

In the Supreme Court of British Columbia

Between:

**UNIVERSITY OF VICTORIA STUDENTS' SOCIETY**

**and**

**JOSÉ BARRIOS**

Petitioners

And:

**CANADIAN FEDERATION OF STUDENTS**

Respondent

**SECOND MEMORANDUM OF ARGUMENT OF THE PETITIONERS**

**I. REMEDY SOUGHT**

1. The Petitioners seek an order scheduling the referendum voting days on March 29, 30, and 31, 2011.

**II. FACTS**

2. Reasons for Judgment were given on February 1, 2011.

**Reasons for Judgement**

3. The Reasons for Judgment stated in part:

.... Finally, the petitioners seek an order directing the scheduling of the referendum on specific dates.

Given my declarations, there is no reason to anticipate that the CFS will refuse to take the necessary steps under the bylaw to ensure that the referendum is held as quickly as possible. Hopefully there is still sufficient time to schedule the referendum during the current academic year but I am not willing to grant the additional orders sought at this time. If consequential or ancillary relief becomes necessary, the petitioners will have leave to apply.

**Reasons for Judgement at paras. 60 and 61**

4. The day after the Reasons for Judgment were issued, James Coccola, the Chairperson for the University of Victoria Student Society (“UVSS”), contacted the David Molenhuis, the Chairperson of the Canadian Federation of Students (“CFS”) to provide names of the UVSS’s Referendum Oversight Committee (“ROC”) appointees and suggest voting dates for the referendum.

**Affidavit #3 of J. Coccola, para. 2, Exhibit A.**

5. Via written correspondence, the parties confirmed the four appointees to the ROC.

**Affidavit #3 of J. Coccola**

6. After some back and forth about referendum voting days, on February 9, 2011 the CFS confirmed March 29, 30, and 31, 2011 as the referendum voting dates. However, the CFS was explicit that referendum will only go ahead if the UVSS pays the CFS additional membership fees totaling \$129,058 (\$6,489.00 for 2008-2009 and \$122,569 for 2009-2010). Thus, the CFS set the referendum voting dates *contingent* on the UVSS paying the CFS \$129,058.

**Affidavit #3 of J. Coccola, para. 7, Exhibit F**

7. As part of the relief sought under the Petition, the Petitioners sought an order requiring voting dates for the referendum on January 31, February 1, 2,3 & 4' 2011.

**Petition to the Court, at Part 1, para 1(d) [CR TAB 1]**

8. The Petition stated that the University of Victoria collected and remitted CFS membership fees of \$232,629 in 2008-2009 and \$242,222.02 in 2009-2010.

**Petition to the Court at para. 6 [CR TAB 1]**

9. Mr. Coccola's Affidavit #1 sworn on November 12, 2010 swears that CFS membership fees in 2008-2009 and 2009-2010 were directly collected by the University of Victoria ("UVIC") from each UVIC undergraduate student and paid directly to the CFS. Complete documentary evidence was attached to Mr. Coccola's affidavit to demonstrate that \$232,629 was remitted directly to the CFS by UVIC in 2008-2009 and \$242,222.02 was remitted directly to the CFS by UVIC in 2009-2010.

**Affidavit #1 of J. Coccola, paras. 21 & 22, Exhibits [CR TAB 4]**

10. Despite being aware of the relief being sought by the Petitioners as set out in the Petition and the evidence regarding fees put forward by the Petitioners, nowhere in the CFS's Response to the Petition did it include any statement that the appropriate level of fees had not been remitted to the CFS. The CFS simply failed to put fee payment in issue.

**Response to Petition [CR TAB 2]**

11. Moreover, in its Response to Petition and accompanying affidavit evidence the CFS did not include any evidence to support its position that an inadequate level of fees had been paid in 2008-2009 or 2009-2010.

**Response to Petition [CR TAB 2]**

12. The first time that the UVSS became aware of the CFS's claim with respect to membership fees was on January 4, 2011, less than two days before the Petition was heard. The UVSS only learned of the amount that the CFS was seeking when it received a forwarded email from the CFS' legal counsel attaching an unfiled affidavit sworn by Lucy Watson.

**Affidavit #3 of J. Coccola, para. 9, Exhibit H**

13. The CFS was fully aware that its claim to addition fees could affect the relief being sought by the Petitioners. CFS counsel acknowledged on January 4, 2011 that the new fee argument "may affect the relief being sought by the petitioners".

**Affidavit #3 of J. Coccola, para. 9, Exhibit H**

14. At the hearing of this Petition, the CFS attempted to introduce unfiled affidavit #3 of L. Watson into evidence. After hearing counsel for both parties, the Court ruled that:

The respondent seeks to rely on a third affidavit of Ms. Watson ... sworn on January 4, 2011, sometime after the respondent's response to the petition was filed on December 10, 2010. For the first time in this proceeding, Ms Watson raises an issue respecting an alleged default in remittance of fees on the part of the Petitioner. In the circumstances, I am satisfied that this was an issue that has arisen for the first time in the course of the proceedings or in such a way as Ms. Watson would have been aware of it when the Respondent filed its response to this application. It may be that the affidavit is not relevant, but it gives rise to a potential argument that the main relief sought by the Petitioner is not available

for the reason that fees sought by the respondent are outstanding. To the extent that the Respondent seeks to rely on the affidavit, it ought to have made that apparent in its substantive reply at an earlier stage. ... I am satisfied there is substantive risk to the Petitioners of prejudice by the delay, which could easily have been avoided if the Respondent had acted in timely way. Ms. Watson's affidavit no. 3 is not allowed.

**Hearing, January 6, 2011**

15. The UVSS has since reviewed the UVSS's records. According to the UVSS's records, all CFS membership fees of any type ever collected from undergraduate students at the University of Victoria have been remitted to the CFS.

**Affidavit #3 of J. Coccola, para. 11**

16. The very latest time this academic year that voting days for a referendum may be scheduled is March 29, 30, 31, 2011 because classes end on April 1, 2011.

**Affidavit #2 of J. Coccola, para. 8**

**III. ISSUE**

17. Can the CFS refuse to unconditionally schedule the referendum on the basis of the CFS's allegation that CFS membership fees are outstanding?

**IV. ANALYSIS**

**Res Judicata - The CFS has Recycled the Argument it Made and that was Rejected During the Hearing of the Petition**

18. The Court has already determined that the CFS's failure to raise its allegation of unpaid fees in a timely way created a substantial risk of prejudice to the Petitioners. The CFS was clearly aware that its newly advanced claim could have the effect of depriving the Petitioners of the main relief they were seeking – the scheduling of referendum dates. On this basis, the Court refused to admit Affidavit #3 of L. Watson.

19. The CFS now recycles the identical argument and takes the position that its allegation of non-payment of fees should prevent a referendum from proceeding at UVIC.

20. Absolutely nothing has changed. The facts are still the same. Had the CFS wanted to prevent a referendum from being scheduled based on its allegation of unpaid fees, the CFS should have made the issue front and centre *at the very latest* in its Petition Response and responsive materials.

21. Despite having many opportunities to do so, at no point has the CFS made the fee issue front and centre in a timely manner. Instead, the CFS did not put the Petitioners on notice of this very significant issue until January 4, 2011. The CFS has many opportunities to raise the fee issue, but did not:

- The CFS did not raise the fee issue when Mr. Barrios delivered the referendum petition in November 2009;
- The CFS did not raise the fee issue when it wrote to Mr. Barrios in January 2010 acknowledging that the petition met the minimum threshold, but that a counter-petition had been received;
- The CFS did not raise the fee issue with the Petitioners in March 2010 when the CFS wrote to Mr. Barrios to advise that it was denying a referendum;
- The CFS did not raise the fee issue when its counsel responded to a letter of the Petitioners' counsel in August 2010; and
- The CFS did not raise the fee issue when it responded to the Petitioners' application.

**Response to Petition [CR TAB 2]**

22. Now that the referendum petition has been declared valid and the counter-petition invalid, the prejudice to the Petitioners is no longer merely hypothetical. If the CFS is entitled to rely on its newly advanced claims regarding fees, the Petitioners will be deprived of the relief they sought under the petition: the scheduling of a referendum this academic year. If anything, the prejudice to the Petitioners has intensified because the end of the academic year is now less than six weeks away and, through the CFS's own conduct the CFS neglected to deal with the fee issue in a timely manner.

*At all Times, the CFS was Fully Aware of the Prejudice that the Petitioners would Suffer*

23. The Petition application made it clear that the last dates possible for a referendum in this academic year are March 29, 30, and 31, 2011 because UVSS classes end on April 1, 2011. Mr. Barrio's Affidavit was clear that he would not likely be a student in 2011-2012 at UVIC.

**Affidavit #2 of J. Coccola, para. 8**

**Affidavit of J. Barrios at para. 36**

24. The Petition application and accompanying affidavits also included numerous documents outlining CFS membership fee remittance information for 2008-2009 and 2009-2010. The evidence demonstrates that fees are collected and remitted directly by UVIC and, thus, that the UVSS had no control over these funds. This all went unchallenged by the CFS.

25. There is no excuse for the CFS's failure to raise the fee issue front and centre at the appropriate time.

*The Actions of the UVSS cannot Defeat the Rights of the Individual Members*

26. In any event, the CFS has misinterpreted its own bylaws.

27. The CFS bylaws, as they were at the relevant time, require that the Individual Members have the "sole authority" to trigger a vote on leaving the CFS by submitting a

petition signed by at least ten percent of the Individual Members to the CFS. Bylaw 1.3.a.iii states:

The individual members of the Federation collectively belonging to a member local association will have the sole authority to initiate a referendum on continued membership, as described in Section 6 of this Bylaw, by submitting to the National Executive of the Federation a petition, signed by not less than ten percent (10%) of the individual members of the association, calling for the referendum.

**Affidavit #1 of J. Barrios, para. 12, Exhibit C, Bylaw 1.3.a.iii**

28. It was the actions of the individual members and, in particular, the petitioner, José Barrios, that triggered the referendum process. Surely, the right of Mr. Barrios and all individual members to “sole authority” over the initiation of a membership referendum cannot be defeated by the actions of a third party, the UVSS.

29. The CFS has recently taken the position with the UVSS that the “University of Victoria Students Society does not have any role in the referendum ...” (CFS letter to UVSS dated February 3, 2011) and that “the Federation’s Bylaws set out that membership is determined directly by the individual members through on-campus referenda” (CFS letter to UVSS dated January 14, 2010).

**Affidavit #3 of J. Coccola, para. 3, Exhibit 3**

**Affidavit #1 of J. Coccola, para. 33(a), Exhibit F**

30. In light of these recent statements of the CFS and the “sole authority” that the individual members have with respect to membership issues as set out under bylaw 1.3.a, how is it possible that alleged non-payment of fees by the UVSS can somehow deny the current individual members their right to a referendum?



31. If the CFS were correct in its interpretation, then even a debt of only \$1 to the CFS from over a decade ago could deny current individual members their right to vote to leave the CFS. That simply cannot be the correct interpretation of the CFS bylaws.

32. If the interpretation is correct, it would surely be unconscionable because it would mean that any voting member could prevent the individual members from withdrawing their membership in the CFS merely by withholding or failing to collect and remit any amount of CFS membership fees. The result would be that individual members would be permanently locked into membership.

#### Reasonable Expectation

33. Mr. Barrios followed the CFS bylaws to the tee. He paid his fees to the CFS. He collected thousands of names on a properly worded petition in the prescribed form. He sent the petition in the prescribed format. He sent the petition at the prescribed time. The referendum that he seeks has already been delayed by a year because of the conduct of the CFS. Now, the CFS says that it can continue to deny the individual members a referendum. Read in conjunction with the clear language of the bylaws that gives the individual members “sole authority” to initiate a membership referendum, the language of bylaw 1.6.j cannot be interpreted to mean that the CFS can deny a referendum to the individual members any time there is a dispute over membership fees with the local association member.

#### There is no prejudice to the CFS

34. Even if the CFS were correct in its allegations regarding fees, which the UVSS strenuously denies, the CFS suffers absolutely no prejudice should a referendum be held. If the CFS is correct in its allegation that fees are owing and UVIC students vote to leave the CFS, the UVSS can be held accountable by the CFS after the referendum.

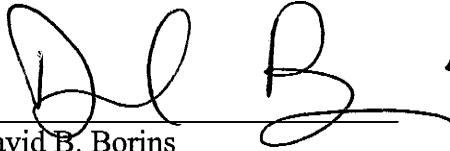
#### No Evidence

35. With the referendum dates six weeks away, and while the CFS continues to press its claim to membership fees, the CFS has not put forward a single document to

substantiate its claim that fees from 2008-2009 or 2009-2010 are owed by the UVSS to the CFS. In the absence of an order, the CFS will succeed in preventing a referendum from occurring at UVIC without having provided a single document supporting its claim.

36. The Petitioners respectfully request an order of the court that the referendum voting days be held March 29, 30, and 31, 2011.

DATED: February 14, 2011



David B. Borins  
Solicitor for the Petitioners

This **Memorandum of Argument** was prepared by **David B. Borins**, of the law firm HEENAN BLAIKIE LLP, whose place of business and address for delivery is 2200 – 1055 West Hastings Street, Vancouver, British Columbia, V6E 2E9, telephone (604) 669-0011, fax (604) 669-5101.