Form 1 (Rule 8(3))

NO. S082674
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SIMON FRASER STUDENT SOCIETY

PETITIONER

AND:

CANADIAN FEDERATION OF STUDENTS,
CANADIAN FEDERATION OF STUDENTS – SERVICES and
CANADIAN FEDERATION OF STUDENT – BRITISH COLUMBIA COMPONENT

RESPONDENTS

- and -

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

WRITTEN ARGUMENT OF THE PLAINTIFFS, CANADIAN FEDERATION OF STUDENTS AND CANADIAN FEDERATION OF STUDENTS – SERVICES RE:

(1) Application (December 30, 2008) to have this Action heard at the same time as the proceeding commenced by Petition (Simon Fraser Student Society v. Canadian Federation of Students et al, S.C.B.C., Vancouver Registry, No. s082674); and

(2) Suitability for Summary Trial (Defendant's application, December 30, 2008)

SUMMARY OF POSITION

The Plaintiffs say:

1. The issues raised in this action 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").

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).

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, the Canadian Federation of Students – British Columbia Component ("CFS-BC") 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).

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 (S089144).

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 and not carried out by the SFSS in good faith.

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

PARTICULARS OF POSITION WITH RESPECT TO THE VOTE

17. 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.
>
> (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

(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;

(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."

18. 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.

ISSUES BETWEEN THE PARTIES

Alleged 1982 Agreement

19. 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 requires 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).

20. 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).

21. 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."

22. 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.

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

(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 CFS-BC;

(b) this alleged agreement was, in any event, rescinded or superseded by the Fee Agreement dated July 20, 1987 entered into between the CFS-BC, 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).

24. 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."

Alleged Implied Terms

25. 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.

SFSS Bylaws

26. 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 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).

Estoppel

27. 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.

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

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

29. 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.

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

31. 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.

SFSS Draft Procedures

32. 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

33. 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.

Date of the Vote

34. 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

35. 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 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.

36. 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

37. 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

38. 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

39. 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.

Ousting of the Oversight Committee

40. 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.

41. 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 pars. 9 and 22 (S082674).

Breach of Confidentiality

42. 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

43. 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. 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

44. 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

45. 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

46. 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)

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

(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 I(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

48. 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 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).

49. 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. In any event, the correspondence in question could not constitute a fundamental breach which would entitle the SFSS to "terminate" the relationship. As well, 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

50. 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)

51. 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.

52. 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 . . ."

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

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

55. 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.

56. 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.

57. 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.

CHRONOLOGY OF PROCEEDINGS

58. On March 18 – 20, 2008, the Simon Fraser Student Society ("SFSS") held its Vote.

59. On March 28, 2008 there was a meeting of the oversight committee (the "Oversight Committee") which had been struck to oversee the referendum of SFU

students. At this Oversight Committee meeting the SFSS representatives proposed that the Oversight Committee prove the results of the Vote. The representatives of the CFS responded that they would not approve the Vote.

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

60. On April 16, 2008, the SFSS filed a Petition (the "Petition") in the British Columbia Supreme Court, Vancouver Registry, Action No. S082674 (the "Originating Application").

Petition filed April 16, 2008.

61. The initial affidavits from the SFSS, although lengthy, essentially provided only a historical account of Canadian Federation of Students activities, some background and a description of the March 18 – 20, 2008 Vote.

Affidavit #1 of J. Papdopoulos sworn April 3, 2008 (S082674);
Affidavit #1 of D. Harder sworn April 14, 2008 (S082674)
Affidavit #1 of T. Gregory sworn April 4, 2008 (S082674).

62. On April 28, 2008, shortly after receiving the Petition, counsel for the CFS and 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 #1 of L. Watson sworn May 26, 2008, Exhibit "TT" (S082674);
Affidavit #3 of K. Kirkpatrick sworn January 23, 2009 at Exhibits "C" (Letter, May 7, 2008) and "X" (Letter, December 16, 2008).

63. In order to provide evidence of its position it was necessary for the CFS to gather several affidavits from deponents in diverse locations. For example, Lucy Watson, the principal deponent, is located in Ottawa. Marne Jensen is in Victoria. Nora Loreto and Jeremy Salter are in Toronto. Andrew Bratton is in Edinburgh. Yvonne Cote is in Kamloops.

64. The CFS and CFS-S put together the bulk of its affidavit evidence in April – July, 2008. During that time and after the parties sought a date for the hearing of the Petition in the fall, 2008 but could not, due to scheduling issues between counsel and the Court, successfully find a fall date.

65. In mid-September, the SFSS delivered their affidavits in opposition to the position taken by the CFS and CFS-S.

(a) Affidavit #2 of Derrick Harder sworn September 14, 2008 (S082674);

(b) Affidavit #1 of Michael Letourneau sworn September 2, 2008 (S082674);

(c) Affidavit #2 of Titus Gregory sworn September 3, 2008 (S082674);

(d) Affidavit #1 of Andrea Sandau sworn September 4, 2008 (S082674);

(e) Affidavit #1 of Jason Tockman sworn September 4, 2008 (S082674);

(f) Affidavit #1 of Bryan Ottho sworn August 29, 2008 (S082674);

(g) Affidavit #1 of John McCullough sworn November 19, 2008 (S082674).

66. This led in turn to a reply affidavit by the CFS, that of Lucy Watson #2 sworn December 15, 2008.

67. After much back and forth, the parties secured the dates of January 28 – 30, 2009 to hear the Petition. A Notice of Hearing dated November 4, 2008 was delivered by counsel for the Petition to counsel for the Respondents.

68. Since that time there have been additional affidavits as follows:

(a) Affidavit #1 of Karen Kirkpatrick sworn December 15, 2008 (SFSS, S082674);

(b) Affidavit #1 of Lucy Watson sworn December 30, 2008 (CFS, S089144).

(c) Affidavit #1 of Rachel Paling sworn January 12, 2009 (SFSS, S082674);

(d) Affidavit #1 of Yvonne Cote sworn January 20, 2009 (CFS/CFS-S, S082674);

(e) Affidavit #2 of Karen Kirkpatrick sworn January 21, 2009 (SFSS, S082674);

(f) Affidavit #3 of Karen Kirkpatrick sworn January 23, 2009 (SFSS, S082674); and

(g) Affidavit #1 of Bobbie Grant sworn January 26, 2009 (SFSS, S082674).

69. In addition there has been affidavit material filed and delivered by Canadian Federation of Students – British Columbia Component ("CFS-BC").

70. Starting September 8, 2008, there was correspondence between counsel for the CFS/CFS-S, counsel for CFS-BC and counsel for the SFSS regarding the failure of the SFSS to remit student fees (the "Fees") from SFU students. There were a series of letters, ending in a letter from counsel for the SFSS dated October 20, 2008 which said:

> "We are writing in response to your letter of 9 October 2008. The hearing of our Petition will determine the legality of the defederation referendum. Until that time, we decline to enter into discussions concerning the financial relationship between the Simon Fraser Student Society, Simon Fraser University and Simon Fraser students."

Affidavit #1 of L. Watson sworn December 30, 2008, Exhibits "I" – "M" (S089144).

71. 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.

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

Statement of Defence filed December 30, 2008.

73. On December 30, 2008, the SFSS also 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.

74. In effect, what counsel for the SFSS is trying to do is bring on a summary trial application in the Action on dates which were agreed to by the parties for the hearing of the Petition. This, obviously, does not allow any time for discovery procedures in the Action.

75. 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.

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

Reply filed January 13, 2009.

ISSUES

(1) Should the Action and the Originating Application be heard at the same time?

(2) Is the Action suitable for disposition under Rule 18A?

ANALYSIS

Should the Action and the Originating Application be heard at the same time?

77. The relevant rule is 5(8) which reads:

> "Consolidation
>
> (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day. "

78. The Petition relies principally on the winding up/oppression provisions of British Columbia company legislation and the *Society Act* (British Columbia). It is submitted that this legislation has no application to the CFS and CFS-S which are both national associations incorporated pursuant to Part 2 of the *Canada Corporations Act* (Canada). For this and other reasons, the CFS and CFS-S submit that the Petition ought to be dismissed and the matter ought to be dealt with by way of the Action.

79. Further, the general rule is that an originating application (i.e. a Petition brought pursuant to Rule 10) and an action (i.e. a Writ and Statement of Claim) ought not to be consolidated. It is submitted that this applies as well to having the two proceedings heard at the same time. In order to hear the matters at the same time the Petition should be converted into an action.

80. In *Hardy Bay Inn Ltd. v. Hughes*, [1982] B.C.J. No. 548 (B.C. Co. Ct.), Mr. Justice Millward at paragraph 18 said:

> "Although 'proceedings' includes actions commenced by writs of summons and originating applications commenced by petition, the view of judges meeting to discuss Chambers practice is reported in a 'chambers practice note' in the Advocate, Volume 38, part 3, page 243 as follows:
>
> > 'In view of the difference in procedure, a proceeding commenced by petition ought not to be consolidated with a proceeding commenced by writ of summons.'"

81. In *Brandsgard v. Petersen*, [1997] B.C.J. No. 1147 (B.C.S.C.), Mr. Justice McEwan said at paragraph 7:

> "That said, I would be remiss if I did not also suggest that it seems to me highly debateable that the conditions for consolidation or a same time and place order are present in this case. For one thing, the differences in procedure between petitions and actions commenced by Writ of Summons militate against such an order on its face (see: *Hardy Bay Inn Ltd. v. Hughes* (1982) 36 B.C.L.R. 317 at page 324). For another thing, there does not appear to be any defence to the foreclosure action, as such. The action against the petitioners as vendors for misrepresentation is a distinct cause of action."

82. In *Berg v. 426204 B.C. Ltd.*, [1995] B.C.J. No. 573 (B.C.S.C.) Mr. Justice Errico at paragraph 17 said:

> "The consolidation of a proceeding brought by a petition in an action, although technically permissible under the Rules, presents difficulties as to the subsequent conduct of the proceeding. If the order sought were to go, what is the process to be followed? The cancellation petition normally proceeds summarily in chambers unless a trial of the issues are ordered. In *Hardy Bay Inn Ltd. v. Hughes* (1982) 36 B.C.L.R. 317, Millward C.C.J. [as he then was] denied an application to consolidate in part because of this concern."

See also *Shah v. Bakken*, [1996] B.C.J. No. 2836 (B.C.S.C.), per Master Joyce (as he then was) at paras. 14 – 19.

83. With respect to procedural differences between the Originating Application and the Petition, in the Action the CFS and CFS-S have sought discovery of documents,

set out in more detail below. Further, examinations for discovery are, it is submitted, necessary. This is of course not available in an originating application.

84. In this case, the SFSS seeks to have its Petition heard summarily, the normal procedure for a Petition. The CFS and CFS-S oppose that. As well, the SFSS seeks a summary trial dismissal of the Action. However, the tests with respect to these two issues are not the same.

85. With respect to the Originating Petition, a matter is only to be decided by petition if there are no disputed facts or law. The onus is on the petitioner to show beyond a reasonable doubt that it is manifestly clear, that there are no triable issues.

> *British Columbia v. Pickering*, [1983] B.C.J. No. 2422 (B.C.C.A.)
> *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.*, [1984] B.C.J. No. 13 (B.C.C.A.) at paras. 11 - 12.

86. With respect to a summary trial, as discussed in detail below, the test is that judgment should only be granted if it is just in all of the circumstances to do so.

87. Although there is an overlap of issue between the proceedings, namely, whether the Vote of Simon Fraser University ("SFU") students which occurred March 18 – 20, 2008 carried out by the SFSS binds, in any way, the CFS and CFS-S, there are also differences in the two proceedings.

88. As stated, the Petition is brought principally as a winding up/oppression and unfair prejudice proceeding pursuant to *Company Act* legislation.

> Petition filed April 16, 2008.

89. 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.

90. The Petition has as parties the SFSS (the Petitioner) and the CFS, CFS-S and CFS-BC (Respondents). In the Action, only the CFS and CFS-S are Plaintiffs. The CFS-BC, which is a separate entity, is not.

91. 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;

(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 property 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 deals with the allegations in the Statement of Defence and with respect to the validity of the CFS Bylaws now challenged by the SFSS 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.

92. The pleadings in the Action are not therefore duplicative of the Petition. Rather, the pleadings in the Action raise new issues and seek relief that is not dealt with in the Petition which is principally based on oppression and unfair prejudice.

Is this Action suitable for disposition under Rule 18A?

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

"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);

. . .

Setting application for hearing

(2) Unless otherwise ordered, an application under subrule (1) must be set for hearing in accordance with Rule 51A.

. . .

Application of Rule 40

(4) Rule 40 (27) (a) and (d), (28), (29) and (31) to (33) applies to subrule (3).

Application of Rule 40A

(4.1) Rule 40A (6) and (7) (a) applies to an application under subrule (1).

Filings with application

(5) A party who applies for judgment under subrule (1)

(a) must serve with the notice of motion and the other documents referred to in Rule 44 (5), every statement of expert opinion, not already filed, on which the party will rely, and

(b) must not serve any further affidavits, statements of expert opinion or notices except

(i) to adduce evidence that would, at a trial, be admitted as rebuttal evidence,

(ii) in reply to a notice of motion filed and delivered by another party of record, or

(iii) with leave of the court.

. . .

(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.

. . .

Preliminary directions

(10) On or before the hearing of an application under subrule (1), the court may order that

(a) a party file and deliver, within a fixed time, any of the following on which it intends to rely:

(i) an affidavit;

(ii) a notice under subrule (6),

(b) a deponent or an expert whose statement is relied on attend for cross-examination, either before the court or before another person as the court directs,

(c) cross-examinations on affidavits be completed within a fixed time,

(d) no further evidence be adduced on the application after a fixed time, or

(e) a party file and deliver a brief, with such contents as the court may order, within a fixed time.

Ancillary or preliminary orders and directions may be made at or before application

(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

(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

94. 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;

(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.

95. 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 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.
>
> (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.

96. In *Cannaday v. Sun Peaks Resort Corp.*, Mr. Justice Esson, writing for the Court, commented on the appropriate use of the Rule 18A summary trial procedure:

> "One point which may properly be taken from this case is that the summary trial procedure is not well suited to factually complex cases. The difficulty, of course, is all the greater where not all parties are competently represented, and perhaps greater again where the application is brought by the defendant.
>
> All too often, proceedings such as these place an inordinate burden on the judge and in the end prove to be a waste of time and effort. In its place, Rule 18A is a useful procedure for permitting speedy and inexpensive resolution of cases, but it is doubtful that its place extends beyond cases which are relatively straightforward on their facts"

Cannaday v. Sun Peaks Resort Corp., [1998] B.C.J. No. 85 (B.C.C.A.) at para. 53.

97. In *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.,* supra, at paragraph 11, the Court confirmed that an application under Rule 18A(8)(b) can be made before the hearing of the summary trial and can succeed where one or more of the following circumstances apply:

> "(a) the litigation is extensive and the summary trial hearing itself will take considerable time;
>
> (b) the unsuitability of a summary determination of the issues is relatively obvious; e.g., where credibility is a crucial issue;
>
> (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
>
> (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial."

See also *World Project Management Inc. v. Regah*, [1994] B.C.J. No. 1124 (B.C.S.C.) at para 4.

98. The CFS and the CFS-S submit that the factors set out below, referred to in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.* and other cases, should be considered by this Court in assessing and deciding that this Action is not suitable for disposition under Rule 18A.

Volume of Material Before the Court

99. A large volume of material can result in a determination that a matter is not suitable for disposition under Rule 18A.

> *Chu v. Chen*, [2002] B.C.J. No. 1370 (B.C.S.C.); *Great Canadian Oil Change Ltd. v. Dynamic Ventures Corp.*, [2002] B.C.J. No. 2015 (B.C.S.C.).

100. In *Chu v. Chen*, the Court declined to decide the case under Rule 18A where there were approximately 850 – 900 pages of pleadings, affidavits (including exhibits), discovery material, outlines of arguments and authorities before the Court.

> *Chu v. Chen*, [2002] B.C.J. No. 1370 (B.C.S.C.), per Bouck, J. at paras. 64 – 75 and 92 – 98.

101. In *Great Canadian Oil Change Ltd. v. Dynamic Ventures Corp.*, the Court also declined to decide the case under Rule 18A where the material before the Court was voluminous.

102. At paragraphs 68 – 73, Mr. Justice Goepel said:

> "68. It is also important to remember the comments of McEachern C.J.B.C. in Inspiration Management Ltd. v. McDermitt St. Laurence (1989), 36 B.C.L.R. (2d) 202 (C.A.) which has long been considered the seminal case on Rule 18A applications. In that decision after trial judges were exhorted to be 'not timid in using Rule 18A for the purpose for which it was intended' the Chief Justice warned that it was 'unfair to scoop-shovel volumes of disjointed affidavits and exhibits upon the Chambers judge and expect him or her to make an informed judgment.' He also noted that counsel cannot expect to succeed in persuading a Chambers judge 'if they permit confusion in the form of masses of disorganized fact and paper to intrude into the decisional process.'

69. That is effectively what has happened on this application. In saying so I mean no criticism of counsel who thoroughly prepared and argued this case and its various issues meticulously. The fact is, however, that at a certain point, the masses of paper necessary to present a case may make such a case unsuitable to be determined under Rule 18A. Before embarking on such applications, counsel should well consider whether the sheer volume of information they have to place before the judge and the number of issues that have to be decided to make the mater unsuitable for determination under Rule 18A.

70. In the result I am satisfied that, based on the mass of materials submitted and the complexity of the issues, the copyright aspect of this case is not suitable for determination under Rule 18A.

71. I further find that on the evidence before me I am unable due to the various conflicts in evidence to find the facts necessary to determine the issues of fact and law raised on this application. I also find that it would be unjust pursuant to Rule 18A(11)(a)(ii) to decide the copyright issue on this application. In that regard I would refer in particular to the primary issue that has to be decided in this case being whether the Langley Building is in fact a copy. Mr. Buse swears it is not so. He has been a practising architect for almost 20 years. An adverse finding on the issue of copying would undoubtedly impact on his professional reputation and perhaps also lead to professional sanctions. I do not believe it would be just to decide an issue of such import on a summary basis.

72. Further, the parties in this case have provided novel arguments in relation to the proper interpretation of certain portions of the Copyright Act. Summary trials are not generally the appropriate place to decide novel and original points of law. They should be decided on full record. See: Bacchus Agents (1981) Ltd. v. Phillipe Dandurand Wines Ltd. (2002) 164 B.C.A.C. 300.

73. In the result, the defendants' application to dismiss the plaintiff's claims in connection with the copyright action under Rule 18A are dismissed."

Great Canadian Oil Change Ltd. v. Dynamic Ventures Corp., [2002] B.C.J. No. 2015 (B.C.S.C.), per Goepel, J. at paras. 68 – 73.

103. Before the Court there are currently three proceedings:

(a) the Originating Application, SFSS v. CFS, CFS-S and CFS-BC, No. S082674;

(b) the Action, CFS and CFS-S v. SFSS, No. S089144; and

(c) an action commenced by CFS-BC against SFSS, No. S090331.

104. There are currently ten applications before this Court:

(a) the Originating Application, the hearing of the Petition brought by the SFSS;

(b) application brought in the Originating Application to have the Originating Application and the Action heard together brought by the SFSS;

(c) application in the Action to have the Originating Application and Action heard together brought by the SFSS;

(d) application for summary trial for dismissal of the Action brought by the SFSS;

(e) application to have Unremitted Fees paid into Court in the Action brought by CFS/CFS-S;

(f) application in the Originating Application to have the Originating Application heard at the same time as CFS-BC v. SFSS (S090331);

(g) application in S090331 to have that action heard at the same time as the Originating Application;

(h) application for summary trial to have action no. S090331 dismissed brought by the SFSS;

(i) application by CFS-BC in action no. S090331 to have Unremitted Fees paid into court; and

(j) application by CFS-BC in action no. S090331 to have the application for summary trial of the SFSS dismissed.

105. Of the ten applications, seven are brought by the SFSS, one by CFS/CFS-S (with respect to Unremitted Fees) and two by CFS-BC (also with respect to unremitted fees and with respect to the summary trial).

106. There are currently 25 affidavits before the Court. Fourteen have been provided by the SFSS. Ten have been provided by the CFS/CFS-S and one by the CFS-BC.

107. The amount of material before the Court is substantial, far in excess of what was before the Court in *Chu v. Chen*, supra.

108. The affidavits (including exhibits) contain the following:

SFSS Affidavits

(a) Affidavit #1 of James Papdopoulos sworn April 3, 2008 – 5 pages;

(b) Affidavit #1 of Titus Gregory sworn April 11, 2008 – 983 pages;

(c) Affidavit #1 of Derrick Harder sworn April 16, 2008 – 75 pages;

(d) Affidavit #1 of Bryan Ottho sworn August 29, 2008 – 2 pages;

(e) Affidavit #1 of Michael Letourneau sworn September 2, 2008 – 151 pages;

(f) Affidavit #2 of Titus Gregory sworn September 3, 2008 – 2 pages;

(g) Affidavit #1 of Jason Tockman sworn September 4, 2008 – 3 pages;

(h) Affidavit #1 of Andrea Sandau sworn September 4, 2008 – 3 pages;

(i) Affidavit #2 of Derrick Harder sworn September 14, 2008 – 134 pages;

(j) Affidavit of #1 of John McCullough sworn November 19, 2008 – 17 pages;

(k) Affidavit #1 of Karen Kirkpatrick sworn December 15, 2008 – 3 pages;

(l) Affidavit #1 of Rachel Paling sworn January 12, 2009 – 2 pages;

(m) Affidavit #3 of Karen Kirkpatrick sworn January 23, 2009 – 36 pages;

(n) Affidavit #1 of Bobbie Grant sworn January 26, 2009 – 2 pages.

CFS/CFS-S Affidavits

(o) Affidavit #1 of Marne Jensen sworn May 14, 2008 – 5 pages;

(p) Affidavit #1 of Lucy Watson sworn May 26, 2008 – 467 pages;

(q) Affidavit #1 of Shamus Reid sworn June 23, 2008 – 7 pages;

(r) Affidavit #1 of Jeremy Salter sworn July 9, 2008 – 5 pages;

(s) Affidavit #1 of Nora Loreto sworn July 10, 2008 – 10 pages;

(t) Affidavit #1 of Michael Olson sworn September 8, 2008 – 13 pages;

(u) Affidavit #2 of Lucy Watson sworn December 15, 2008 – 293 pages;

(v) Affidavit #1 of Lucy Watson sworn December 30, 2008 – 105 pages;

(w) Affidavit #1 of Yvonne Cote sworn January 20, 2009 – 3 pages; and

CFS-BC Affidavit

(x) Affidavit #1 of Jacqueline Lalande sworn January 9, 2009 – 154 pages.

Total: 2,480 pages.

109. The pleadings are as follows:

(a) Petition – 9 pages;

(b) Writ and Statement of Claim, Statement of Defence and Reply in the Action – 24 pages;

(c) Writ and Statement of Claim and Statement of Defence in action no. S090331 – 18 pages;

Total: 51 pages.

110. The Outlines, written arguments of the parties and the briefs of authority are also substantial.

111. As indicated, the SFSS seeks to have the hearing of the Petition and the Rule 18A applications in the Action and in action No. S090331 heard at the same time. Currently, there are three days of court time set aside for all of this. Given the complexities and volume of material, this may well prove to be an insufficient amount of time.

112. The CFS and the CFS-S submit that the given the complexities and volume of material, the proceedings ought to be decided by way of conventional trial.

Conflicting Affidavit Evidence and Issues of Credibility

113. There is a good deal of disputed factual affidavit evidence regarding several issues.

114. For example:

(a) the appropriateness, including accuracy, of the campaign material used by the SFSS before and during the Vote;

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 38 – 53 and 68 – 70;
Affidavit #1 of M. Letourneau sworn September 2, 2008 at paras. 49- 52.

(b) whether or not there was an agreement that the Oversight Committee discussions and deliberations were to remain confidential and whether that agreement was breached;

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 34 – 37;
Affidavit #1 of Michael Letourneau sworn September 2, 2008 at paras. 18 – 21;
Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 23 and 24.

(c) whether or not the CFS and the SFSS acted in accordance with decisions made and agreements reached by the Oversight Committee and whether bona fide efforts were made by both sides with respect to putting place a referendum in compliance with CFS Bylaws;

(d) viability of the Oversight Committee model;

(e) whether or not the Kamloops students at SFU were provided with an opportunity to participate; and

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 77 – 78;
Affidavit #1 of M. Letourneau sworn September 2, 2008 at paras. 84 – 87;
Affidavit #1 of Y. Cote sworn January 20, 2008.

(f) whether or not there were polling infractions, the seriousness of such polling infractions and degree the SFSS and its Independent Elections

Commission ("IEC") adequately dealt with or investigated complains of such infractions.

115. With respect to the actions of the representatives on the Oversight Committee, there is a good deal of disputed affidavit evidence as to who did and said what involving such issues as: the objections of the CFS representatives to holding a referendum on the same date as the SFSS general elections and when and how those objections were made, the draft procedures put forward by the SFSS representatives and whether or not the draft was appropriately considered and discussed by the CFS representatives, information provided by the SFSS representatives regarding the IEC and whether or not the CFS representatives took that information into account, commented on it and properly considered working with the IEC, the discussion, negotiation and eventual agreement on a referendum question and whether or not positions taken by the CFS during such negotiations were inappropriate, the issue of the polling station locations and hiring of poll clerks and whether the Oversight Committee could have come to an agreement with respect to those matters and scheduling, meetings and decisions with respect to campaign materials and whether or not those decisions were taken in an appropriate manner.

Affidavit #1 of M. Letourneau sworn September 2, 2008 at paras. 22 – 70;
Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 22 – 37 and 62;
Affidavit #2 of L. Watson sworn December 15, 2008 at paras. 21 – 22 and 25 – 32 and 34 – 42.

116. With respect to viability of the Oversight Committee model, again, there is a conflict between whether this Oversight Committee model can work, has worked in the past and was viable in the case at bar. Certainly, the position of the CFS and CFS-S is that the model does work and could have worked in this case had the SFSS not elected to bypass the model and engage the IEC.

117. Some evidence put forward by the SFSS is directed to a contrary conclusion. Evidence provided by Titus Gregory, raises past history with respect to other Oversight Committee experience.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 93 and 94;
Affidavit #2 of L. Watson sworn December 15, 2008 at para. 9;
Affidavit #2 of D. Harder sworn September 14, 2008 at para. 22;
Affidavit #1 of Titus Gregory sworn April 11, 2008, Exhibit "A" at paras. 16 and 20.

118. With respect to polling infractions, the CFS and CFS-S has produced affidavits by Shamus Reid, Jeremy Salter, Nora Loreto, Michael Olson and Andrew Bratton. The SFSS has produced affidavits denying infractions by Brian Ottho, Michael Letourneau, Titus Gregory (#2), Jason Tockman, Andrea Sandau, Derrick Harder (#2), John McCullough and Rachel Paling. Resolving these issues would require the Court to make findings of fact based on conflicting affidavits.

119. Further, the SFSS at several places in the pleadings and evidence raise the issue of the lack of good faith on the part of the CFS.

Statement of Defence filed December 30, 2008, at para. 7(b), and 17;
Petition filed April 16, 2008, at paras. 11(a), 11(b), 12(a), 12(b), 20(a);
Affidavit #1 of M. Letourneau sworn September 2, 2008 at paras. 71 – 72;
Affidavit #2 of D. Harder sworn September 14, 2008 at para. 40.

120. The CFS and CFS-S say that the CFS's representatives on the Oversight Committee at all times acted reasonably and in good faith and that, in fact, it was the SFSS representatives who acted unreasonably and did not compromise and that the SFSS acted in bad faith in bringing in the IEC and usurping the authority and jurisdiction of the Oversight Committee.

Affidavit of L. Watson #2 sworn December 15, 2008 at paras. 26 – 32 and 34 – 42.

121. The issue of "bad faith" is not easily dealt with using affidavit evidence in a summary trial. In *Iacobucci v. WIC Radio Ltd.*, [1997] B.C.J. No. 2874 (B.C.S.C.), Mr. Justice Harvey held that an issue involving allegations of bad faith could not be dealt with pursuant to Rule 18A. In making that decision the Court made the following comments:

> "17. The law is clear that a chambers judge must not choose between conflicting affidavits simply on the basis that he or she prefers one story to the other.
>
> . . .
>
> 25. However, as the plaintiff has presented his case, contested issues surrounding his dismissal loom large. Extrinsic evidence of bad faith has been alleged by the plaintiff. I am of the opinion that whether such allegations fall under the rubric of bad faith in firing in Wallace or classed as aggravated damages for mental distress, they are not easily amenable to resolutions through affidavit evidence alone.
>
> . . .
>
> 31. In these circumstances, I do not propose to make any order under Rule 18A(10), as I am of the view that the trial judge should see and hear both cross-examination and examination in chief, and be able to view and weigh the entirety of the evidence on both sides.
>
> . . .
>
> 39. On the case that stands before me, I have already found that a weighing of evidence and determinations of credibility will have to be made. The plaintiff alleges the course of conduct by the defendants amounting to bad faith . . . The examinations for discovery which were conducted prior to this action, took place before that decision [*Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. No. 94] was rendered. The parties may therefore want to conduct further discoveries in light of the Wallace decision.
>
> 40. Further, the very nature of these allegations makes them unsuitable for resolution on affidavits alone, as I have discussed above."

The Course of the Proceedings/Pre-trial Discovery Not Completed

122. It is submitted that, generally, pre-trial discovery procedures should be completed before a Rule 18A application is brought. If there is a possibility that a party could bolster its position by discovery of documents and/or by conducting examinations for discovery, it will normally be considered to be unjust to decide issues on a Rule 18A application.

Bank of British Columbia v. Anglo-American Cedar Products Ltd., [1984] B.C.J. No. 2690 (B.C.S.C.), per MacDonald, J. at para. 10.

123. In British Columbia Supreme Court Rules Annotated 2009, Seckel and MacInnis, Thomson & Carswell, Ontario, the authors, in discussing Rule 18A applications say at page 155:

> "'Demand for List of Documents' Requirement
>
> It is not necessary that lists of documents be prepared prior to the bringing of a Rule 18A application. However, if a demand for discovery of documents has been served and not complied with by the applicant, the applicant will not likely be entitled to a favourable ruling: *Roynat Inc. v. Dunwoody & Co.* (1993), 83 B.C.L.R. (2nd) 385 . . .; *Phillips Paul v. Malak Holdings Ltd.*, 2002 BCSC 1191. . . A party cannot frustrate his opponent's discovery rights, simply by filing a motion under Rule 18A, *Access Foundation v. Larkspur Foundation* (1980), 20 C.P.C. 3rd 166 (B.C.S.C.)."

124. In *EVO Properties Ltd. v. 637934 B.C. Ltd.*, Mr. Justice Sigurdson held that it was premature to attempt to determine a claim for specific performance under a real estate transaction until further discovery of documents and examinations for discovery had taken place. At paragraphs 33 – 40, his Lordship said:

> "33. The first question is whether it is appropriate to consider this application under Rule 18A before there has been further production of documents and examinations for discovery of the parties. Is this application, as the purchaser contends premature?
>
> . . .
>
> 36. In *Phillips Paul v. Malak Holdings Ltd.*, [2002] B.C.J. No. 1869, Burnyeat, J. held that it may be premature to proceed with an 18A application where discovery of documents is not complete.
>
> 37. It seems to me that many of the documents that the purchaser seeks production of prior to examinations for discovery may be relevant and should be produced.
>
> . . .

> 39. Although it may turn out that much of the documentary evidence surrounding clause 5, which may be developed through documentary production and discovery, is not admissible on the issue of proper interpretation of clause 5 or on the issue of whether any obligation the owner has under clause 5 was satisfied. I think that it is premature to attempt to determine this case under a Rule 18A until there has been further discovery of documents and examinations for discovery.
>
> 40. I also think that the application under Rule 18A is premature in that many of the alternative positions argued on the application that may have to be considered were either not pleaded or were the subject of little or incomplete evidence. To decide the proper interpretation of clauses 4 and 5 in isolation without proper discovery of documents and examinations for discovery could be potentially unfair and prejudicial."

EVO Properties Ltd. v. 637934 B.C. Ltd., [2004] B.C.J. No. 1880 (B.C.S.C.), per Sigurdson, J. at paras. 33-40.

125. In *Phillips Paul, Barristers and Solicitors v. Malak Holdings*, [2002] B.C.J. No. 1869, Mr. Justice Burnyeat, dealing with whether or not a solicitor ought to be able to proceed with a summary trial in an action commenced to collect a fee from a client said at paragraphs 8 – 10:

> "8. To date, the plaintiff has not complied with the requirement that a list of documents in the usual form be made available after the Demand for Discovery of Documents forwarded on March 16, 2001. As well, it is not appropriate for the plaintiff to proceed with a Rule 18A application until the discovery of documents is complete.
>
> 9. In *Hunt v. TNP, PLC*, (1993), 72 B.C.L.R. (2nd) 14 (B.C.S.C.), Esson, C.J.S.C., as he then was, dealt with the question of whether it was appropriate to allow a defendant to proceed with an application under Rule 18A when that party had not completed the discovery of documents. In this regard, Esson, C.J.S.C. stated:
>
> > 'In an unreported decision pronounced on June 1, 1990, Maczko, J. held that it was not appropriate to allow a defendant to proceed with an 18A application pending the completion of discovery of documents by that defendant. The principal distinguishing feature between that and the present application is that, in the application before Maczko, J., there was an outstanding order for the

> defendant to produce further documents. Counsel for the plaintiff submits that the same result should follow where a demand for discovery remains outstanding. I agree. (At page 17)

> 10. I am satisfied that the principal set out in Hunt, supra, remains the same where a demand has been answered but not answered appropriately or fully. The application of the plaintiff pursuant to Rule 18A should not proceed until there has been complete discovery of documents."

126. In *0693313 B.C. Ltd. v. J.A.B. Enterprises Ltd.* the Court dismissed an application by the defendant under Rule 18A in a claim relating to a contract of purchase and sale of real estate. In doing so Madam Justice Ross stated at paragraph 52:

> "I have concluded that this is a case that is not suitable for summary trial. In reaching this conclusion, I have had particular regard to the following:
>
> (a) The action is at an early stage. The factual investigation is not complete; indeed it has scarcely begun. The parties have exchanged Statements of Claim and Defence, but documents have not been exchanged and neither party has conducted an Examination for Discovery; see *Taylor Ventures Ltd (Trustees of) v. Taylor*, 2002 BCCA 533, 174 B.C.A.C. 201.
>
> (b) The applicant has not yet complied with a Demand for Discovery of documents; see *Phillips Paul, Barristers and Solicitors v. Malek Holdings Ltd.*, 2002 BCSC 1191. In that regard, at the time the motion was heard, the plaintiff had provided a List of Documents. The defendants had not yet provided a List of Documents in response to a Demand dated June 15, 2007.
>
> (c) The Contract provided for amendments to be in writing. The only expressed reference to the Increased Deposit in the written agreement provided for it to be paid on June 30, 2004. It was not paid. However, the Second Amendment provides that the contract is in good standing and none of the parties are in breach. There is, in my view, sufficient ambiguity surrounding the meaning to be given to the Contract as amended by the First and Second Amendment, that it is unwise to attempt to resolve this issue in the absence of evidence of the factual matrix.
>
> (d) The affidavit evidence with respect to central issues in the litigation is in direct conflict. I have concluded that it is not

> possible to resolve those conflicts on the basis of other evidence; see PMC v. EM Estate, 2004 BCCA 128 . . .
>
> (e) These difficulties are compounded by the fact that if these issues were being canvassed in evidence at trial, as discussed by Southin, J.A. in Cotton, the parties would give their evidence in narrative form, setting out the whole course of dealings between them in relation to the matters at issue. By contrast, the evidence with respect to the 18A from both parties consists of a few disconnected paragraphs, mixed with conclusions and, to some extent, argument."
>
> .....

0693313 B.C. Ltd. v. J.A.B. Enterprises Ltd., [2007] B.C.J. No. 2005 (B.C.S.C.) at para. 52 citing *Taylor Ventures Ltd. (Trustee of) v. Taylor*, [2002] B.C.J. No. 2253 (B.C.C.A.) and *Phillips Paul, Barristers and Solicitors v. Malak Holdings Ltd.*, [2002] B.C.J. No. 1869 (B.C.S.C.).

127. It is submitted that *EVO Properties Ltd. v. 637934 B.C. Ltd.*, supra, *0693313 B.C. Ltd. v. J.A.B. Enterprises Ltd.*, supra, and the other decisions set out above stand for the proposition that it is inappropriate to proceed with a Rule 18A application in cases where discovery has not been completed.

128. The Action initiated by the CFS and CFS-S is just over a month old and no document disclosure/examinations for discovery have taken place. The CFS and CFS-S have demanded discovery of documents from the SFSS as of January 11, 2009. The SFSS has not yet responded to that demand.

> Writ of Summons and Statement of Claim filed December 19, 2008; Demand for Discovery and Notice to Produce dated January 11, 2009.

129. There are a number of areas where discovery of documents could be of assistance both to the parties and the Court. Examples are:

(a) the CFS and CFS-S seek the internal memorandum and minutes of the SFSS with respect to its decision-making regarding the defederation process. In particular, such documentation regarding the SFSS decision on February 25, 2008 to have the Vote in respect of the defederation of

the SFSS from the CFS and CFS-S run by the IEC would be significant. Similarly, internal correspondence between SFSS executive members would be relevant. The position of the SFSS is that it acted at all times in good faith and in a *bona fide* effort to achieve a vote because the SFSS executive had concluded that the Oversight Committee, established pursuant to the CFS Bylaws to take responsibility for and authority over the referendum, had become dysfunctional should be tested. Further, such documentation is relevant to the applicability of the Oversight Committee model in the CFS Bylaws and whether the SFSS should be estopped or otherwise prevented by laches, acquiescence or a limitation period from challenging the validity of such CFS Bylaws. Such documentation, as part of the factual matrix, could also be relevant to the interpretation of the CFS Bylaws, the SFSS bylaws and CFS practice. For these reasons, correspondence between the SFSS executive and the SFSS representatives on the Oversight Committee (and amongst such representatives) should also be produced.

(b) The CFS and CFS-S also seek relevant correspondence between the SFSS executive and members of the executive at Kwantlen University College Student Association. There was a good deal of coordination going on between those two student associations in efforts to defederate. For example, Titus Gregory of the Kwantlen University College Student Association has sworn an Affidavit on behalf of the SFSS in the Petition Action. This correspondence too could be relevant to the good faith and *bona fides* of the SFSS.

(c) Correspondence between the Oversight Committee representatives from the two sides should also be produced. This is relevant to, again, the SFSS's position that it only involved its IEC in order to proceed with a vote in respect of a referendum. The CFS's position is that its representatives on the Oversight Committee acted in good faith, bona fides and

reasonably in an effort to have the referendum in accordance with the CFS Bylaws in March, 2008. The SFSS disputes this. Correspondence between the Oversight Committee representatives is significant to that issue as well.

(d) Any documentation with respect to the alleged 1982 agreement or the July 20, 1987 fee agreement between CFS, CFS-S and the Canadian Federation of Students – British Columbia Component should be produced. All that has been produced to date with respect to the alleged 1982 agreement is a document signed only by the SFSS. It is certainly unclear whether the alleged 1982 agreement was agreed to by the CFS and the CFS-S. Documentation with respect to those two agreements may assist in the interpretation of those agreements, particularly the merits of the SFSS's position that the alleged 1982 agreement should override the 1987 fee agreement and the CFS Bylaws with respect to CFS membership referenda procedure. The SFSS specifically pleads and relies on the "intent" of the SFSS signatories to the 1987 Fee Agreement. This alleged "intent" ought to be investigated.

Statement of Defence filed December 30, 2008, para. 4(c).

(e) Documentation should be produced with respect to the May, 1995 amendment to the CFS Bylaws which mandates the oversight committee model for CFS referenda. Documentation with respect to the May 1995 CFS general meeting and the attendance of the SFSS at that meeting will be relevant to whether there was a properly constituted meeting at which the amendment was made and also to the defences set out in the Reply of the CFS and CFS–S of estoppel, acquiescence, laches and the *Limitations Act* (British Columbia).

(f) Documentation with respect to the creation of the Simon Fraser University ("SFU") Graduate Student Society should be produced by the SFSS. This

is relevant to the issue of whether graduate students should have voted in the Vote.

(g) Documentation with respect to what efforts, if any, were made to get SFU students at Kamloops involved with the Vote should be produced.

(h) Documentation with respect to the polling Infractions should be produced. In particular, documentation with respect to the role of the IEC in the Vote, whether and when the IEC received complaints over polling Infractions and what response the IEC made, if any, to such complaints is relevant to the question of whether the Vote was carried out in accordance with CFS practice or principles of fairness and natural justice.

(i) There is no evidence produced as to the status of Unremitted Fees so as to allow the Court to consider the claim in the Action for breach of trust or the quantum of the CFS/CFS-S' claim for failure to remit fees. That information is within the particular knowledge of the SFSS.

Writ and Statement of Claim, paras. 11 – 16 and the relief sought.

130. With respect to the issue of contract interpretation in the context of a Rule 18A application, in *Cannaday v. Sun Peaks Resort Corp.* [1998] B.C.J. No. 85, Mr. Justice Esson, speaking for the Court, referred to the need to have regard to the factual matrix which forms a background to a contract when considering that contract and at paragraph 32 said:

> "In principal, I agree that the issue of fairness and reasonable should not have been determined without regard to the surrounding facts and circumstances at the time the contract was approved and entered into. A related contention, advanced by Mr. Manson in his submissions on the third appeal, is that, even assuming the agreement was neither fair nor reasonable and was, therefore, in breach of section 115(7), it was wrong to hold the agreement unenforceable without having regard to the whole of the facts and circumstances as they existed in 1992, when the company took the position that it was unenforceable."

The Court decided the case was not suitable to be dealt with pursuant to Rule 18A.

See also *Blair v. Carstens*, [1987] B.C.J. No. 1082 (B.C.S.C.), per MacKinnon, J. at page 3.

131. In summary, the CFS and CFS-S submit that there is a serious possibility that they will be able to bolster their position by discovery of documents and by conducting examinations for discovery. For this and the other reasons set out above, it would be unjust to decide the Action pursuant to this Rule 18A application.

Bank of British Columbia v. Anglo-American Cedar Products Ltd., [1984] B.C.J. No. 2690 (B.C.S.C.); *EVO Properties Ltd. v. 637934 B.C. Ltd.*, [2004] B.C.J. No. 1880 (B.C.S.C.); *0693313 B.C. Ltd. v. J.A.B. Enterprises Ltd.*, [2007] B.C.J. No. 2005 (B.C.S.C.).

Complexity

132. This Action involves a number of complex factual and legal issues including:

(a) interpretation and applicability of the CFS Bylaws and CFS practise with respect to defederation in a number of respects;

(b) a determination as to whether the CFS, CFS-S and the SFSS entered into the alleged 1982 agreement;

(c) issues of contractual interpretation, supervention and rescission regarding the alleged 1982 agreement (if this Court finds that there was such an agreement), the 1987 fee agreement and amendments to the CFS Bylaws in May, 1995;

(d) whether any of the terms put forward by the SFSS can be implied into the agreement between the parties and, in particular, into the CFS Bylaws;

(e) whether the defederation process in the current CFS Bylaws is contrary to the constitution and bylaws of the SFSS and, if so, the ramifications of that;

(f) whether there is an implied term of good faith between the parties, if so the scope of that implied term of good faith and whether that term was breached by either of the parties during this process;

(g) in particular, whether there was an "anticipatory breach" of an obligation of good faith by the CFS and CFS-S;

(h) whether a 1995 amendment to the CFS Bylaws creating the Oversight Committee model for defederation is valid as having been enacted at a properly constituted meeting and the defences raised in the Reply of the CFS/CFS-S being laches, acquiescence, estoppel and the *Limitation Act* (British Columbia);

(i) a determination as to whether the Vote was effective to remove the SFSS from the CFS and CFS-S and, in particular, whether the Vote was carried out in accordance with the CFS Bylaws and principles of fairness and natural justice and in good faith;

(j) if the Court holds that the SFSS remained a member of the CFS and CFS-S after the Vote, the quantum of fees owing by the SFSS to CFS and CFS-S;

(k) whether or not the SFSS holds or held Unremitted Fees in trust and if so whether there was a breach of trust and whether the SFSS is liable for that breach as trustee, pursuant to the principles of trustee de son tort or for knowing assistance in a breach of trust; and

(l) applicability of section 85 of the *Society Act*.

133. The CFS and CFS-S submit that the number and complexity of the foregoing factual and legal issues, some of which may involve novel points, make this Action inappropriate for determination under Rule 18A.

Taylor Ventures Ltd. (Trustee of) v. Taylor, [2002] B.C.J. No. 2253 (B.C.C.A.)

Amount Involved

134. The SFSS is a founding member of the CFS and CFS-S and the current membership fees received by the CFS and CFS-S (inclusive of fees to the CFS-BC, a separate and distinct British Columbia society associated with the CFS), as a result of the continued membership of the SFSS has been approximately $470,000 per annum. This will be reduced because of the creation of the Graduate Student Society and the resulting departure of graduate students from the SFSS. However, the amount is still significant.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 6 and 12.

135. Were the SFSS to leave, the CFS the CFS-S would lose a founding member and would suffer an ongoing loss of membership fees. The withdrawal of the SFSS would weaken the CFS and CFS-S in British Columbia and across Canada and could have adverse consequences with respect to the continued participation of other British Columbia student associations. The CFS the CFS-S submit that the amount involved and the importance of the issues warrant a conventional trial.

Affidavit #1 of L. Watson sworn May 26, 2008 at paras. 6, 12 and 87.

Urgency and Prejudice Arising from Delay

136. The CFS and CFS-S submit that there is no urgency here or prejudice to the SFSS if this Action proceeds to a conventional trial. Currently, SFU students are still enjoying the benefits of membership in the CFS. The SFSS continues to collect, although not remit, the CFS/CFS-S student fees that are the subject of this Action.

Resolution of Factual Issues in the Absence of Admissible Evidence Where Such Evidence May Be Tendered in Admissible Form at a Subsequent Trial

137. With respect to the May, 1995 CFS Bylaw amendment that is being challenged by the SFSS, it is submitted that there is currently no admissible evidence with respect to what occurred at the CFS/CFS-S meeting in question.

138. All that has been produced is what is called "draft closing plenary minutes of the May 1995 general meeting of the CFS", attached as Exhibit "H" to the Affidavit of Titus Gregory #1 sworn March 10, 2008 in another proceeding, *Canadian Federation of Students v. Kwantlen University College Student Association*, S.C.B.C. Vancouver Registry, No. S081553.

> Affidavit of Titus Gregory #1 sworn March 10, 2008 at Exhibit "H".

139. There is no evidence that Titus Gregory attended the May 1995, meeting. Indeed, the draft minutes suggest that there was no one there from Kwantlen College. There is no evidence of who produced the draft minutes or where Titus Gregory obtained the copy that is exhibited in his Affidavit.

140. The CFS and the CFS-S submit that Exhibit "H" is hearsay evidence from an unknown source. Mr. Gregory does not even swear that he believes the draft minutes to be accurate. This evidence is not admissible at a summary trial.

> Rule 51(10) of the Supreme Court Rules;
> *Ulrich v. Ulrich*, [2004] B.C.J. No. 286 (B.C.S.C.) at paras. 19, 22 – 23, 25 – 26, 32 – 36, 38 – 39, 73 and 83; *American Pyramid Resources Inc. v. Royal Bank* (1986), 2. B.C.L.R. (2nd) 99 (S.C.) per Davies, J. at paras. 15 – 16, affirmed on appeal, [1987] B.C.J. No. 196 (B.C.C.A.);
> *Sermeno v. Trejo*, [2000] B.C.J. No. 1088 (B.C.S.C.) per Macauly, J. at paras. 6 – 14.

Potential for Dealing with Certain Issues but Leaving Other Issues Unanswered

141. As set out above, it is submitted that there is either no evidence or no admissible evidence on several issues including:

(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.