

Form 125 (Rule 51A(12))

NO. S089144
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

**OUTLINE OF THE PLAINTIFFS
(DEFENDANT'S APPLICATION FOR SUMMARY TRIAL
DATED DECEMBER 30, 2008 PURSUANT TO RULE 18A)**

Part III

Basis for opposing relief:

SUMMARY OF POSITION

The Plaintiffs say:

1. the issues raised by this application are not suitable for disposition under Rule 18A and the application ought to be dismissed with costs.
2. Alternatively, should this Court decide that it is appropriate to deal with this matter in whole or in part pursuant to Rule 18A, this Court ought to decide in favour of the Plaintiffs and declare that the Defendant (the "SFSS") remains a voting member of both the Canadian Federation of Students ("CFS") and Canadian Federation of Students – Services ("CFS – S").

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3. The claims of the CFS/CFS – S for judgment against the SFSS for Unremitted Fees, relief in relation to breach of trust and for damages in relation to breach of the Fee Agreement and the CFS Bylaws would require further investigation and adjudication.

BACKGROUND

4. The Canadian Federation of Students ("CFS") is a Canadian non-profit corporation incorporated under Part 2 of the *Canada Corporations Act* (Canada).

5. The Canadian Federation of Students – Services ("CFS – S") is a Canadian non-profit corporation incorporated under Part 2 of the *Canada Corporations Act* (Canada).

6. The Defendant, Simon Fraser Student Society ("SFSS"), is a society incorporated under the *Society Act* (British Columbia) and a local student association that represents undergraduate students at Simon Fraser University ("SFU").

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 3 (S089144).

7. Both the CFS and the CFS – S are national student associations.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 3 (S089144).

8. The SFSS was a founding member of the CFS and the CFS – S as of October, 1981. The student members of the SFSS approved by majority vote in a referendum full membership in the CFS and the CFS – S in 1982. The members of the SFSS have been individual members and the SFSS has been a voting member of both national associations continuously ever since.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 5 (S089144).

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9. As a voting member of the CFS and the CFS – S, the SFSS is bound by the bylaws (the "CFS Bylaws") of the CFS and the CFS – S. The bylaws of those national associations are substantively identical.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 5 (S089144).

10. As of July 20, 1987, the CFS, the CFS – S and the SFSS entered into a fee agreement (the "Fee Agreement") which remains in force.

Affidavit #1 of L. Watson sworn December 30, 2008 at paras. 4, 6 and Exhibit "A" S089144).

11. Pursuant to the *College and Institute Act* (British Columbia), CFS Bylaws and the Fee Agreement, the CFS and the CFS – S submit that the SFSS is currently obliged to collect and remit to the CFS and CFS – S membership fees (the "Fees") from SFU students as follows:

- (a) per full-time student per semester - \$3.90;
- (b) per part-time and continuous intake students per semester - \$3.90 (pro-rated in accordance with the practice of the SFSS with respect to the pro-rating of its own membership fee).

College and Institute Act R.S.B.C. 1996, c. 52, s. 21;

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 6 (S089144).

12. From 1982 until the SFU 2008 summer session, SFU collected Fees from SFU students and remitted such Fees to the SFSS and the SFSS had, in turn, remitted such Fees to the CFS and CFS – S, all in accordance with the CFS Bylaws, the Fee Agreement and the *College and Institute Act* (British Columbia). Most recently, Fees paid to the CFS and the CFS – S, collectively, have been approximately \$215,000 per annum, depending on enrolment.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 7 (S089144).

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13. In breach of the CFS Bylaws and the Fee Agreement, and despite demands, the SFSS has not remitted Fees to the CFS or the CFS – S with respect to the SFU 2008 summer or fall sessions.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 8.

14. The unremitted Fees for 2008 (the "Unremitted Fees") have always been and remain trust funds, held in trust by the SFSS for the benefit of the CFS and the CFS – S.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 12 (S089144).

15. On or about March 18 – 20, 2008, the SFSS organized and held a vote (the "Vote") of SFU students regarding membership in the CFS.

Affidavit #1 of L. Watson sworn December 30, 2008 at para. 4 (S089144).

16. The CFS/CFS – S say that the Vote was not effective to remove the SFSS from the CFS and the CFS – S because the Vote was not held in accordance with the CFS Bylaws and, in any event, was carried out in an unfair manner, contrary to the rules and principles of natural justice.

Affidavit #1 of L. Watson sworn December 30, 2008 at paras. 2 - 4 (S089144).

THIS MATTER SHOULD NOT PROCEED BY WAY OF SUMMARY TRIAL

17. On April 16, 2008, the Simon Fraser Student Society ("SFSS") filed a Petition (the "Petition") in the British Columbia Supreme Court, Vancouver Registry, Action No. S082674.

Petition filed April 16, 2008.

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18. On April 28, 2008, shortly after receiving the Petition, counsel for the Canadian Federation of Students ("CFS") and the Canadian Federation of Students - Services (the "CFS-S") wrote to counsel for the SFSS and took the position that this matter ought not to be dealt with by way of Petition, asking that this matter be dealt with by way of Writ and Statement of Claim and saying that the CFS/CFS-S would oppose proceeding by way of Petition. This position has been reasserted several times.

Affidavit of L. Watson #1 sworn May 26, 2008, Exhibit "TT" (S082674).

19. After much back and forth, the parties secured the dates of January 28 – 30, 2009 to hear the petition and a Notice of Hearing dated November 4, 2008 was delivered by counsel for the petitioner to counsel for the respondents.

20. On December 19, 2008, the CFS and the CFS-S filed a Writ of Summons and Statement of Claim (the "Action") against the SFSS seeking payment of student fees.

Writ of Summons and Statement of Claim filed December 19, 2008.

21. On December 30, 2008, the SFSS filed a Statement of Defence in this Action.

Statement of Defence filed December 30, 2008.

22. Also on December 30, 2008, the SFSS filed and delivered a Notice of Motion in the Action for a Rule 18A summary trial and Notices of Motion in both the Action and the Originating Application seeking an Order that the two proceedings be heard at the same time.

Notice of Motion (Summary Trial) of the Defendant filed December 30, 2008; and
Notices of Motion (Action to be Heard with Originating Application) of SFSS filed December 30, 2008.

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23. On January 12, 2009, the CFS and the CFS-S delivered a Demand for Discovery of Documents and Notice to Produce to the SFSS in this Action. This has not been responded to by the SFSS.

Demand for Discovery of Documents and Notice to Produce to the Defendant dated January 11, 2009.

24. On January 13, 2009, the CFS and CFS-S filed a Reply in the Action.

Reply filed January 13, 2009.

25. Although there is an overlap of issue between the proceedings, namely, whether the Vote binds the CFS and CFS-S, there are also differences in the two proceedings.

26. The Petition is brought principally as a winding up/oppression and unfair prejudice proceeding pursuant to British Columbia *Company Act* legislation.

Petition filed April 16, 2008.

27. On the other hand, the Writ and Statement of Claim seeks payment of SFU student fees which were or should have been remitted to the SFSS and then paid to the CFS and CFS-S.

Writ and Statement of Claim filed December 19, 2008.

28. The Statement of Claim, Statement of Defence and Reply filed in the Action raise a number of issues that are not raised in the Petition, specifically:

- (a) as stated, the Action seeks recovery of SFU student fees which the CFS and the CFS-S say are owing to them by the SFSS. This raises issues with respect to the quantum or amount of such fees;

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- (b) the Statement of Claim makes a trust claim in respect of Unremitted Fees relying on the terms of a 1987 Fee Agreement as well as section 21 of the *College and Institute Act* (British Columbia). Breach of trust is alleged as is the doctrine of trustee de son tort and knowing assistance with breach of trust;

Statement of Claim filed December 18, 2008, at paras. 8 – 15.

- (c) the SFSS has pled in the Statement of Defence filed in the Action that there are certain implied terms to the “agreement” between the parties. These terms are different from the implied terms asserted in the Petition.

Statement of Defence filed December 30, 2008 at para. 7;
Petition filed April 16, 2008 at para. 11.

- (d) the SFSS has pled in the Statement of Defence filed in the Action that certain amendments made to the CFS Bylaws are invalid as not having been passed at a properly constituted meeting;

Statement of Defence filed December 30, 2008, at paras. 14 - 15.

- (e) the SFSS has raised in its Statement of Defence filed in the Action an “anticipatory breach” of a contractual obligation of good faith;

Statement of Defence filed December 30, 2008 at para. 17.

- (f) the Reply of the CFS and CFS-S in the Action in dealing with the allegation in the Statement of Defence that certain CFS Bylaws are invalid pleads that such bylaws are valid and also raises as defences estoppel, acquiescence, laches and the *Limitation Act* (British Columbia).

Reply filed January 13, 2009, at paras. 8 – 10.

29. The relevant portions of Rule 18A are as follows:

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"Application

(1) A party may apply to the court for judgment, either on an issue or generally, in any of the following:

(a) an action in which a defence has been filed;

(b) an originating application in respect of which a trial has been ordered under Rule 52 (11) (d);

(8) On an application heard before or at the same time as the hearing of an application under subrule (1), the court may

(a) adjourn the application under subrule (1), or

(b) dismiss the application under subrule (1) on the ground that

(i) the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or

(ii) the application under subrule (1) will not assist the efficient resolution of the proceeding.

(10.1) An order under subrule (8) or (10) may be made by a judge or by a master, and may be made before or at the same time as an application under subrule (1).

Judgment

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(11) On the hearing of an application under subrule (1), the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and

(c) award costs."

Supreme Court Rules B.C. Reg. 221/90

30. The leading authority on the use of Rule 18A is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* In that decision, Chief Justice McEachern, for the majority, held that in order to give judgement under Rule 18A a Judge must be able to find the facts necessary to decide issues of fact or law. Furthermore, a Judge must be satisfied that it would not be unjust to give judgement. In connection with the latter requirement, the Judge should consider the following factors:

- (a) the amount involved;
- (b) the complexity of the matter in issue;
- (c) the urgency of the matter;
- (d) the likelihood of prejudice arising from delay;
- (e) the cost of proceeding to a conventional trial;

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- (f) the course of the proceedings; and
- (g) any other matters which arise for consideration.

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd., [1989] B.C.J. No. 1003 (B.C.C.A.) at paras. 47 and 48.

31. Other relevant factors are:

"(a) A court should be reluctant to decide isolated issues in the absence of a full factual matrix and should not decide issues on the basis of assumed facts.

(b) While the court may in certain circumstances resolve issues and find facts in the face of conflicting evidence, it should be reluctant to do so where there are direct conflicts in affidavit evidence, the resolution of which will require findings with respect to credibility.

(c) A court should be reluctant to resolve factual issues in the absence of admissible evidence where such evidence may well be tendered in admissible form at a subsequent trial.

(d) A court should be reluctant to "slice off" and decide isolated issues and circumstances where resolution of those issues will not resolve the litigation or will only resolve the litigation if answered in a particular way. In such circumstances, the 18A applicant will be required to demonstrate and the court expected to decide that the administration of justice including the orderly and effective use of court time will be enhanced by dealing with the separate issue brought forth by the applicant.

(e) The matter will not be suitable for resolution by Rule 18A where resolution of a particular issue or issues in the summary trial will require that the court make findings or rulings which will impact on parties or issues which are not before the court on the application. In particular, the court hearing the summary trial must not decide the issues on the basis of facts which might be inconsistent with the findings of the judge at trial.

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(f) In some cases, the complexity of the issues raised or the volume of the material before the court may be such that the matter is unsuitable for resolution by summary trial."

RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C., [2008] B.C.J. No. 1325 (B.C.S.C.), per D.M. Masuhara, J. at paras. 13 and 40.

32. The CFS and CFS – S submit that this matter is not suitable for disposition under Rule 18A for the following reasons:

- (a) the volume of materials before the Court;
- (b) conflicting affidavit evidence and issues of credibility;
- (c) the course of the proceedings and the fact that there have been no pre-trial discovery procedures;
- (d) the number of issues before the Court and the complexity of such issues;
- (e) the amount involved and the importance of the case;
- (f) the question of urgency and prejudice arising from a delay;
- (g) absence of admissible evidence with respect to certain issues, in particular, the validity of the 1995 May amendment to the CFS Bylaws which brought into effect the oversight committee model; and
- (h) the potential for splitting the case on summary trial and dealing with some but not all of the issues before the Court.

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THE SFSS REMAINS A VOTING MEMBER OF THE CFS AND CFS – S

33. A principal issue between the parties is whether the Vote was valid and legally effective to provide the basis for a defederation by the SFSS from the CFS and CFS – S.

34. The SFSS maintains that the Vote was effective. CFS and CFS – S maintain the Vote was not.

35. Particulars of the CFS/CFS – S position with respect to the Vote are set out in paragraph 18 of the Statement of Claim, herein, which reads:

"18. The Vote was not effective to remove the SFSS from the Canadian Federation of Students or from the Canadian Federation of Students – Services because the Vote was not held in accordance with the Bylaws and, in any event, was carried out in an unfair manner, contrary to the rules and principles of natural justice. Particulars of the foregoing include:

- (a) 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;
- (b) the SFSS commenced a campaign to withdraw from the Canadian Federation of Students and the Canadian Federation of Students – Services in August, 2007 without authority or approval from the Oversight Committee and contrary to the Bylaws. The early campaigning by the SFSS resulted in an unfair Vote;
- (c) the SFSS produced inaccurate and defamatory campaign materials and widely distributed such materials again without any authority or approval of the Oversight Committee and contrary to the Bylaws. The use of inaccurate and defamatory campaign materials by the SFSS resulted in an unfair Vote.

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- (d) the SFSS insisted that the Vote be held March 18 -- 20, 2008, the same date as the SFSS's general elections, again without the authority or approval of the Oversight Committee and contrary to the Bylaws. The holding of the Vote on the same date as the SFSS's general elections resulted in an unfair Vote;
- (e) in addition to a question being put to SFU students about Canadian Federation of Students membership, a second question was put to SFU students about what to do with the "former CFS semesterly membership fee". The addition of this second question was without approval or authority and, in fact, in breach of a decision reached by the Oversight Committee and was, again, contrary to the Bylaws. The second question resulted in a biased and unfair Vote;
- (f) contrary to an agreement and ruling by the Oversight Committee that discussions and deliberations of the Oversight Committee were to remain confidential, the SFSS representatives on the Oversight Committee did not maintain confidentiality and this breach of confidentiality resulted in an unfair Vote;
- (g) at the time of the Vote, the Chief Returning Officer of the IEC, Mr. J.J. McCullough, held an anti-CFS bias which resulted in a biased and unfair Vote or, in the alternative, gave the appearance of a biased and unfair Vote;
- (h) at the time of the Vote, there were approximately 4,200 graduate students at SFU. Despite the fact that a separate society for graduate students at SFU was incorporated July 26, 2007 and was up and running from that date, the graduate students participated in the Vote. This was contrary to the Bylaws and resulted in an unfair Vote;
- (i) although SFU has a facility and students attending this facility in Kamloops, British Columbia, no polling station was set up in Kamloops, the Kamloops students at SFU were not made aware of the Vote, no steps were taken to enable such students to vote and no Kamloops students participated in the Vote. This resulted in an unfair Vote; and

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- (j) the process by which the Vote was held by the IEC was contrary to the Bylaws and the practice of the CFS and CFS – S as well as the rules and principles of fairness and natural justice because there were many voting and polling violations including:
 - (i) poll clerks and others who ran the Vote took direction regarding process and procedure from the SFSS, one of the proponents;
 - (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;
 - (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;
 - (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;
 - (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;
 - (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;
 - (vii) there was improper and unsupervised sealing, transportation, storage and disposal of ballots and ballot boxes;

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- (viii) there were many incidences of failure to have the requisite two poll clerks at polling stations during voting hours. Further, polling stations closed or ran out of ballots during voting hours;
- (ix) SFU students were turned away although presenting valid student identification;
- (x) there was not a privacy screen at all polling stations at all times so as to ensure secrecy of voting and, further, where there was a privacy screen, not all voters used the privacy screen. 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. In other cases, more than one voter went behind a privacy screen at one time; and
- (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;
- (k) pursuant to section 7 of Bylaw I of the Bylaws, in order for a member local association to withdraw from the Canadian Federation of Students or the Canadian Federation of Students – Services the National Executive must receive a letter from the member local association with notice of withdrawal after a valid referendum has been held in accordance with the Bylaws in which a majority of the students voting have voted for withdrawal from the Canadian Federation of Students. The National Executive must then examine the notification to determine whether it is in order and make a recommendation to the voting members of the Canadian Federation of Students. At the opening plenary of the next general meeting of the Canadian Federation of Students ratification of the withdrawal is to be put to a vote and the withdrawal will only take effect on June 30 following a ratification of the withdrawal. The foregoing has not occurred with respect to the purported SFSS withdrawal;
- (l) such further and other particulars which the CFS and the CFS – S may discover and put before the Court."

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36. It is submitted that, contrary to what is suggested in paragraph 8 of the SFSS Outline, the CFS Bylaws contemplate only one method of defederation as described in paragraph 18(k) of the Statement of Claim.

37. As a member of the CFS and CFS – S, the SFSS is contractually bound to act in accordance with the bylaws and practice of those national organizations. Further, the SFSS is bound to abide by any changes or amendments to the CFS Bylaws made after the SFSS joined. In 1995, an amendment was made to the CFS Bylaws which require defederation referendums to be conducted using an oversight committee model.

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "A", CFS Bylaws, Bylaw 1 – Membership (S082674).

38. The material provided by the SFSS includes an alleged agreement dated December 22, 1982 between the CFS and the SFSS, described at paragraph 5 of the SFSS's Outline. Paragraph 5 of this alleged agreement reads:

"5. The Member Institution shall conduct all referenda required by the By-Laws of the Federation in the same manner as any other referendum it may conduct."

Affidavit #1 of D. Harder sworn April 14, 2008, Exhibit "C" (S082674).

39. Paragraph 1 of the alleged 1982 agreement reads:

"1. The Member Institution shall abide by all provisions of the Bylaws of the Federation as amended from time to time."

40. It is submitted that the proper interpretation of the alleged 1982 agreement is that the SFSS was to use its own procedure for CFS-related referenda unless and until the CFS Bylaws required a different procedure to be used.

41. With respect to this alleged 1982 agreement, it is further submitted:

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- (a) first, there is insufficient evidence that this alleged agreement was ever agreed to. The copy produced is unsigned by the CFS. The CFS cannot find a copy. It is submitted that it is not binding. Certainly, it does not bind the CFS – S or the Canadian Federation of Students- British Columbia Component;
- (b) this alleged agreement was, in any event, rescinded or superseded by the Fee Agreement dated July 20, 1987 entered into between the Canadian Federation of Students – British Columbia Component, CFS, CFS – S and the SFSS. The 1987 Fee Agreement which is signed by all of the relevant parties deals with the same subject matter that the alleged 1982 agreement dealt with. The 1987 Fee Agreement does not contain a term equivalent to paragraph 5 of the alleged 1982 agreement; and
- (c) to the extent the alleged 1982 agreement called for the SFSS to use its own procedure in carrying out a CFS membership referendum, any such requirement was rescinded or superseded by the 1995 amendment to the CFS Bylaws.

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit "D" (S082674).

42. Paragraph 6 of the 1987 agreement reads:

"6. In all other matters the Member Local Association agrees to be bound by the bylaws of the Federation as duly amended from time to time."

43. The SFSS also takes the position that an obligation to conduct a CFS defederation referendum in accordance with the oversight committee model in Bylaw 1 of the CFS Bylaws would somehow be in conflict with the constitution and bylaws of the SFSS (Outline of the SFSS, paragraph 27). It is submitted that, with respect, there is no merit in this position. There is nothing in the constitution and bylaws of the SFSS which

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would require the referenda process provided for in bylaw 17 of the SFSS bylaws to be used on all occasions or, in particular, with respect to a referendum on leaving the CFS.

Affidavit #1 of D. Harder sworn April 14, 2008, Exhibit "A" (S082674).

44. Further, it is submitted that at all material times the SFSS regarded or appeared to regard itself bound by the CFS Bylaws and agreeable to conduct a referendum on defederation pursuant to the CFS Bylaws until February 25, 2008 at which time the SFSS decided because it could not get what it wanted at the Oversight Committee it would run its own vote with its own independent electoral commission ("IEC"), effectively ousting the Oversight Committee from any involvement with the Vote. This was contrary to the CFS- Bylaws and as well led to what was, in many respects, an unregulated campaign and Vote. The SFSS is estopped from now taking the position that the oversight committee requirement in the CFS-Bylaws does not apply to the SFSS.

45. In order for the SFSS to cease being a voting member of the CFS and CFS – S, it is submitted that:

- (a) the SFSS must defederate in accordance with the CFS Bylaws; and
- (b) the defederation process must be fair, in accordance with the principles of natural justice and carried out in good faith.

46. For the reasons set out in paragraph 18 of the Statement of Claim, set out above, it is submitted that:

- (a) the Vote was not carried out in accordance with the CFS Bylaws; and
- (b) the Vote was not carried out in a fair manner, was not in accordance with the principles of natural justice and was not carried out in good faith by the SFSS.

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47. As a result, the Vote is invalid and legally ineffective. It is not binding on the CFS and the CFS – S.

SFSS Draft Procedures

48. In particular reply to paragraph 17 of the SFSS Outline and the “draft procedures” put forward by the SFSS Oversight Committee representatives, at the first meeting of the Oversight Committee (February 4, 2008) the Oversight Committee agreed that rather than consider at once the whole of the procedures proposed by the SFSS, each of the separate items would be considered, issue by issue. The SFSS representatives did not propose an alternative way to proceed. What was done followed the normal practice for an oversight committee.

Affidavit #2 of L. Watson sworn December 15, 2008 at para. 26 (S082674).

SFSS Notice

49. In particular reply to paragraph 18(a) of the SFSS Outline, the CFS representatives on the Oversight Committee did not claim that the notice delivered by the SFSS to the National Executive of the CFS in August, 2007 was invalid but, rather, said that because the petition of the members of the SFSS did not set out a date for a defederation referendum, this matter was to be dealt with by the Oversight Committee.

Alleged Implied Terms

50. In particular reply to paragraphs 26 and 27 of the SFSS Outline, it is submitted that the contractual relationship between the parties is governed by the CFS Bylaws and the 1987 Fee Agreement. There is no basis for implying the alleged terms into one or both of those contracts.

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Alleged Invalidity of CFS Bylaws I(6) and I(7)

51. In particular reply to paragraph 28 of the SFSS Outline, it is submitted that the CFS Bylaws in question are valid.

52. The evidence before the Court is that the CFS Bylaws are as set out in Exhibit "A" to the Affidavit #1 of L. Watson, sworn May 26, 2008.

53. There is no admissible evidence that there was any problem with the creation of these bylaws.

54. In addition, the CFS and CFS – S plead and rely on estoppel, acquiescence, laches, and the *Limitation Act* (British Columbia).

Reply filed January 13, 2009 at paras. 8 – 10.

Date of the Vote

55. In particular reply to paragraphs 29 – 33 of the SFSS Outline regarding the lack of a date of the petition of the members of the SFSS, again, it is the practice of the CFS that where a petition calling for a referendum does not specify a date, that issue falls to the oversight committee to confirm or alter the date set out in a notice. This does not lead to either an invalid notice or validity concerns with respect to a subsequent referendum.

Concurrent SFSS Elections

56. In particular reply to paragraphs 33 and 35 of the SFSS Outline, it is submitted that holding a defederation referendum on the same day as general elections for the executive of the local student association is contrary to CFS practice and creates unfairness and confusion, particularly in the context of the pre-campaigning carried out

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by the SFSS executive in this case. As well, it led to confusion and ultimately a dispute over who was governing the referendum, the Oversight Committee or the IEC.

57. In particular reply to paragraph 35 of the SFSS Outline, it is submitted that the CFS Bylaws must govern a defederation referendum, not the SFSS bylaws.

Vote Question

58. In particular reply to paragraphs 36 – 38 of the SFSS Outline, it is submitted that the use of a second question regarding how the CFS student fees should be reallocated did bias the result and led to an unfair Vote. It was contrary to CFS practice. It was not necessary to deal with "reallocation of fees" during the Vote. The normal practice is that when a local student association leaves the CFS and CFS – S, student fees which had been collected and remitted to the CFS and CFS – S simply stop being collected.

Early Campaigning

59. In particular reply to paragraphs 39 – 41 of the SFSS Outline, it is submitted that early campaigning is contrary to the wording and spirit of the CFS Bylaws and CFS practice and does create an unfair result. It is submitted that the proponents of the defederation campaign, the SFSS executive, ought not to have engaged in active campaigning directed at a reference vote prior to the campaign period.

False Campaign Material

60. In particular reply to paragraphs 42 – 45 of the SFSS Outline, it is submitted that the use of defamatory, libellous or factually incorrect campaign materials was contrary to a decision by the Oversight Committee of February 11, 2008 and, again, led to an unfair vote.

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Ousting of the Oversight Committee

61. In particular reply to paragraphs 46 – 52 of the SFSS Outline, it is submitted that the CFS Bylaws are clear that the Oversight Committee has the authority and jurisdiction to run a defederation referendum. Again, it is the CFS Bylaws and not the SFSS bylaws that govern a defederation referendum. The fact that the SFSS, using the IEC, wrongfully usurped the authority of the Oversight Committee did take the Vote outside of the CFS Bylaws.

62. Evidence before the Court with respect to the history of the oversight committee model, demonstrates that an oversight committee, if given adequate chance, can and does work. In this case, it is likewise submitted that the Oversight Committee could well have worked and resulted in a fair referendum carried out pursuant to the CFS Bylaws had the SFSS not unilaterally decided to have its own vote with the IEC.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 93 and 94 (S082674);
Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 9 and 22 (S082674).

Breach of Confidentiality

63. In particular reply to paragraphs 53 and 54 of the SFSS Outline, it is submitted that the evidence before the Court and particularly the transcripts of Oversight Committee meetings attached as Exhibits "B" – "J" to Affidavit #2 of L. Watson sworn December 15, 2008, show that there was an agreement at the Oversight Committee with respect to confidentiality and that it was breached. It is submitted that this breach did contribute to an unfair vote.

Bias of the Chief Electoral Officer

64. In particular reply to paragraphs 55 – 56 of the SFSS's Outline herein, Mr. McCullough has sworn an affidavit herein (November 19, 2008) in which he did not deny the correspondence in which he demonstrates an anti-CFS bias. Given that Mr.

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McCullough was the chief electoral officer of the IEC and essentially ran the Vote, this leads to an appearance of a biased Vote.

Graduate Students

65. In particular reply to paragraph 57 of the SFSS's Outline, it is submitted that pursuant to the CFS Bylaws and practice and, in addition, the bylaws of the SFSS, the graduate students ought not to have been part of the Vote.

Kamloops Students

66. In particular reply to paragraphs 58 – 59 of the SFSS's Outline, there is no direct evidence of what efforts were made to include the Kamloops SFU students in the Vote. The direct evidence before the Court suggests that no such efforts were made. This demonstrates the problem with the SFSS having removed the Oversight Committee from the Vote. The lack of meaningful participation by the Kamloops SFU students contributed to an unfair Vote.

Affidavit #1 of Yvonne Cote sworn January 20, 2009 (S082674).

Polling Infractions

67. In particular reply to paragraphs 61 and 62 of the SFSS Outline, it is submitted that there is strong evidence, some contradicted some not, of substantial problems with the Vote. Such problems could well have affected the result. The SFSS cannot, it is submitted, meet the onus of showing that the result would not have been different.

Bylaw I(7)

68. In particular reply to paragraphs 63 – 65 of the SFSS Outline:

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- (a) it is not the position of the CFS or the CFS – S that the national executive of the CFS can simply ignore a proper defederation referendum. Rather, if there is a proper defederation referendum, this is to be put to the members of the CFS to vote on the application to defederate at the next annual general meeting. In the case at bar, had the Vote been a valid defederation referendum, the earliest that the SFSS could have defederated would have been in June, 2008 at the next annual general meeting following the Vote; and
- (b) It is submitted that Bylaw 1(7) is valid, there is no admissible evidence to suggest the contrary and, in any event, the defences of estoppel, acquiescence, laches and limitations apply.

Anticipatory Breach

69. In particular reply to paragraph 20 of the SFSS Outline, the letter of February 29, 2008 from counsel for the CFS says:

“Further to our letter of February 27, 2008, we gather that there was a further Oversight Committee meeting on February 28, 2008 but, unfortunately, none of the key issues between the parties, including the proposed date for a referendum, have been resolved.

We understand that the Society intends to go ahead with its decision, made at a Society board meeting on February 25, 2008, to independently present two questions to voters on March 18 – 20, 2008, as set out in our earlier letter.

The CFS wishes to make it clear that it will not recognize the validity of this proposed poll which is being conducted outside of the procedure set out in the Bylaws.

For all of 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.

Having said that, the CFS does intend to implement a campaign but will do so under protest on a without prejudice basis to its

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position that any poll unilaterally conducted by the Student Society on March 18 – 20, 2008 is not a valid or legally effective defederation referendum.”

Affidavit #1 of L. Watson sworn May 26, 2008, Exhibit “X” (S082674).

70. In particular reply to paragraph 66 of the SFSS Outline, the CFS (and CFS – S) took the position that the Vote would be invalid as of February 29, 2008 for the reasons set out above. That position is maintained. The issue is whether that position is correct. This does not result in an “anticipatory breach” of any contractual obligation. If the Vote was invalid, the CFS and CFS – S were correct in their position. If not, and the SFSS is correct, then the Vote constitutes a valid defederation referendum pursuant to the CFS Bylaws. Further, the SFSS did not “accept” any “anticipatory breach” but, rather, went ahead with their Vote as planned and then attempted to convince the CFS and CFS – S to accept the validity of the Vote after it had occurred.

Collateral Attack

71. The SFSS also raises the principle of “collateral attack”. It is submitted that principles of “collateral attack” have no application to the position being taken here by the CFS and CFS – S.

Outline dated December 15, 2008, para. 20 (S082674).

Inapplicability of Section 85 of the Society Act (British Columbia)

72. The SFSS relies on this provision at paragraph 18 of the Statement of Defence. It is submitted that this section does not apply to the CFS and CFS – S.

73. Section 85 of the Society Act (British Columbia) reads in part:

“85 (1) Despite anything in this Act, if an omission, defect, error or irregularity occurs in the conduct of the affairs of a society . . .”

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74. "Society" under this Act is, again, limited to societies incorporated pursuant to that legislation or predecessor legislation.

75. It is submitted that a federal non-profit corporation must be governed by the legislation pursuant to which it was incorporated.


76. As well, with respect to section 85 of the Society Act (British Columbia), courts have stated consistently that it must be clear that that section applies to the circumstances at bar before a court will intervene pursuant to that section.

77. Courts have also expressed reluctance to intervene in the affairs of non-profit associations such as the CFS and CFS – S. Rather, courts will defer to the executive of such organizations particularly with respect to association practise and bylaw interpretation.

78. In this case, it is the SFSS which is asking the court to intervene in the internal affairs of the CFS and CFS – S. The National Executive of the CFS and CFS – S have made a decision that the Vote did not take place in accordance with the CFS Bylaws and is not otherwise valid and binding on the CFS/CFS – S. The SFSS asks the court to overturn that decision.

79. If this Court decides this case, in whole or in part, by way of summary trial, it is submitted that this Court should rule in favour of the CFS/CFS – S and declare the Vote invalid and that the SFSS remains a voting member of the CFS and the CFS – S.

Dated: January 23, 2009


Solicitor for the Plaintiffs,
Canadian Federation of Students and
Canadian Federation of Students – Services

THIS OUTLINE, PART III, was prepared by Martin L. Palleson of the firm of Gowling Lafleur Henderson LLP, Barristers and Solicitors, whose place of business and address for service is P.O. Box 30, 2300 - 550 Burrard Street, Vancouver, B.C., V6C 2B5, Telephone: 604-683-6498.

- (a) circumstances surrounding the alleged 1982 agreement or the 1987 agreement and the "intention" of the SFSS signatories to the 1987 agreement; and
- (b) circumstances surrounding the May, 1995 amendment to the CFS Bylaws (which brought into effect the Oversight Committee model for referenda).


142. Further, there is little evidence before the Court with respect to Unremitted Fees and the quantum of the claim of the CFS and CFS – S against the SFSS.

143. This raises the potential for the Court to be unable to deal with all issues in the Action in a summary trial and for issues to be left outstanding.

144. This is something which Courts have strongly cautioned against.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 28, 2009



Solicitor for the Plaintiffs

THESE SUBMISSIONS are made by Martin Palleson, of the firm of Gowling Lafleur Henderson LLP, Barristers and Solicitors, whose place of business and address for service is P.O. Box 30, 2300 - 550 Burrard Street, Vancouver, B.C., V6C 2B5, Telephone: 604-683-6498.