

November 23, 2012

Christopher Girodat
Director of Student Services and Chairperson
Kwantlen Student Association
12666 – 72 Avenue, Cedar 1240
Surrey, BC, V3W 2M8

Dear Mr. Girodat,

We act for Oliver Capko and the Kwantlen pro-life club *Protectores Vitae*.

Mr. Capko has applied to have his club registered, and turned in his forms six weeks ago, on October 12, 2012. The “in office” section of the form was stamped by the Kwantlen University College Student Association (hereafter “KSA”) as having been received October 19, 2012. After approximately one month had passed, the Executive Committee of the KSA responded by denying club recognition to *Protectores Vitae* because the club’s position on a social and political issue (i.e. abortion) differs from the KSA’s position on that issue.

While deliberating on the application of *Protectores Vitae*, on October 26th, 2012, the Executive Committee amended the Club Procedures in order to make its KSA Policies apply to clubs. The original wording of the Procedures (and currently still listed on the KSA website) is as follows:

Article 2. Relationship between Club and the KSA

1. Clubs are basically autonomous in their activities as long as they adhere to official KSA Rules. Club privileges can be withdrawn if KSA Rules are not adhered to.

On October 26, the Committee amended Article 2 as follows:

Article 2 – Relationships with Campus Groups

1. Clubs are basically autonomous in their activities, provided that they adhere to the *Constitution, Bylaws, Regulations, Policies, Executive Procedures*, and other rules of the Kwantlen Student Association (the “Rules”). The Kwantlen Student Association shall not intervene unless the Club acts in a way that is unlawful, contrary to the Rules, or contrary to the purpose of the Club.
2. Recognised Groups are completely independent of the Kwantlen Student Association. The Kwantlen Student Association may refuse to provide recognition to Recognised Groups if the activities of the Recognised Group are unlawful or contrary to the Rules.
3. The Kwantlen Student Association shall not approve the creation or the recognition of a Campus Group whose aims, purposes, or proposed activities contravene the Rules. The approval or the recognition of a Campus Group by the Kwantlen Student Association does not imply the

endorsement of the aims, purposes, beliefs, or activities of that Campus Group.

The KSA is an administrative decision-maker which derives its authority from the *Society Act*, R.S.B.C. 1996, c. 433 (*Society Act*) and the *University Act*, R.S.B.C. 1996, c. 468 (*University Act*). All registered Kwantlen students are required to be members of and must pay dues to the KSA, which are collected along with tuition and other fees, pursuant to s. 27.1 of the *University Act*. As a body exercising statutory authority and receiving mandatory dues to carry out a public function, the KSA has a legal obligation to serve the public and all students fairly, without discrimination based on a student's views, opinions, beliefs or philosophy. The KSA may have the ability to formulate a political opinion or position on moral, social and political issues, but neither the *Society Act* nor the *University Act* empowers the KSA to impose those opinions on individual students or clubs who disagree, even if the KSA's opinions are characterized as "Policies" or "Rules."

In *Roncarelli v. Duplessis*, [1959] SCR 121, the Supreme Court of Canada made it abundantly clear that administrative decision-makers must exercise their statutory discretion according to the purpose of the statute, not arbitrarily or based on irrelevant considerations. In *Roncarelli*, the Court held that the Commission's discretion under Quebec's *Alcoholic Liquor Act* could not be used to revoke the liquor licence of the restaurant of a Jehovah's Witness because he had assisted his unpopular co-religionists with their legal troubles. At page 140, Rand J stated:

In public regulation of this sort there is no such thing as absolute and untrammelled discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

Under the *Society Act*, the KSA has the right to establish a constitution, bylaws and regulations, and can regulate the operations and conduct of campus clubs. However, the *Society Act* does not authorize the KSA to discriminate against a club because of its opinions, beliefs, or philosophy. For example, if the KSA adopted a position "in support of boycotting Israel for being an apartheid state," that position would not empower the KSA to deny club status to a pro-Israel campus club.

Further, discrimination against *Protectores Vitae* on the basis of the club's beliefs runs counter to the very purpose of Kwantlen Polytechnic University, as described by the University's own Statement of Academic Freedom:

3. Academic freedom includes the right of all members of the University community to inquire, discuss and express themselves, study, conduct research, teach, publish, create and exhibit their work, associate and peaceably assemble without deference to prescribed doctrine on ideas, principles, concepts, or issues related to pedagogy and research; and without hindrance by the University, any of its representatives, or coercion by external agents.

4. The rights described in (3) presuppose, but are not limited to, the freedom to:

- discuss ideas both in research and in the classroom that challenge theories, laws, propositions, methodologies, conventional thought, and ideologies, including the right to criticize the University, the University stakeholders, the government, and society at large;
 - organize and join political associations, convene and conduct public meetings, publicly demonstrate and picket in orderly fashion, advocate, and publicize opinions by print, sign or voice.
5. The censorship of information is inimical to the free pursuit of knowledge. Therefore, no censorship based on moral, religious or political values shall be permitted against any communication or informational material, including collections in the University libraries.

Kwantlen's Statement of Academic Freedom promotes the free exchange of ideas by stating that "The censorship of information is inimical to the free pursuit of knowledge". Denying a club the right to exist and operate at Kwantlen merely because you and other students disagree with this club's beliefs and opinions amounts to censorship. Denying club status to a club espousing a minority opinion constitutes deference to "prescribed doctrine on ideas, principles, concepts, or issues" contrary to Kwantlen's own stated ideals. It is only by allowing dissent and debate that institutions of higher learning can provide the rich soil needed for intellectual growth. Student associations should be supporting free speech and vigorous debate, not attempting to muzzle it. As John Stuart Mill stated: "To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility".

The KSA is a society and may be sued pursuant to s. 4(3) of the *Society Act*. It has a duty of good faith and fairness to its members under the *Society Act* and at common law. Under s. 85 of the *Society Act*, the courts have wide discretion to intervene in the affairs of the KSA to remedy the lack of good faith, unfairness and illegality of KSA's actions.

The KSA Student Clubs and Groups, Set-up Requirements and Maintenance states:

These are several requirements that campus-based student organizations must meet in order to form and maintain themselves.

1. *You must be a Kwantlen student to start up a club and you must have an open door policy whereby membership into your club is available to any current Kwantlen student. It is acceptable for clubs to have membership primarily from one campus- this is not considered to be a limit on membership, just a practical element.*
2. *All members of your club must be in good standing with the KSA.*
3. *All campus-based student organizations must adhere to KSA rules as laid out in this package and per the KSA Clubs Procedure and KSA Regulations (attached to the back of this package). Club privileges can be withdrawn if KSA Rules are not adhered to. At times the bureaucracy will seem daunting but the rules and paperwork that is set up is designed to prevent abuses and ensure proper checks and balances. When you have questions, or get frustrated, just give us a call.*
4. *Any club whose membership drops below 10 members (at least 10 members must be Kwantlen Students) shall automatically be put on the inactive list.*
5. *Should any club become unreachable after 30 days, the club will be deemed inactive.*
6. *If a club wishes to request funding, or a space (room booking); a Planning Tool must be filled out and given to the Clubs and Events Coordinator. The Planning Tool may be obtained by contacting the Clubs and Events Coordinator or can be found on the KSA web site under 'Events and Campus life' then 'KSA Events Planning tool'. Guidelines for the Planning Tool are on the first page of the document. Please contact the Clubs and Events Coordinator if you have any questions about completing the planning tool.*

7. A *Club Renewal Form* (attached to this package) must be submitted to the KSA each year in October. This is done to ensure that clubs are active and adhering to procedures.
8. Clubs are encouraged to keep records of meetings and decisions (*financial decisions must be recorded*). Templates for meeting agendas or minutes may be provided upon request.
9. *Clubs must operate democratically*. Executive officers may not veto decisions of the members. Such an occurrence may cause the club to be placed in bad standing by the Clubs and Events Coordinator.
10. Any and all club funds shall be submitted and reported to the KSA- see next section. Academic Associations must submit a budget and annual report each year. Clubs are required to submit financial statements each semester.

The pro-life club has not broken any of these “KSA rules” as set out in the KSA Clubs Procedure, Regulations and Package. The Set-up Requirements and Maintenance do not stipulate that political opinions of students serving on the KSA executive must be adhered to or agreed with by students in order for students to form a club. The Procedure and Regulations do not stipulate that, in order to form a club, students’ political beliefs need to be in harmony with all or any of the political beliefs articulated by KSA. Characterizing the KSA’s political opinions as “Association Policies” does not change this reality.

The KSA is attempting to characterize its ideological policies as actual “rules” that clubs must comply with. But in fact, the “Association Policies” are statements of belief on various social and political issues. To view these Policies as practical policies that require adherence is not feasible, reasonable or lawful. For example, it would be ludicrous to purport that a club cannot be formed if it does not recycle, according to the 3.3 Policy Promoting Waste Reduction, Recycling and Composting Policy. The KSA cannot possibly police each club to supervise adherence to each of the KSA’s social or political ideologies. These Policies are not intended as such.

In addition to being unfair, in bad faith and discriminatory, the demand that *Protectores Vitae* adhere to the KSA’s ideological policies directly contradicts the KSA Clubs’ Package Procedures, of which Article 2 stipulates:

2. The KSA will not censor, control or interfere with any club on the basis of its beliefs, interests or opinions expressed or the events it holds or participates in unless they are illegal or contrary to the purpose of the club or KSA Rules.
3. The approval of a club by the KSA does not imply endorsement of the beliefs of that club.

Article 3, under Club Formation Procedures states that:

4. The following disclaimers must be stated end of club registration forms. Disclaimer (i) must also be placed on the two active clubs list at 1) the front desk and 2) the KSA website.
 - i. “The approval of a club by the KSA does not imply endorsement of the beliefs of that club.”

If the Student Association deems it their prerogative to regulate the political beliefs of clubs, why does section 4(i) of Article 3 expressly state that KSA is not endorsing the club’s beliefs? Denying club status to *Protectores Vitae* is a direct violation of Articles 2 and 3 of the KSA Clubs’ Package Procedure.

In *Mowat v. University of Saskatchewan Students’ Union*, [2006] S.J. No. 681, at paragraph 60, the Court ruled that the University of Saskatchewan Student Union (USSU) did not act in good faith when it amended its rules in order to favour a desired outcome. The Court uses a “good faith” test to examine the motivations of decision-makers, and penalizes decision-makers who do not operate in good faith.

This “good faith” principle is applicable to all decisions that the KSA has made or will make. If the KSA decides to further “tweak” its own rules so as to more easily enable discrimination against the pro-life club, such a move will further support the contention that the KSA is not acting in good faith, and did not act in good faith when making its October 26, 2012 amendments. A Court will easily observe this.

The October 26 amendment was made for the specific purpose of trying to create a basis for denying club status to Protectores Vitae. This decision is not one in good faith. The amendment was a deliberate attempt to legitimize discrimination against the pro-life club and its members, many of whom seek to join and establish the club for religious reasons.

On behalf of Protectores Vitae, we hereby demand that the KSA immediately a) revoke its decision to reject the application of Protectores Vitae, and grant status as applied for six weeks ago; and b) rescind the October 26 amendment of Article 2.

We attach a copy of the Petition filed in the Supreme Court of British Columbia against the student association at the University of Victoria. Like KSA, the student association at U-Vic had actively discriminated against the campus pro-life club, Youth Protecting Youth. The student association at U-Vic mistakenly thought that it could impose its opinion about abortion on all U-Vic students by discriminating against the pro-life club just because of the club’s pro-life opinion. This made court action necessary. This court action was settled when the student association at the University of Victoria agreed to refrain from any further discrimination against the campus pro-life club.

We sincerely hope that it will not be necessary for Mr. Capko and other students to sue the KSA in order to secure their right to freely associate on the Kwantlen campus, free from discrimination by the student association that they are required by law to join.

If you do not grant club status to Protectores Vitae on or before Thursday, November 29, 2012, you will leave Mr. Capko no option but to commence legal proceedings seeking a Court Order that the KSA cease from its illegal discrimination against Mr. Capko. If that becomes necessary, our client will be seeking his legal costs against you.

I look forward to your response.

Yours truly,

John Carpay, B.A., LL.B

cc: Oliver Capko
Arzo Ansary, Director of External Affairs
Tony Chiao, Director of Finance
Amrit Mahil, Director of Student Life
John Dixon, B.C. Civil Liberties Association