

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 DEFENDANT

(APPLICATION FOR SUMMARY TRIAL PURSUANT TO RULE 18A)

PART I

The following relief will be sought at the hearing:

1. An Order dismissing the Plaintiffs' claims against the Simon Fraser Student Society ("the SFSS").

PART II

2. The SFSS and individual students at Simon Fraser University ("SFU") have been members of the Canadian Federation of Student – National ("CFS National"), Canadian Federation of Students – Services ("CFS Services") and Canadian Federation of Students – British Columbia Component (the "CFS – BC") since 1982. These entities will be referred to collectively as the CFS unless otherwise specified. In March 2008, the students at SFU voted to leave the CFS by way of referendum ("the Defederation Referendum"). The CFS indicated that it did not consider the result of the Defederation

Referendum to be binding on it and in September 2008, requested that the SFSS pay CFS membership Fees, which the SFSS would not do. The CFS National and services commenced an action claiming payment of fees in December, 2008. The CFS –BC commenced a similar action in January 2009.

A. Facts

3. Members of the CFS national component are automatically members of the CFS-BC Component and CFS Services, and SFU Students were members of all three entities, as well as the SFSS, prior to the Defederation Referendum. There are two categories of members in the CFS, as set out in the CFS National Bylaws (“the CFS Bylaws”):
 - (a) “Voting Members” -- the local student association at the university or college whose students are members of the CFS. Voting Members are also referred to “Local Associations” in the CFS Bylaws. In the case of SFU, the Voting Member or Local Association was the SFSS.
 - (b) “Individual Members”-- the individual students at the university or college, who collectively make up the Voting Member. In the case of SFU, the Individual Members were the individual students at Simon Fraser University (“SFU Students”).
4. CFS Bylaws I(3)(a)(i), (ii) and (iii) set out the basic principle that the authority to make decisions with respect to membership rests with the Individual Members and that they have a right to decide membership issues by way of referendum,
5. All local associations that join the CFS enter into a contract relationship with the CFS. It is pursuant to that contract that the individual members pay membership fees to the CFS. The SFSS contract with the CFS in 1982 provided, amongst other things, that referenda concerning defederation would be conducted in accordance with the referenda procedures of the local association (“the 1982 Agreement”). In 1987, the SFSS signed a further contract with the SFSS concerning the method of fee payment (“the 1987 Agreement”). It did not supersede or otherwise replace the 1982 Agreement.

6. The obligation of the SFSS to collect fees for the CFS (or to cause SFU to collect fees on behalf of the CFS) under the Agreements was contingent on the SFSS and its Individual Members remaining a member of the CFS.
7. In March 2007, the SFU students voted in SFSS referendum on whether they wished to continue their relationship with the CFS. That vote indicated that they did not wish to continue the relationship and the SFSS started proceedings to formally terminate its membership in the CFS.
8. The CFS Bylaws appear to provide two ways for a local association to terminate its membership in CFS. Bylaw I(6), which is captioned "Vote on Defederating" contemplates the local association holding a referendum on the issue of membership, the process that is in issue in this Petition. Bylaw I(7), which is captioned "Procedure for Application for Withdrawal" appears to contemplate the local association applying to withdraw at a general meeting of the CFS.
9. The SFSS chose to pursue both routes, although it focussed its efforts on the referendum process set out in Bylaw I(6).
10. The SFSS gave notice of its intention to withdraw from the CFS in accordance with Bylaw I(7) and requested that the CFS put the matter to a vote at the November 2007 AGM. The CFS refused to put the matter to a vote at the AGM on the grounds that, as they interpreted Bylaw I(7), the AGM could only vote on the withdrawal motion if the members of the local association had already voted to leave pursuant to the CFS Bylaws.
11. The SFSS also pursued the defederation referendum process set out in CFS Bylaw (I)(6). The first step in the process, as set out in CFS Bylaw I(6)(a), was for the SFSS to forward a petition to the CFS National Office calling for a defederation referendum, signed by no less than 10% of SFU students, which the SFSS did ("the 2007 Petition").
12. The second step in the process, as set out in Bylaw I 6(b) of the CFS Bylaws, was for the SFSS to deliver notice of the defederation referendum to the CFS head office by registered mail ("the Notice"), giving the CFS at least six months notice of the date of the Defederation Referendum and setting out the dates and times of the Referendum, which

the SFSS did on 24 August 2007. The Notice clearly indicated that the Defederation Referendum would be held 18,19 and 20 March 2008.

13. The next step in the CFS process, as set out in Bylaw I(6)(f), was to establish a Referendum Oversight Committee ("ROC") composed of two individuals appointed by the CFS and two appointed by the SFSS. Under CFS Bylaw, the ROC has the responsibility of overseeing the referendum vote. The CFS appointed two individuals, Ben Lewis and Lucy Watson, and the SFSS appointed two individuals, Michael Letourneau and Kyall Glennie, both graduate students and members of the SFSS.
14. The final step in the CFS process, as set out in Bylaw I (6) (g), was for the local association to pay any outstanding CFS fees not less than six weeks before the date of the referendum, which the SFSS did.

B. Procedural Issues

15. The SFSS was concerned that the ROC process established in Bylaw I (6) would be unworkable. For one thing, the ROC was composed of only four persons, two appointed by each party. The SFSS was concerned that the ROC would become deadlocked and that, in the absence of any mechanism for breaking the deadlock, it would not be able to fulfill its function. The SFSS also wanted to reach agreement on referendum sufficiently well in advance of the vote to avoid last minute disputes.
16. To that end, in November, 2007, the President of the SFSS, Derrick Harder, sent the CFS a proposed procedure which attempted to address what the SFSS saw as the potential difficulties with the CFS process ("the Draft Procedures"). In his covering letter, Mr. Harder specifically informed the CFS that under the SFSS Bylaws any referendum must be held at the same time as SFSS general elections, and indicated that it was the SFSS's hope that a procedure could be worked to allow the two to proceed smoothly. Mr. Harder further expressed the SFSS's concern about the lack of any mechanism to break deadlocks on the ROC and suggested the appointment of a third party arbitrator, as outlined in the Draft Procedures.

17. The only reply he received from the CFS was a letter stating that sole authority to make rules concerning the Defederation Referendum rested with the ROC. When the ROC met, the SFSS appointees again suggested that the ROC consider the Draft Procedure as a starting point for its processes. The CFS appointees would not do so. While the ROC discussed procedural matter, it dealt with the issues in a piecemeal fashion, and became embroiled in dispute. There was no mechanism adopted for resolving disputes and the ROC became deadlocked.

C. Problems within the ROC

18. By the latter part of February 2008 the ROC was embroiled in disputes over a variety of issues, including the following:
 - (a) The CFS alleged that the Notice the SFSS delivered in August 2007 was invalid because the 2007 Petition did not set out the dates of the Defederation Referendum, thereby obliging the ROC to pick the dates.
 - (b) The CFS objected to the SFSS having selected the date of the Defederation Referendum instead of the ROC.
 - (c) The CFS objected to the fact that the Defederation Referendum and SFSS general elections were being held at the same time.
 - (d) The CFS objected to the form of question the SFSS had proposed and instead suggested a two-page question that was both confusing and biased.
 - (e) The CFS objected to what they saw as “pre-campaigning” by the SFSS; namely, discussions between SFSS members concerning the merits of membership in the CFS and SFSS posters and websites that raised the issue.
19. The ROC resolved the dispute over the wording of the Defederation Referendum question, but could not agree on the other issues. When the President of the SFSS expressed his concerns about the ROC directly with the President of the CFS, she refused to discuss it

20. On 27 February 2008, counsel for the CFS wrote a letter to the SFSS stating its view that it was no longer possible to have a fair referendum. On 29 February 2008, the CFS sent another letter stating that they would not accept the results of the Defederation Referendum but nevertheless intended to campaign.
21. Since the SFSS Bylaws require that the SFSS give 21 days notice of any referendum, the SFSS Board passed a series of resolutions on 25 February 2008 to the effect that five referendum questions, including the Defederation Referendum, be put to vote. Given the problems with the ROC, the SFSS requested that the SFSS Independent Electoral Commissioner ("IEC") be prepared to run the Defederation Referendum along with the elections and other referenda that were being put to vote that year.
22. By late February, with campaigning scheduled to commence 3 March 2008, the SFSS had to decide whether it should proceed with the Defederation Referendum, as requested by its members, or cancel the Defederation Referendum, as demanded by the CFS. It chose to proceed. It did so because its members had indicated their desire for a vote on the issue both in the 2007 referendum and the 2007 Petition and because it was satisfied that the objections that the CFS had been raising were without merit.
23. The Commissioner of the IEC and SFSS asked the CFS appointees to the ROC to participate in the oversight of the referendum and send scrutineers to supervise the vote. They refused to do so. Since the CFS Bylaw (I)(6) required at least two weeks of campaigning, the campaign had to start on or around 3 March 2008 in order for the vote to proceed on 18-20 March 2008. The Defederation Campaign was very actively fought on both sides and the CFS participated fully. In addition to putting up posters and promoting the CFS on its website, it flew members in from other parts of Canada and participated in public debates on the merits of membership.
24. Quorum for the Defederation Referendum was 5% of the SFSS' total membership. A total of 4490 (or 17 %) of the SFU students qualified to vote did vote in the Defederation Referendum. Of those, 2676 (or 66.97%) voted not to remain in the CFS, 1469 voted to remain in the CFS, and 42 ballots were spoiled or blank.

25. In its Statements of Claim, the CFS sets out its complaints with respect to the legality of the Defederation Referendum. The SFSS says these complaints are without merit.

D. Interpretation Issues

26. The SFSS submits that the CFS' position with respect to the Defederation Referendum is based on an unreasonable interpretation of its Bylaws that is inconsistent with both the express words and intent of those Bylaws. In interpreting the relevant provisions of the CFS Bylaws, the Court should consider the surrounding provisions in the Bylaws, the CFS's contractual relationship with the SFSS, and the implied terms of that relationship, including principles of democracy and the duty of fairness and honesty implied into contracts concerning voluntary associations.
27. The SFSS further submits that the following were implied and/or express terms of the contract between the SFSS and CFS:
- (a) that the Individual Members had the right to decide whether they wanted to remain members of the CFS and could terminate their membership in the CFS if a majority voted in favour of doing so in a referendum.
 - (b) that the CFS would respect the right of the Individual Members to decide the issue of membership and would respond to a Defederation Referendum initiated by the Individual Members, in good faith, in accordance with principles of democracy, the CFS Bylaws and the Bylaws and Constitution of the SFSS.
 - (c) that the CFS would not unreasonably interfere with or prevent the Individual Members from exercising their right to vote on membership in the CFS.
 - (d) that the CFS would interpret the CFS Bylaws governing defederation referenda in a manner that was consistent with the Individual Member's right to decide on issues of membership and the principles of democracy
 - (e) that the CFS would respect the Defendant's Bylaws and practices concerning defederation referenda and interpret the CFS Bylaws in a manner that did not conflict with the Defendant's Bylaws;

- (f) that the CFS would either respect the outcome of any referendum held on membership or seek a Court ruling setting aside the results; and
- (g) that the SFSS did not delegate or cede to the CFS the power to amend or override the SFSS Constitution and Bylaws in respect to referendum.

28. In addition, or in the alternative, the SFSS submits that Bylaws I(6) and I(7) are of no force and effect because they were not enacted at a properly constituted meeting of the CFS. The meeting at which the National CFS Bylaws were approved did not have quorum. There is no evidence that the CFS –BC Bylaws were ever voted on.

E. CFS Complaints

Inadequacy of the Petition

29. The CFS claims that the Notice was inadequate or inconsistent with their Bylaws because the 2007 Petition did not set out the dates of the Defederation Referendum and the ROC therefore had to set the dates of the vote. The SFSS submits that the CFS is simply incorrect in its interpretation of the relevant Bylaw.
30. Bylaw I(6)(a) states that the local association must deliver a petition signed by 10% of its local members. As noted above, the SFSS did that. The Bylaws do not say that the petition itself must set out the dates of the referendum. Notice is dealt with in the next provision, Bylaw I (6)(b), which provides that local association give the CFS six months notice of the dates of the referendum and that the Notice set out the actual dates of the Defederation Referendum. The Notice the SFSS delivered in respect to the Defederation Referendum complied with that provision. It was legal notice delivered in accordance with the CFS Bylaws and, as such, was binding on both parties.

1.1.1 Who Picks the Dates

31. The CFS claims that the ROC was entitled to ignore the dates in the Notice and set other dates for the Defederation Referendum.
32. This interpretation of the ROC's authority is also inconsistent with the CFS own Bylaws:

- (a) Bylaw I(6)(b) says that the local association must give six months notice of any referendum, including the dates of the referendum. Since the ROC is only created after Notice of the Defederation Referendum is delivered setting out the dates, the ROC cannot have selected the dates.
- (b) Bylaw I(6)(b) of the CFS Bylaws provides that failure to comply with the notice provisions in Bylaws I(6)(b) invalidates the Defederation Referendum. If the ROC had moved the date of the Defederation Referendum it would either have had to move it six months or proceed in violation of that provision, thereby running the risk that the results could be invalidated.
- (c) Bylaw I (6) (f) which sets out the responsibilities of the CFS does not include setting the date of the vote.

33. On a plain reading of these provisions, the ROC does not have the ability or authority to set the date of the referendum.

1.1.2 Concurrent SFSS elections

34. The CFS claims that the fact that the Defederation Referendum was held on the same day as the SFSS elections violated the CFS Bylaws and created unfairness. Once again, that claim is without any merit.
35. There is no prohibition against the two being held together in the CFS Bylaws and it is required that they be held together under the SFSS Bylaw 17.

The Fee Question

36. The CFS also complains that holding the Defederation Referendum at the same time as the referendum concerning the reallocation of CFS fees should the SFSS leave the CFS was unfair ("the Fee Question"). The referendum on the Fee Question was held under the SFSS Bylaws and under the supervision of the IEC, along with three other SFSS referenda. The two questions were presented on separate ballots. Furthermore, it was necessary for the SFSS to put the Fee Question to vote. If the SFSS left the CFS, the

SFSS and SFU had to have authority to adjust the payment and allocation of fees, and the students had a right to decide how their money was to be used.

37. The *University Act* confirms that decisions concerning the collection of fees must be determined by referendum.
38. Finally, the SFSS submits that including the fee question did not violate any Bylaw or create any unfairness to the CFS.

1.2 PRE-CAMPAIGNING/

39. The CFS alleges that the vote was unfair because of “pre-campaigning” by the “No” side, by which they appear to refer to material appearing in posters and on websites and other places which supported the “We Want Out” position. Once again, this claim is without merit.
40. There is no prohibition against pre-campaigning in the CFS Bylaws or under the common law. CFS Bylaw 6(c) addresses the issue of campaigning, but it simply provides that there be *no less* than two weeks of campaigning. It does not create any blackout period or prohibition against either side promoting its point of view prior to the commencement of the set campaign period.
41. The SFSS submits that such a prohibition would be both inconsistent with democratic principles and impossible to enforce. It is not possible, or desirable, to prevent persons or organizations from promoting political positions. Such a prohibition would open the door to endless court applications by defeated parties seeking to set votes aside on the basis of “pre-campaigning”. That would require the Court to determine, amongst other things, what constitutes pre-campaigning and how that the alleged “pre-campaigning” may have affected individual voters.

1.3 FALSE CAMPAIGN MATERIAL

42. The CFS further claims that the results of the Defederation Referendum should be invalidated on the grounds that the posters and other campaign materials posted by the “We Want Out” side were inaccurate, misleading and defamatory.

43. Firstly, the SFSS submit that the materials were not false or misleading. The majority of the posters and other materials simply expressed the opinions of SFSS members concerning membership in the CFS and the factors they considered in forming their opinions. The CFS may disagree with these individual opinions, but that does not render the material 'false' or misleading. The right to express political opinions is at the heart of democracy and it is both healthy and inevitable that disagreements arise as to its contents.
44. Secondly, if the CFS thought the SFSS campaign materials were false they could have and did promote their conflicting views in posters, during discussions with prospective voters, and debates. If the CFS thought particular materials were defamatory, the proper approach would be to file a claim in defamation.
45. Thirdly, there is no legal precedent for the a court in Canada setting aside elections or referendum results on the basis that campaign materials are false or misleading. On the contrary, in the context of public elections and union votes Commonwealth courts and tribunals have repeatedly stated that it would be both undesirable and impossible for Courts to try to judge the legitimacy of an election campaign based on the truth or falsity of campaign representations.

1.4 ISSUES CONCERNING THE ROC

46. The CFS alleges that the ROC had sole authority to provide oversight for the Defederation Referendum. It claims that the IEC wrongfully usurped that authority and that the Defederation Referendum took place outside of the CFS Bylaws and is invalid.
47. Firstly, the CFS points to the SFSS Board's resolutions on 25 February 2008 giving notice of the Defederation Referendum. The SFSS Board had a duty to give notice under its own Bylaws and its compliance with that duty did not create any unfairness or breach the CFS Bylaws.
48. Secondly, it points to the fact that the IEC stepped in to run the Defederation Referendum when the ROC was unable to do so. The CFS's position with respect to Bylaw I(6)(f) and the ROC role is based on the following propositions:

- (a) The ROC had sole authority to run the Defederation Referendum and, if it was not able to do so, the Defederation Referendum could not proceed.
 - (b) Any Defederation Referendum which was not run entirely by the ROC was automatically invalid and/or not binding on the CFS.
49. Taken at its simplest, the CFS interpretation of its rights and duties under its Bylaws would, in essence, allow the CFS to prevent any referendum from proceedings by instructing their representatives to the ROC to created a deadlock within the ROC which would prevent the ROC from fulfilling its duties under the Bylaws, thereby blocking the vote on membership. That interpretation is neither desirable nor supported by the CFS Bylaws or the surrounding context.
50. The SFSS submits that the better interpretation of the CFS Bylaws governing Defederation Referenda is as follows:
- (a) An ROC committee should be created under the CFS Bylaws after Notice is given.
 - (b) The purpose of the ROC is to facilitate the Individual Members right to vote on membership..
 - (c) In the absence of a dispute mechanism, the parties to the ROC should attempt to fulfill their duties.
 - (d) If they are unable to do so, the local association reserves the right to step in an ensure that the referendum proceeds as scheduled.
 - (e) The ROC failure to fulfill its duties does not automatically invalid the vote.
 - (f) If the ROC fails to fulfill its function and the vote proceeds, the issue is whether the election was fair and whether its results properly reflect the democratic will of the voters.

51. In the present case, the SFSS delegated the responsibility for running the Defederation Referendum to the ROC. However, the ROC proved unable to fulfill its responsibilities. Leaving aside the dispute over dates, which was not even within its mandate, the ROC could not reach an agreement on such seemingly uncontroversial matters such as the location of polling stations and hiring polling clerks. On 29 February 2008, the CFS had openly stated that it would not accept the results of the Defederation Referendum. By that date, at the very latest, it was clear that the CFS and its appointees to the ROC had no interest in seeing the Defederation Referendum proceed.
52. In the circumstances, the SFSS had both the right and the duty to ask the IEC to step in and ensure that the Defederation Referendum proceeded as scheduled.

Breach of Confidentiality

53. The CFS complains that one of the SFSS appointees to the CFS, Mike Letourneau, breached a confidentiality agreement between the members of the ROC by allowing himself to be interviewed by the Peak Newspaper on 18 February 2008 concerning the two page Defederation Referendum question proposed by the CFS.
54. There is no confidentiality provision required under the CFS Bylaws or reflected in the Minutes of the ROC. There was no indication in the Minutes or otherwise that the meetings were in camera and no principle reason why they should be. Furthermore, the CFS cannot reasonably suggest that Mr. Letourneau's comments created unfairness. All that Mr. Letourneau did was to state his opinion that the two page question was confusing and his view the ROC was not deadlocked.

1.5 BIAS ON PART OF INDEPENDENT ELECTORAL OFFICER

55. The CFS complains that the IEC, John McCullough, was biased based on an e-mail purportedly between Mr. McCullough and a third party, who has not sworn an affidavit in these proceedings. In that e-mail, which Mr. McCullough was apparently critical of the CFS. This evidence should be given little, if any weight.

56. In any event, Derrick Harder has attached an article from the Peak Newspaper to his Affidavit #2, in which Mr. McCullough was equally critical of the SFSS. Mr. Harder deposed that he thought Mr. McCullough was suitable to run the Defederation Referendum because he had experience and had remained independent from both organizations.

1.6 GRADUATE STUDENTS

57. The CFS complains that graduate students voted in the Defederation Referendum when they were not qualified to do so or, in the alternative, did not have a legitimate interest in its outcome. They take this position because the graduate students at SFU had formed the Graduate Student Society and were scheduled to split from the SFSS on 1 May 2008. The SFSS submits that the issue is whether the graduate students were qualified to vote under the Bylaws, not whether they had an "interest". Prior to 1 May 2008, the graduate students were still members of the SFSS. At the time of the Defederation Referendum, they had paid their CFS and SFSS fees for the year, were members of the CFS and SFSS, and entitled to vote under the CFS and SFSS Bylaws.

1.6.1 Kamloops Student

58. The CFS claims that students enrolled in a SFU program at the Kamloops campus were not given the opportunity to vote because there were no polling stations set up at Kamloops.
59. There are a number of students enrolled at SFU who do not attend classes on any of the three SFU campus - Surrey, Burnaby or Vancouver. These students are considered "off campus" students. Kamloops students are considered "off campus" students because Simon Fraser University does not have a campus in Kamloops, although it does offer classes. Polling stations have never been set up in Kamloops because there are only a small number of students served by the program. That does not mean they did not have an opportunity to vote. Off-campus students can vote by mail, a process which was explained to the CFS in November 2008. The Registrar at SFU gives the IEC e-mail addresses for all off-campus students for whom the SFU has e-mail addresses. The IEC emails them and asks them if they want to participate. If so the ballots are mailed to them.

60. Mr. Letourneau, who was on the ROC and Mr. McCullough, who was chair of the IEC both deposed to their belief that this process was followed in the present case with respect to the Kamloops students.

Alleged Irregularities in the Vote

61. The CFS claims that the results of the Defederation Referendum was invalid because of irregularities in the voting, in particular:

- (i) They allege that “No” side campaigners and scrutineers improperly attempted to influence voters.
- (ii) They allege that the poll clerks and scrutineers did not do their jobs properly.
- (iii) They alleged there was improper sealing, transportation and storing of the ballots and ballot boxes.
- (iv) They alleged there was not sufficient privacy for the voters.

62. The burden is on the CFS to prove that there were substantial irregularities of a sufficiently serious nature that they were calculated to affect the outcome of the vote. In the present case, the CFS affidavits alleging irregularities are vague, speculative and misleading and fall far short of establishing any irregularities. Furthermore, the alleged irregularities, even if provided, could not reasonably be suggested to have changed the outcome of the vote.

Bylaw I(7)


63. The CFS takes the position that the Defederation Referendum is also invalid because the SFSS failed to comply with Bylaw I(7). As noted above, that Bylaw provides that upon receipt of a written application to withdraw from the CFS, the CFS Executive will review the application to see if it is in order. If so, it can make recommendations to the members of the CFS, who vote on the application at the next AGM. In other words, it is the CFS’

position that its Executive has the authority to simply override the results of the Defederation Referendum.

64. The SFSS submits that the CFS interpretation of Bylaw I (7) would lead to an unjust and absurd result. The SFSS submits that the only reasonable interpretation of the CFS Bylaws is that I(7) and I(6) were intended to provide alternatives routes for leaving the CFS.
65. In the alternative, the Defendant says that Bylaw I(7) is of no force and effect because it was not enacted at a properly constituted meeting of the CFS and is of no force and effect.
66. In the further alternative, the CFS had already unequivocally informed the SFSS that it would not respect the results of the Defederation Referendum. The only reasonable conclusion was that the CFS would breach its contractual obligation of good faith under the Agreement when considering any application under Bylaw I(7) and that any such application would inevitably be rejected. The SFSS therefore chose to accept the CFS's anticipated breach of the Agreement and to terminate the Agreement in anticipation of the CFS's breach.
67. For all the above reasons, the SFSS submits that the results of the Defederation Referendum are valid and binding, that it is no longer a member of the CFS and that it does not own any fees to the CFS.

20 January 2009

Dated



Solicitor for the Applicant

THIS Outline was prepared and delivered by Susan Coristine of the firm Coristine Woodall, Barristers & Solicitors, whose place of business and address for service is 660-220 Cambie St., Vancouver, B.C., V6B 2M9, fax: (604) 689-3292.