IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Simon Fraser Student Society v. Canadian Federation of Students,* 2010 BCSC 336

Date: 20100317
Docket: S082674
Registry: Vancouver

Between:

Simon Fraser Student Society

Petitioner

And

Canadian Federation of Students, Canadian Federation of Students – BC Component, and the Canadian Federation of Students - Services

Respondents

- And -

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 Blair

Reasons for Judgment

Counsel for Simon Fraser Student Society:	S. Coristine
Counsel for Canadian Federation of Students and Canadian Federation of Student - Services:	M. Palleson
Counsel for Canadian Federation of Students – British Columbia Component:	M. Underhill
Place and Date of Trial:	Vancouver, B.C. January 28 – 30 and May 25 & 26, 2009
Place and Date of Judgment:	Vancouver, B.C. March 17, 2010

[1] In my reasons for judgment filed August 10, 2009 and found at 2009 BCSC 1081, I dismissed the applications brought by the Simon Fraser Student Society (the "SFSS") in the above actions and petition for summary judgments pursuant to Rule 18A of the *Rules of Court.* I directed that the parties' dispute be returned to the trial list to be heard in a full rather than a summary trial.

[2] The respondents to the SFSS's applications, the Canadian Federation of Students (the "CFS") and the Canadian Federation of Students – Services (the "CFS – Services") as well as the Canadian Federation of Students – B.C. Component (the "CFS – BC") having succeeded at the summary trial applications seek their costs. Counsel for the SFSS submit costs should be in the cause.

[3] Counsel did not address costs at the summary trial, but in my reasons for judgment I commented on costs at paras. 47 and 48:

> **Costs**
>
> [47] The SFSS pursued their Rule 18A application in the face of strong opposition from the CFS, the CFS – Services, and the CFS – BC, which asserted from the commencement of the hearing that this was not a situation which could be appropriately dealt with in a summary trial. I subsequently concluded that this was not a dispute to be dealt with summarily. In the ordinary course I would anticipate awarding the CFS entities costs at Scale B. The CFS and CFS – Services, represented by the same counsel, would have a single set of costs, as would the CFS – BC.
>
> [48] The cross-applications brought by the CFS entities were dismissed, but occupied such a minimal amount of time during the five days as to be inconsequential. If there are matters with respect to costs upon which the parties wish to make submissions on or before August 24, 2009, they may arrange with the Registry a date before or after August 24, 2009 to address the question of costs.

[4] The parties sought and obtained leave from me to make written submissions on costs, with the SFSS filing the last response submission on February 10, 2010.

[5] I acknowledge that at paras. 47 and 48 of my reasons for judgment I anticipated awarding the CFS entities their costs, given that the SFSS had failed in its summary trial applications and the circumstances leading to the dismissal of the SFSS's applications. The submissions provided by counsel, together with a review of the authorities cited, caused me to reflect further on the costs question. I thank counsel for their assistance as reflected in their thorough submissions.

[6] The general rule is that costs are not awarded against a party who makes an unsuccessful application under Rule 18A unless the circumstances can be characterized as exceptional or extraordinary. In normal circumstances costs are in the cause, reflecting the fact that the unsuccessful party, SFSS in this case, may eventually succeed at trial: See for example, *Antrobus v. Antrobus,* 2008 BCSC 345 and *656925 British Columbia Ltd. v. Cullen Diesel Power Ltd*., 2009 BCSC 260.

[7] Mr. Justice Verchere in *Toronto Dominion Bank v. Fortin,* 1978 CarswellBC 291 (B.C.S.C.) addressed the considerations leading to an order that costs be in the cause upon the dismissal of a summary trial application. He wrote at paras. 6 and 7:

> [6] There is merit, I think, in the contention that the right to seek the summary disposition of an action should not be discouraged and a degree of support thus emerges for the view that an applicant under R. 18, regardless of whether he is the plaintiff or the defendant in the action, should not be penalized in costs if and when the application fails only because it has been made to appear that there exists and arguable defence, or a claim not totally without merit, as the case may be. An applicant for an order under R. 18 has a burden generally more onerous than that which his opponent is required to carry, and it can, therefore, well be thought, in my opinion, that his task should not be made more difficult by the fear of being mulcted in costs if, without being found at fault, he should fail in the performance of his task.
>
> [7] More important, however, is the consideration that the failure of a motion under R. 18 does not mean that the other side's case will inevitably and ultimately prevail. Hence, it may well be the case that a party who has succeeded on an application under R. 18 fails miserably at the trial; and it may also well be the case that the trial judge, after hearing the evidence and argument in the matter, is compelled to say that the issue relied on was quite without merit. Nevertheless, if that party had been given the costs of the application under R. 18, the other party's ultimate success would be diminished by the amount of those costs and he might well be heard to complain of an element of injustice in that situation.

[8] The factors suggesting that the CFS entities ought to be awarded their costs include the position that their counsel expressed at the commencement of the summary trial that the matter was inappropriate for summary trial given the complex nature of the pleadings involving two actions and a petition, the sheer volume of the affidavit and other material filed, the questions raised by the conflicts in the affidavits and the bad faith allegations made by both the CFS entities and the SFSS. The allegations of bad faith are particularly difficult to determine through affidavit evidence alone. The summary trial preceded both full discovery of documents and examinations for discovery, and it is possible that some of the questions surrounding conflicts in the affidavits and the bad faith allegations might have been answered in part had discoveries preceded the summary trial. I would further add that SFSS's application was neither frivolous nor bound to fail.

[9] The aforementioned factors are worthy of consideration in determining the question of costs, but I am unable to conclude on balance that they constitute extraordinary or exceptional circumstances from which I might order that CFS, CFS – Services, and CFS – BC be granted their costs on the summary trial.

[10] I order that costs in this Rule 18A summary trial application, including the costs associated with submissions addressing the question of costs, be costs in the cause.

"R.M. Blair J."

BLAIR J.