

## MEMO - PRIVILEGED AND CONFIDENTIAL

**TO:** The Alma Mater Society of the University of British Columbia Vancouver (AMS)

**FROM:** Davis LLP (Linda Parsons, QC and Sheila Tucker)

**DATE:** December 7, 2009

**RE:** **AMS re: UN Declaration**

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You have requested us to provide the AMS Student Council (“Council”) with a legal opinion addressing the ability to recall the current President and VP External from their positions. You have also asked us to address the employment-related legal issues relating to the actions and potential removal of these members of Executive Council. We have considered the specific questions you asked and augmented them, as necessary, to reflect the legal issues involved and in order to provide Council with recommendations for immediate and future action and response.

### **I. Summary**

- Q1. Can Council, by Council resolution, legally recall the President and the VP External as directors and, if not, can they legally recall them as officers?
- A. No. The Constitution and Bylaws only contemplate the recall of an Executive member of Council from his or her position *in its entirety*. The wording of the Bylaws and Code do not permit the roles of director and officer to be treated as ‘severable’ in our view. As discussed in our earlier opinion of March 2009, notwithstanding the provision for recall by vote of Council found in the Bylaws, the *Society Act* requires such a recall to be done by special resolution of the membership. Since the director and officer positions are not ‘severable’, a recall of these officers by Council resolution would face the same procedural barriers as a recall of directors.

Given the size of the student membership and the resulting time and expense involved in calling for a special resolution (or referendum in lieu) to recall directors, some amendments of the Bylaws should be considered for the future. For example, a Bylaw amendment could provide for the *disqualification* of Executive Members of Council in specific circumstances, thereby triggering removal without a special resolution of

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members for ‘recall’. This is similar to the automatic disqualification under BC company law, if a director becomes a bankrupt.

Q2. If it is not legally possible at this time to remove the members of Executive Council by Council resolution (either as directors *or* officers), are there other steps Council can consider?

A. **Yes. There are some actions that can be taken to address institutional concerns relating to the actions of the President and VP External, pending any contemplated amendments to the Bylaws. Assuming that Council concludes, after a review of the facts and the analysis contained in this memorandum, that the conduct of the President and the VP External constitutes a breach of the Code and/or a breach of the director duties of good faith and honesty, potential actions include:**

- **passing a Motion of Censure by Council to express displeasure with the actions of a director and officer [see proposed wording in this memorandum];**
- **passing a Motion of Council to require Council ‘ratification’ of certain decisions of members of Executive Council prior to any implementation of such decisions [see proposed wording in this memorandum]; and**
- **passing a Motion of Council to remove the President as Chair indefinitely, and appointing another chair in his stead.**

Q3. Are elected Officers considered employees of the Society?

A. It is not entirely clear whether the President and VP External would be considered employees of the Society for purposes of the common law of wrongful dismissal. The common law requires the plaintiff in a wrongful dismissal action to establish the existence of an employment relationship separate and apart from the role as Officer. The Code of Procedure contains provisions that support the existence of an employment relationship, but the Code and Bylaws also provide some basis for characterizing the ‘salary’ paid to Officers as a form of director’s fee. The facts indicate that the Officers are performing some general management services that would be expected in an employment context (eg. direct supervision of AMS employees). However, the Officers are also required to spend a substantial amount of time on duties that would be typically expected of a director *qua* director. As credible arguments can be made both for and against the existence of an independent employment relationship, a definitive answer would only be available through litigation or by way of amendments to the Code and Bylaws.

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- Q4. Would members of Executive Council have grounds for claiming wrongful dismissal if Council were to remove their duties and benefits as Officers?
- A. Assuming a judicial finding of an employment relationship existing separate and apart from the director role, a member of Executive Council would have an action for wrongful dismissal if he or she were removed from his or her salaried position in the absence of just cause for termination of an employment relationship under the common law. As the Officers are ‘employed’ under limited term contracts (as opposed to contracts of indefinite duration), the damages for breach of the employment contract would consist of the amount that would have been earned during the remaining term of the contract.
- Q5. What actions would the Society have to take in order to mitigate the concerns and consequences of a wrongful dismissal claim?
- A. The Society could amend the Code and Bylaws to expressly make the amount currently provided to Officers as ‘salary’ into a director’s fee for service, and to provide that the amount of the director’s fee will be pro-rated upon loss, voluntary or involuntary, of the Officer position in accordance with the Bylaws and *Society Act*. However, (assuming a judicial finding of an employment relationship existing separate and apart from the director role), this would amount to a fundamental change to an existing employment relationship. Thus, such a change could not be made effective to a sitting incumbent without causing a termination of the incumbent Officer’s existing contract of employment. Thus, any such change could only effect future office-holders.
- Q6. Could removing specific duties and benefits of elected Officers constitute a constructive dismissal from their employment position?
- A. A constructive dismissal occurs when a sufficiently fundamental term or condition of employment is altered. Generally speaking, the removal of key management or supervisory duties may constitute a constructive dismissal, as will any decrease in salary greater than 10-15%. Assuming that there is a judicial finding of a separate employment relationship, the removal of key duties from the employment position may be found to constitute an constructive dismissal.
- Q7. Assuming that the President and External VP are found to be ‘employees’ of AMS for purposes of the law of wrongful dismissal, would a failure by either of them to comply with the Code, and specifically, a serious failure to comply with positive obligations of consultation with Council and disclosure to Council, constitute grounds for dismissal *as employees*?

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- A. A failure to disclose may constitute just cause for dismissal as, depending on the circumstances, the failure to disclose may destroy the trust necessary to maintain employment in an position of responsibility and relatively independent operation.
- Q8. Assuming that there is no employment relationship that exists separately from the officer role for purposes of wrongful dismissal, could the removal of supervisory responsibilities over other employees and other duties not affecting a director's status *qua* director have any employment consequences?
- A. If there is no separate employment relationship and the money paid to the Officers as 'salary' is, in reality, a form of director's fee, then the duties of the Officers' positions may be changed without triggering any employment consequences.
- Q9. **What legal consequences would flow from Council passing a motion to restrict the 'duties' of the President and the VP-External in relation to the supervision of staff?**
- A. **If the President and VP-External are not 'employees', Council is entitled to pass such a motion because the supervision of staff is not an express component of the duties of such officers in the Bylaws, the Code or the Executive Procedures Manual. If the President and VP-External are 'employees', the supervision of staff is a significant component of the historical and current duties of such officers and making such a change would potentially cause a constructive breach by the Society of the employment contracts. A defence would be available to the Society in the latter situation, if the conduct of the Officers constituted 'just cause' for termination. If the defence was not successful, the 'damages' payable by the Society to the Officers would be the limited to the amount of compensation payable (and as yet unpaid) to these Officers up to the end of their term.**

## II. General Background Facts

1. There are five positions on the AMS Executive. Those positions and the current incumbents are as follows: President (Blake Fredrick), VP Academic (Johannes Rebane), VP Finance (Tom Dvorak), VP External (Tim Chu), and Crystal Hon (VP Administration).
2. According to the listing on the AMS website, the AMS Executive Committee currently comprises the holders of the five executive positions, along with five non-voting members of the Student Council, including Adrienne Smith, Policy Advisor.
3. The March 13, 2009 Minutes of the Executive Committee include the following:
  13. UN international covenant

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The AMS will pursue a legal battle with the Province on the basis that the recent Education funding cuts are against the UN charter.

There is no “ACTION ITEM” corresponding to this minute.

4. The April 16, 2009 Minutes of the Executive Committee include the following:

4. Updates

...

- Blake

...

- UN complaint with Pivot; may wait until Adrienne gets back.

5. The May 6, 2009 Student Council Minutes include a discussion of a document entitled “Report Card: An analysis of the various parties’ platforms” which had been distributed by the VP External Office. Following discussion, a resolution including the following terms was carried:

Whereas the literature being distributed by the VP External Office has not been subject to review by the External Policy Committee or by any members of Council, and;

Whereas some of [the] material is contrary to or not supported by the current AMS policy, and was not part of the provincial election policy approved by Council and;

...

Be it further resolved that AMS Council direct the VP External to remove any print ads that call for lower tuition, as well as any mention of it online, and to cease pursuing tuition decrease as an objective for this election; and

Be it further resolved that Council not permit the External Office to distribute any new publications pertaining to the provincial election without the prior approval of the External Policy Committee.

6. The October 1, 2009 Minutes of the Executive Committee includes the following under “Personal Updates”:

- Adrienne is working on the UN complaint and liaising with the provincial government. ...

...

7. By letter dated September 1, 2009, a retainer agreement (“Pivot Retainer”) was entered into between the AMS and Pivot Legal LLP (“Pivot”). The Pivot Retainer was addressed to Adrienne Smith on behalf the AMS. The copy provided shows the Pivot Retainer as

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having been signed off by Blake Fredrickson as authorized signatory on September 1, 2009. However, Mr. Fredrickson's signature and signature date are then struck out, and the signatures of Tom Dvorak (VP Finance) and Johannes Rebane (VP, Academic) are shown below, along with September 9, 2009 date stamps.

8. The description of services set out the Pivot Retainer states that Pivot is being retained to "draft and submit a complaint to the United Nations via the Section 1503 complaint mechanism." The outlined steps anticipated to be taken in fulfilment of the Retainer include: "c. Complete and submit a complaint to the United Nations...".
9. A formal complaint, dated November 18, 2009, was filed with the United Nations by Pivot on November 25, 2009 ("UN Complaint"). The UN Complaint names as the complainants, the AMS on behalf of its membership, and Tristan Markle as an individual complainant. The UN Complaint is signed by Mr. Fredrickson in his capacity as AMS President.
10. The existence and filing of the UN Complaint was publicly announced at a November 26, 2009 press conference attended by the Pivot lawyer, Mr. Fredrickson and Mr. Markle.
11. Mr. Fredrickson and Mr. Chu submitted Second (September 2009) and Third (November 2009) Quarterly Reports to the Council as required by AMS Code of Procedure, Section VI, Article 9. Neither the Pivot Retainer nor the UN Complaint are mentioned in these performance reports.
12. As of September 2009, the AMS Code of Procedure, Section VIII E., established a seven member External Commission. As VP External, Mr. Chu is the Chair of the External Commission; the remaining positions are filled by AMS Active Members. The powers and duties of the External Commission as set out in Article 2 include:
  1. The External Commission shall  
...
    - (d) discuss and analyze the impact of Provincial and Federal Government educational policy, and make recommendations to either the Vice-President External Affairs or Council;
    - (e) subject to the approval of Council, lobby the appropriate level of government on issues of interest to students, including but not limited to transit, student loans, post-secondary education funding, daycare, equity, student housing, and government policies;
    - (f) prepare briefs, discussion papers, or policy documents with respect to post-secondary education for approval by Council and

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for submission to governmental or non-governmental bodies external to the University;

- (g) present options and recommendations to Council regarding policies or plans that are related to its area;

...

13. The decisions to proceed with the Pivot Retainer and/or the UN Complaint were not put before the External Commission.
14. The Minutes of Executive Meetings are circulated to all Council members. However, beyond what is found in the published minutes, the decisions to proceed with the Pivot Retainer and the UN Complaint were not raised to the attention of or brought before non-Executive Council members.
15. Following announcement of the UN Complaint, an Emergency Meeting of the Council was held on November 28, 2009. The following motions were among those passed at the November 28<sup>th</sup> meeting:
  - (a) to retract the UN Complaint and issue a press release stating that it did not represent the will of the Society and should not be construed as an action of the Society;
  - (b) that Council request President Blake Frederick to resign from Council;
  - (c) that Council request Vice President External Affairs Tim Chu to resign from Council.
16. During the November 28, 2009 meeting, VPs Dvorak and Rebane asserted that they had signed the Pivot Retainer without fully reviewing or understanding it, had relied on their trust in the President and VP External in signing, and apologized for their failure to act with due diligence.
17. Following the UN Complaint, Petitions for Recall were signed in respect of Mr. Frederick and Mr. Chu, along with a Petition to Meet to set up a meeting of Council to be held December 7, 2009 at 4:00 p.m. The receipt of these petitions was acknowledged by the Speaker at the November 28<sup>th</sup> meeting and declared to be in order.
18. By open letter to the AMS Council sent November 30, 2009, Mr. Fredrickson and Mr. Chu advised that they had decided not to resign from their positions. Their open letter includes the following statements:

...

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We would first like to formally apologize for not properly consulting with AMS Council and students before filing the UN complaint, which calls for increased government funding for post-secondary education, increased financial assistance, and decreased tuition fees. We were both elected with the mandate to lobby government aggressively to lower tuition fees. Additionally, we raised the UN complaint several times in our Executive Committee meetings and received signatures on the legal contract to proceed with the complaint from our fellow executives Vice-President of Finance Tom Dvorak and Vice-President of Academic and University Affairs Johannes Rebane. At the time we believed these measures to be sufficient, but based on communications with councillors and students-at-large, it has become very clear to us that we should have undertaken a rigorous consultation process before filing the complaint. We sincerely regret that we did not follow this process and will correct our actions to ensure that this problem does not occur in the future.

...

19. A regularly scheduled Council meeting was set for December 2, 2009.
20. Mr. Frederick and Mr. Chu placed a motion to the Council meeting agenda for December 2, 2009, seeking to pass a resolution changing the existing AMS policy to a policy that the AMS will “oppose future tuition increases” and “lobby to progressively introduce free education in British Columbia as outlined in the [UN] International Covenant on Economic, Social and Cultural Rights.”
21. By email dated November 30, 2009 and circulated to all Council Representatives by means of an internal address distribution list, Mr. Frederick and Mr. Chu, solicited support for the policy motion they had placed on the December 2<sup>nd</sup> meeting agenda.
22. At the Council meeting of December 2, 2009, the following occurred:
  - (a) the policy motion put on the agenda by Mr. Fredrickson and Mr. Chu was referred to the External Policy Committee for consideration and consultation;
  - (b) a motion authorizing a press release regarding the Society’s retraction of the UN Complaint was passed;
  - (c) a motion adopting a “Temporary Communications Policy” was adopted. Under the Temporary Communications Policy, the issue of press releases to any media outlets and official broadcast emails to any portion of the Society membership (with the exception of the notice list) require a resolution at the quorate meeting of the Communications Planning Group or a two-thirds resolution of Council.



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### III. Governance Issues re: Removal of President/VP External from “Office”

#### A. Removal from ‘Office’ Under the Bylaws

The question that has been posed is whether Mr. Frederickson and Mr. Chu could be removed from their positions as President and VP External, but allowed to continue as members-at-large of the Executive. Both *Society Act* and the Bylaws warrant consideration.

The following Bylaws are of particular relevance:

- Bylaw 5(1) provides that the Board of Directors of the Society are the voting members of Council.
- Bylaw 5(3) establishes that each of the individuals constituting Executives of Council are elected from the student body in their specific capacity as executive council members (i.e., not elected ‘at large’ and then appointed as Executives by the other directors, which is a common practice in societies and companies).
- Bylaw 5(3)(c) references removal from office of a member of the Executive of Council, and bylaw 5(3)(c)(ii) contemplates the replacement of such member by by-election. Taken together, these Bylaws suggest that removal from the *office* of Executive of Council is equivalent to removal from Council entirely.
- Bylaw 5 does not identify a category of ‘director’ (i.e. a voting member of Student Council) that is filled by a member of Executive of Council who has been recalled from his or her *office*.
- Bylaw 5(2)(a) sets out a finite list of the persons who constitute voting members of Council. There is no category of voting member that applies to a member of Executive of Council who has been recalled *as an officer*.
- Bylaw 5(3)(c)(iv) refers to an Executive member possibly being re-elected following his or her recall, suggesting that if an Executive member is recalled, it is a full recall (i.e. from office and membership on Council), and that the only way such person may regain status as a voting member of Council is to be re-elected as an Executive Member.

Read together, these Bylaws strongly suggest that the removal of an elected Executive from his position and into an “at large” Council position is not permitted.

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We note that under Bylaw 5(2)(b)(iii) the Council may, by 2/3 vote, appoint a non-voting member of Council. Presumably, a recalled Executive member could be appointed as a non-voting member under this provision. However, since a non-voting member is not a ‘director’ (see, Bylaw (1)), such an appointment would not allow the recalled Executive to retain ‘director’ status. Accordingly, while a non-voting appointment following a recall would maintain Council membership, the appointment could not be used as a means of ‘retaining’ or ‘reviving’ a recalled Executive’s ‘director’ status.

As discussed in our March 2009 memorandum on the removal of directors, current British Columbia law<sup>1</sup> does not permit removal of a ‘director’ by vote of Council, notwithstanding Bylaw 5(3)(c)(i) (1). Since removing an Executive from elected position and placing him into a non-voting Council position would effectively strip the Executive of ‘director’ status, this action would also amount to an unlawful removal of a director under the interpretation of the *Society Act* given by the British Columbia Supreme Court.<sup>2</sup>

We note that Article 5 of the Executive Procedures Manual outlines a discipline and removal process. Even assuming the President and VP External defied the will of Council by filing the UN Complaint without Council authorization, it is not clear that conduct would constitute a breach of responsibility *for purposes of the Executive Procedures Manual*. Moreover, the removal process referred to in the Executive Procedures Manual is expressly subject to the Society’s Constitution, Bylaws and Code of Procedure (see Article 1), and thus cannot override the terms of those documents.

Finally, it should be noted that even if the Bylaws and the *Society Act* contemplated a separate process for recalling an officer as compared with recalling a director, the notice of motion relating to the Recall did not specify that it was in reference to recalling an officer. It was generic and, given the wording of the Bylaws, it would undoubtedly be treated by a court as notice of motion to recall a member of Executive Council qua ‘director’.

Conclusion: The Bylaws do not permit the recall of an ‘officer’ as a discrete process from the recall of a ‘director’. As addressed in our March 2009 memorandum, the recall of a director must be done by special resolution (or indirect voting equivalent to special resolution), and cannot be done by resolution of Council. Thus, the use of the Council resolution process to recall of an officer from his particular Executive position is impermissible for the same reason it is impermissible for the recall of a director. **Note, however, that the Council may resolve to change the Chair of Council to someone other than the President (see Bylaw 5(3)(d)(i)(1)).**

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<sup>1</sup> *Sangnam Educational and Cultural Society of B.C. v. Gounder*, [1990] B.C.J. No. 2778 (SC)

<sup>2</sup> See also *Lee v. Lee’s Benevolent Association of Canada*, 2003 BCSC 1150, which holds that where bylaws fail to provide a specific process for the removal of an officer (qua officer), officers must be removed in the same manner as specified in the bylaws for removal of a director.

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As the removal of the President and VP External from their ‘officer’ positions does not provide a workable solution, we will address other possible means of addressing the situation.

**B. Court-Ordered Removal of a Director**

There are two different means of seeking judicial assistance:

Oppression: This is a statutory cause of action that may be brought in limited circumstances. The action would have to be brought by one or more AMS members against the President and/or VP External as defendant. The plaintiff members would have to show that the conduct of the President and/or VP External was unfairly prejudicial to them *as compared with another group of students*. The facts set out above do not disclose any basis for a claim based on differential treatment.

Derivative Action: This is also a statutory cause of action. A derivative action would be brought by the AMS as opposed to individual members. A derivative action against the President and/or VP External would assert that the President/ VP External acted in a manner which harmed the AMS as a whole. However, the measure of damages in a successful derivative action is ‘loss of value’ to the members’ interest. In a non-profit society this is very difficult to ascertain, as there is no ‘share value’ or ready equivalent to protect from harm.

In any event, the remedies granted in successful derivative actions generally comprise an award of damages and/or an order that the director(s) afford restitution. The Court has made it clear that the removal of a director will rarely be ordered:

Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, *Shareholder Remedies in Canada* ... removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation ... by tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort...<sup>3</sup>

Thus, in our opinion, judicial removal is not a feasible solution.

**C. Motion of Censure**

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<sup>3</sup> *Catalyst Fund General Partner 1 Inc. v. Hollinger Inc.* (2004), 1 B.L.R. (4<sup>th</sup>) 186 (Ont. S.C.)

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A motion of censure is an expression of displeasure with the actions of a director or officer. Censure ‘expresses the assembly’s indignation, and is a lighter form of pronounced punishment’ as opposed to more severe punishments, such as removal.

A motion of censure requires notice. The ‘offender’ must be given an adequate opportunity to defend him or herself, but may not vote on the motion. A vote by secret ballot is often held, although not required.

Council has already met at least twice to discuss collective concerns regarding the conduct of the President and the VP External. Following the second of these meetings, the President and the VP External had, and exercised, an opportunity to defend their conduct (in particular, the Open Letter circulated in answer to the request for their resignations). In these circumstances, it is our view that formal notice of a motion of censure need not be given in advance of the Council meeting tonight. If it is the will of the Council, such a motion may be proposed during this evening’s meeting, seconded and discussed. If this occurs, during discussion the President and the VP External will be permitted a further opportunity to defend their positions. A vote may then be taken, either by show of hands or written ballot.

**A censure motion could be worded along the following lines:**

**“Resolved, that the Student Council of the Alma Mater Society of University of British Columbia Vancouver censure Blake Frederick, President and Tim Chu, VP External, for serious breaches of the Code of the Society and the responsibilities of individual board members. In particular, that the Council censure each of Blake Frederick and Tim Chu for failing to consult with Council and failing to disclose to Council their decision to authorize external legal counsel to file the UN Complaint on behalf of the AMS.”**

### **D. Remedial Motion to Address Future Recurrence**

The Council may wish to consider taking immediate steps to curb certain categories of unauthorized actions from being taken on behalf of the AMS. This would be consistent with the Temporary Communications Policy, which was just adopted by AMS.

Each voting member of Council has a duty to act in the best interests of AMS. In fulfilment of this duty, Council could pass a motion resolving it is in the best interests of the AMS that any ‘Reputational Decisions’ (as hereinafter defined) made by a member of Executive Council shall require ratification by a majority vote of Council, prior to any implementation by the Executive Council Member. “Reputational Decisions” are those which are likely to affect the external reputation of AMS with the public, any level of government or non-governmental institutions, including, without limitation, initiation of any legal process in the name of AMS, publication of political or policy views on behalf of AMS, or agreement by the AMS to participate in political or social activist rallies, conferences or similar forums.

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The motion could be worded along the following lines:

**“Resolved, that it is in the best interests of the Society that any decisions made by a member of Executive Council shall require ratification by a majority vote of council, prior to implementation of such decision, if the decision is likely to materially affect (whether positively or negatively) the external reputation of the Society with the public, any level of government or non-governmental institution, including but not limited to decisions relating to the initiation of legal process in the name of the Society, publication of political or policy views on behalf of the Society, or any agreement by the Society to participate in forums of a political or policy nature.”**

### **E. Bylaw Amendments**

The Council may wish to consider amending the Bylaws in order to address any future unauthorized conduct by members of the Executive Council. While a full review of potential amendments to the Bylaws is beyond the scope of this memorandum, Council may wish to consider the following:

- Conduct a review of the scope of the delegation of Council’s decision-making power to, and supervisory powers over, the members of the Executive Council under the Bylaws. The Council may want to consider whether some of the Council powers currently delegated to members of the Executive Council should be reduced in scope and/or whether new or stricter terms of reporting and oversight should be imposed.
- Amend the Bylaws to provide for the disqualification of a voting member of Council from holding an office/position on the Executive Council upon the member’s being sanctioned under a disciplinary proceeding under the Executives Procedures Manual or Code of Conduct for an action or inaction that Council deems to be a breach of the duty of that member to act honestly and in the best interests of AMS.
- Amend Bylaw 5 to expressly provide that a member of Executive Council may be recalled as an officer by a 2/3 vote of Council, and upon such recall from office to become a voting member at large of Council. A by-election would be held to fill the recalled Executive Council member’s officer/director role. This amendment would result in an increase in the number of directors on the Council in extraordinary situations.

## **IV. Employment Issues**

### **A. Additional Background Facts**

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23. The Code includes the following provisions:

Section VI: Executive

Article 1. General

1. Executive members ... shall be salaried employees for the duration of their terms in office. ..
2. In the event that a yearly amount has been set as the salary for Executive members ..., and if Executive members serve for less than, or more than, a full year, their salary shall be pro-rated.
3. Each Executive members shall work, on average, no less than forty (40) hours per week.
4. Each Executive member shall keep no less than five (5) office hours per week, including at least one (1) hour a week in a public location.

Section II: Council, Council Members and Others

Article 2 Conflict of Interest for Members of the Executive

...

2. Members of the Executive shall also be subject to the provisions of Article in their capacity as executives, notwithstanding their status as employees of the Society.

24. The Bylaws include the following provisions:

Bylaw 10(1)(a)(i):

The General Manager shall ... manage the general business affairs of the Society as determined from time to time by Council; ...

Bylaw 12:

1. Honoraria shall be granted to the President and the Director of Finance in amounts equivalent to their tuition at the University during their term in office or two hundred dollars (\$200), whichever is the greater sum.
2. An honorarium in the amount of two hundred dollars (\$200) shall be granted to the following persons:
  - (a) each member of the Executive of Council, excluding the President and the Director of Finance;
5. Where possible, the above honoraria shall be paid in two instalments, one at the end of November, and the other at the end of January. In the case of Executive member of Council ... or any other person receiving

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an honorarium from the Society resigning or being removed from office, or for any reason being unable to complete his term of office, the honorarium shall be paid on the basis of twenty-five dollars (\$25) per month of service.

25. The President and VP External positions are each currently salaried in the low to mid \$20,000s.
26. The type of work performed by Executive members includes the type of duties that would reasonably be expected of a managing director position, including some management responsibilities and direct supervision of AMS employees.
27. The Canada Revenue Agency (“CRA”) recently determined that a past AMS Executive Council member was not entitled to employment insurance benefits based on time spent serving as an Executive member. Reasons for decision have not yet been issued.

### **B. Employee Status of President and VP External**

The existence of an employment relationship is dependent on the facts of the case. It is possible for a director to have an employment relationship which exists separately from his position as director. To support a wrongful dismissal claim, a plaintiff needs to establish that the director role and the employment role are separate and distinct.<sup>4</sup> In this case, there is evidence pointing both toward and away from the conclusion that there is a *separate* employment relationship.

The following factors suggest that the Executive members have a separate employment relationship with the AMS:

- As set out above, the Code expressly refers to the Executive members as ‘employees.’
- The Code also requires Executive members to work 40 hours per week.
- Honoraria for Executive members are provided for separate and apart from the ‘salary’ provided to Executive members. Further, the honoraria are provided on terms that expressly contemplate discontinuance of payment in the event of removal from office.

The following factors suggest that the “salary” paid to Executive members is, in reality, merely a form of director’s fee:

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<sup>4</sup> *Phil Lloyd’s Restaurant Ltd. v. North Forty Restaurants Ltd.*, [1983] S.J. No. 320 (Q.B.), paras. 28-33; *Emery v. Royal Oak Mines Inc.*, [1995] O.J. No. 1708 (Ont. S.C.)

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- The amounts of the Honoraria provided for under the Bylaws are merely nominal.
- The Bylaws expressly provide for the separate employment position of General Manager.
- Although the Executive members are required to work a minimum amount of hours per week, and some of their time is spent on what would be considered management employment duties, it is clear that at least part of their work time includes traditional directors' activities, including maintaining office hours open to the public in their elected capacities.

Thus, the Code contains provisions that support the existence of an employment relationship, but the Code and Bylaws also provide some basis for characterizing the 'salary' paid to Officers as a form of director's fee. The facts indicate that the Officers are performing some general management services that would be expected in an employment context (i.e., direct supervision of AMS employees). However, the Officers are also required to spend a substantial amount of time on duties that would be typically expected of a director *qua* director. It is also unusual that the duties and requirements of the Executives are set out in the Code itself, as opposed to established by oral or written terms of employment.

Accordingly, this case falls within a grey area in terms of whether an Executive member who was effectively removed from his employment position (even if the office was retained) would have a claim for wrongful dismissal. As almost equally credible arguments can be made both for and against the existence of an independent employment relationship, a definitive answer would only be available by way of judicial determination, or by clarification by means of amendments to the Code and Bylaws.

In the event that the grounds for removal from office also amounted to just cause for termination for purposes of employment law, no damages would be payable with respect to a coincident termination of the employment relationship.

#### Just Cause

Assuming there is a separate employment relationship for wrongful dismissal purposes, would the conduct engaged in by the President and VP External provide just cause for termination of the employment relationship? The position taken the President and VP External in response to the request for their resignation essentially asserts a belief that their conduct and plans were known to and condoned by other members of the Executive Committee. The fact that the October 1, 2009 Minutes of the Executive Committee expressly note that "Adrienne is working on the UN complaint", the fact that the Pivot Retainer was signed by two other members of the



**MEMORANDUM**

Executive Board, and the fact that Adrienne Smith is a member of the Executive Committee, provides some objective evidence that could be pointed to as a basis for the asserted belief. If a factual finding favourable to the President and VP External were made in that respect, the remainder of their conduct may be regarded as a failure to comply with procedural requirements and meet reasonable expectations in terms of the failure to disclose to the Student Council, as opposed to an act of defiance. Further, while the Student Council acted in response to the earlier unauthorized distribution of election materials through the VP External's office (the "Report Card"), the censure and directions given on that occasion were expressly tied to the election period, as opposed to more generally.

However, the failures to report on the matter of the UN Complaint in their quarterly reports to Council, to otherwise disclose or report the matter to Council, and to bring the matter before the External Commission are all serious matters, and it could be reasonably asserted that these failures, in and of themselves, amount to just cause (i.e., notwithstanding any honest belief that the Executive Committee was aware of their conduct). In this respect, the clear, positive disclosure obligation found in Code, Section VI (Executive), Article 3(2)(d) and the previous "Report Card" incident are especially noteworthy.

A failure to disclose material information in the face of a positive obligation to disclose may constitute just cause for dismissal. Depending on the circumstances, the failure to disclose may demonstrate sufficient unsuitability and unreliability to destroy the trust relationship necessary to maintain a working employment relationship where the employee occupies a position of responsibility and is required to function with limited supervision.

We note that, in the event that a separate employment relationship is found to exist, it would be a contract for a defined and limited term of employment (that is, until a new Executive is elected). Thus, the monetary damages payable in relation to the breach of the employment contract would be the amount that would have been payable during the remaining period of the contract.<sup>5</sup>

Finally, we note again that it is unclear whether the 'salary' paid to the Officers should be properly considered a form of director's fee. If there is no separate employment relationship and the money paid to Officers as 'salary' is, in reality, a form of director's fee, then the duties of the Officers' positions may be changed without triggering any employment consequences.

**C. Current Steps for Consideration**

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<sup>5</sup> It is possible for additional damages to be awarded to an employee in circumstances where the manner of termination constitutes an independent tort (e.g., defamation) or itself causes significant psychological damage. However, these damages relate to the manner in which the termination is carried out, and not the fact of the termination *per se*. In the event changes are made to the duties of the Officers, we would recommend legal advice be sought prior to ensure that the manner of proceeding accords with the law in these respects.

**MEMORANDUM**

As discussed above under “Governance”, it is possible for the Council to require confirmation of any ‘Reputational Decision’ made by members of the Executive Council. In the event that there is a separate employment relationship capable of grounding a wrongful dismissal claim, these types of restraints on Executive decision-making cannot be properly asserted as a basis for wrongful dismissal, as they relate to actions undertaken in the separate role of director.

Council may also wish to consider narrowing or putting limitations on the President and VP External’s powers of direct supervision over other AMS employees. While it is possible for the removal of core powers and responsibilities from an employment position to constitute a constructive dismissal, provided the amounts paid as salary to these Officers remains unchanged, it can be reasonably argued that such changes are not sufficiently fundamental enough to the position to amount to a constructive dismissal. In the event that there is a judicial finding that there is a separate employment relationship and it is further held that these changes are fundamental to the employment relationship for purposes for constructive dismissal, on the facts set out above AMS has a viable argument that the dismissal would have been for just cause. Finally, in the event that a constructive dismissal claim is successfully pursued, the fact that the Officers continued to be paid would negate any damages for breach of the employment contract.

**D. Recommendations for the Future**

The Code and Bylaws can be amended to bring clarity to these issues. For example, the amounts currently paid as ‘salary’ to Executive officers could be expressly designated as director’s fees, and made payable on terms akin to those used for the current \$200 honoraria, which expressly provide for discontinuance of payment on a pro-rata basis following removal from office.

Alternatively, the provisions of the Code making Executive Officers salaried employees of the Society could be kept, but amended to expressly provide that the employment relationship will automatically terminate in the event of an officer’s removal from office in accordance with the Bylaws.