant the issues, or how straightforward the claim. Proportionality is intended to enhance, and should never inhibit or curtail, the determination of a proceeding on its merits.

[38] In this regard, the concept of whether a proposed *procedure* is disproportionate to the amount involved in a claim and to the importance or complexity of its issues (Rule 1-3) is to my mind quite different from the question of whether a proposed *pleading* threatens to delay or prejudice the fair trial of a proceeding (Rule 9-5(1)(c)). After all, it is the pleadings that establish the factors that are enumerated in Rule 1-3.

[39] Turning to Rule 9-5(1)(a), the test is whether it is "plain and obvious" that the pleading discloses no reasonable cause of action or defence: *Hunt v. Carey*

Canada Inc., [1990] 2 S.C.R. 959 at para. 28. If there is any doubt as to whether a reasonable defence is disclosed, it should be resolved in favour of permitting the pleadings to stand: *McGauley v. B.C.* (1989), 39 B.C.L.R. (2d) 223 (C.A.).

[40] Rule 9-5(1)(c) and (d) involve a number of considerations. These include whether the pleadings are unintelligible, confusing and difficult to understand, whether they are so irrelevant ("embarrassing" and "scandalous") that they will involve the parties in useless expense and prejudice the trial by involving them in a dispute that strays far from the issues, and whether they do not advance any defence known to law ("unnecessary" or "vexatious"). See, for instance, *Moulton Contracting Ltd. v. British Columbia*, 2010 BCSC 506, and the cases cited therein by Hinkson J., as he then was. These considerations also encompass a pleading that is made for an improper purpose, such as to harass and oppress the other parties, as opposed to raising a *bona fide* defence.

[41] Rule 9-5(1)(d) also raises a number of considerations. A pleading is an "abuse of the process of the court" not only if it attempts to re-litigate something already decided, but also if it violates such principles as judicial economy, consistency, finality and the integrity of the administration of justice: see, for instance, *Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 47, citing *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77 at para. 37.

[42] The plaintiffs say that with its amendments, the defendant is guilty of all of these sins.

[43] The defendant maintains that its amendments are *bona fide*, relevant and necessary to defend the plaintiffs' claims fully. It notes that both sides agree that they entered into a contract, but disagree as to its terms. It asserts that its defence in these circumstances is two-fold. The first prong is that the SFSS is no longer bound to pay the fees claimed by the plaintiffs because its defederation referendum was a legally valid vote that ended the contract between them. The second is that the Federation fundamentally breached the contract in two independent ways,

thereby relieving the defendant from its contractual obligations. The first way was to breach its agreement to act in good faith (paragraphs 21-24). The second way was to breach its agreement concerning fees (paragraphs 4, 8(g) and 25-27).

[44] The pleading of the second prong begins with paragraphs 21 and 22, to which the plaintiffs do not object. The fundamental question raised in paragraph 21 is whether the Federation breached its alleged agreement to act in good faith. The particulars of the alleged breaches are given in paragraph 22 and include, in essence, attempting to undermine the defederation referendum process.

[45] Paragraph 23 says that these undermining attempts were consistent with and part of a general campaign aimed at preventing students across Canada from leaving the Federation in order to obtain the benefit of their fees. Paragraph 24 alleges that the plaintiffs' efforts were in furtherance of this campaign, and consistent with the Federation's approach to membership votes held at other campuses both before and after the SFU vote, including those listed.

[46] Paragraph 25 begins the 'improper use of fees' allegations by alleging that the Federation committed a fundamental breach of the agreement by refusing or failing to use the collected fees to further the interests of university students in general and the Individual Members in particular. Instead, it is alleged in paragraph 26, fees were spent on the salaries and expenses of professional staff, and on conducting the campaign described in paragraph 23, at SFU and other campuses as described. As a result of this fundamental breach, paragraph 27 asserts, the SFSS was relieved of its obligations under the contract.

[47] I observe that the campaign referred to in paragraphs 23 and 24 in part supports the plea of fundamental breach particularized in paragraph 26.

[48] The plaintiffs say that these paragraphs violate Rule 9-5(1)(a) because they disclose no reasonable defence. They submit that the actions of the Federation towards other individual members on other occasions can have nothing to do with the terms of the contract between the parties, or with the conduct of the vote, given

that some of the other occasions referred to in paragraph 4 are alleged to have occurred after the breaches particularized in paragraph 22. Moreover, they argue, the conduct of other votes, some of which have already been the subject of judicial proceedings, can provide no defence on their own.

[49] With respect to the pleading of fundamental breach in relation to the use of fees, the plaintiffs say that it is "plain and obvious" that this discloses no reasonable defence, as the doctrine of fundamental breach has now been "laid to rest" by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4, [2010] 1 S.C.R. 69.

[50] The plaintiffs' interpretation of the *Tercon Contractors* case goes, in my view, a little too far. That case, in a 5:4 decision, considered the doctrine of fundamental breach in the context of an exclusion clause. That is not the context we have before us. Here, the defendant pleads that the Federation committed a fundamental breach of their contract, the effect of which was to relieve the SFSS from performing its obligations. Whether or not that should more properly be described as a breach going to the root of the contract rather than a fundamental breach, the fact is that in law it remains a good defence.

[51] But the plaintiffs assert, in essence, that it cannot succeed in this case because even if the alleged particulars of this fundamental breach could be found to be a breach at all, they could not possibly be serious enough to justify the termination of the agreement. In my view, that is not a question that can properly be determined on this sort of application, particularly where, as on the pleadings here, the terms of the contract must be discerned from a number of different documents produced at different times. It requires a weighing of evidence and findings of fact that are more appropriately dealt with at trial. The defence does not have to be a slam dunk in order to survive an application to strike the pleading.

[52] The plaintiffs then say that to permit these paragraphs to stand would involve the court and a wide-ranging analysis of the practices of the plaintiffs not only with respect to the vote and the SFSS, but with respect to other campuses, involving

these parties in useless expense, and requiring them to stray far from the real issues in the case. Those issues are whether the SFSS breached the contract between the parties, and whether the vote was carried out properly.

[53] In examining this proposition, it is necessary to consider paragraph 18 of the statement of claim. As the defendant points out, many of the particulars pleaded in that paragraph support not the plea of breach of the bylaws, but rather the plea that the vote was carried out in an unfair manner, contrary to the rules and principles of natural justice. Further particulars contained in the Federation's affidavit materials include reference to SFSS campaign statements to the effect that the Federation is an "Ontario-centered bureaucracy that won't let you leave", that it uses collective resources to interfere with local elections, that it shuts down dissenting voices, is anti-democratic, and wastes students' money.

[54] Further particulars from the Federation's affidavits include the failure of the SFSS representatives on the Oversight Committee to respect the "custom and practice" that all discussions and deliberations of its Oversight Committees are to be kept confidential, and the failure to have campaign materials reviewed by the Oversight Committee and approved prior to distribution, to ensure that standards of fairness and accuracy are met.

[55] The defendant argues that, as the plaintiffs have raised these allegations, then the necessary inquiry will not be meaningfully broadened by the defendant's new pleadings. That may be so, but the more important point is that it is not "plain and obvious" that the defence raised in those pleadings is an unreasonable one.

[56] The fact is that the defendant had already pleaded what in essence constitutes repudiation by fundamental breach, in paragraph 17 of its original statement of defence (now paragraph 19). In the circumstances, its amended plea of fundamental breach based on alleged breaches of the Federation's agreement to act in good faith, and its allegedly improper use of fees, cannot in my view be described as irrelevant, frivolous, unnecessary, vexatious, or made for an improper purpose.

[57] I consider, however, that the pleading goes too far when it leaves the parameters of the dealings between the parties and brings in the events at other campuses on the basis that the approach of the Federation in the SFU election was consistent with its approach at other campuses. While it is open to the defendant to allege a campaign of which the events at issue in this action were a part, that pleading should be confined to the context in which it properly arises, being the alleged undermining of the vote at Simon Fraser University, and the improper use of fees as particularized in paragraph 26. The further reference to membership votes at other campuses in my view adds nothing by way of a defence, and is unnecessary. It is at best a pleading of evidence.

[58] I therefore order that the words "consistent with and" in paragraph 23, and the portion of paragraph 24 following the words "was in furtherance of this agreement", be struck. The plaintiffs' application is otherwise dismissed.

[59] Before leaving this matter, I feel obliged to adopt, with respect, the words of my brother Blair set out at paragraph 42 of his judgment:

> The cost of this litigation, no matter which party or parties are successful, will be borne by post-secondary students enrolled at SFU, as well as by students at those institutions which are members of the CFS. Tuition, books, accommodation and meals already impose a significant burden on post-secondary students without requiring them to contribute further to the costs of resolving the parties' dispute. I would anticipate that the student fees paid to the SFSS and the CFS can be used more productively for programs directly benefiting those students rather than being consumed in more litigation.

[60] This litigation should be brought into case management at the earliest opportunity, and all efforts should be made to explore alternative methods of resolution, such as mediation, judicial settlement conference, or such other means the parties may choose.

[61] The defendant should have its costs of this application in the cause.

"GRAUER, J."