Court file no. 94577/16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CHRISTIAN NAGGAR, EMILIE HIBBS, JOSHUA HAVILAND, CHRISTIAN BROWN, KATHLEEN HEPWORTH, ALEXANDRA BROWN and KASSIA ALMEIDA

Applicants

and

THE STUDENT ASSOCIATION AT DURHAM COLLEGE AND UOIT

Respondent

APPLICATION UNDERsection 97 of the *Court of Justice Act* and rule 14.05 of the *Rules of Civil Procedure*, and section 2 of the *Canadian Charter of Rights and Freedoms*.

APPLICANTS' FACTUM

December 21, 2017

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PART I – OVERVIEW

1. The questions to determine in this matter is this: can a student union deny students access to an "integral part of student life", namely official student club status, simply because student union executives disagree with the students' beliefs and opinions? What is the lawful mandate of a student union, and did the Respondent student union in this case exceed its authority and breach the administrative and procedural rights of the Applicants?

PART II – FACTS

2. Emilie Hibbs, Joshua Haviland, Christian Brown, Kathleen Hepworth, Alexandra Brown, Kassia Almeida and Christian Naggar (the "Applicants") and other students at Durham College and at UOIT decided, in the summer of 2015, to create a new campus club called Speak for the Weak ("SFTW"), to discuss life issues on campus.[1]The Applicants are all students of either Durham College or UOIT.[2] Durham College is a college with multiple locations in the Durham region, and is a "Crown agent" pursuant to statute.[3] UOIT is a University created by the Ontario government in order to increase student access to post-secondary institutions.[4]

3. By agreement with Durham College, and UOIT, the Student Association at Durham College and UOIT (hereafter the "SA") is the sole representative of the over 20,000 students at Durham College and UOIT.[5] The SA receives millions of dollars in forced dues collected from students by the two institutions and then transferred to the SA,[6] on the understanding that the SA will carry out its mandate to serve its student members.[7] The SA not only has a monopoly on

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[1] See Affidavit of Christian Naggar, sworn, January 28, 2016, paras 2-10, CAR Vol 1, Tab 2, pp 10-11.
[2]Naggar Affidavit, paras 2-9, CAR Vol 1, Tab 2, pp 10-11.
[3]*Ontario Colleges of Applied Arts and Technology Act*, section 2(4), SO 2002 c 8, Sched F.
[4] See Transcript Excerpt of Legislative Assembly of Ontario, June 17, 2001, CAR Vol 1, Tab 2(N), p 161.
[5]Agreement between SA and Durham College, CAR Vol 2, Tab 4(E); Operating Agreement between SA and UOIT, CAR Vol 2, Tab 4(F).
[6]See Toronto Star article "Durham College, UOIT deny cash to student association", CAR Vol 1, Tab 2(O), p 164.
[7]See e.g. *Student Association Accountability Policy*, CAR Vol 1, Tab 2(M).

student representation at the Durham College and UOIT, students have no choice but to support it with their fees – they cannot "opt out".

A. The Core Role of Campus Clubs

4. The SA by its Letters Patent is required "to provide a common framework within which students can communicate, exchange information and share experience, skills and ideas."[8] The SA meets this objective by providing a framework for the establishment of campus clubs.[9] The SA admits that campus clubs are an "integral part of student life". The SA's *Campus Cubs Procedure* states:

> The Student Association at Durham College & UOIT (SA) facilitates the creation and support of CampusClubs to fulfill its mission of superior service, advocacy, and support. These clubs act as a forum wherestudents can gather to form communities with similar interests, backgrounds, and ambitions. The SArecognizes and supports the formation of Campus Clubs as **an integral part of student life**.[10]

5. Since Campus Clubs fulfill a core organizational objective of the SA, and are an integral part of student life, the SA dedicates substantial organizational and financial support to Campus Clubs, including use of SA meeting space, event booking, promotion, use of SA equipment (e.g. audio visual equipment), advice and support from SA staff; base funding of $750 per year, access to SA petty cash, further access to approximately $70,000 in annual Campus Club grant funding,

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[8] SA Letters Patent, "Objects of the Corporation" (b), CAR Vol 1, Tab 2(C), 45.
[9] Transcript of Cross-Examination of Reina Rexhmataj, March 17, 2016 ("Rexhmataj Transcript"), pp 110-114, CAR Vol 3, Tab 11, pp 704-705.
[10] *Campus Clubs Procedure*, "Introduction", CAR Vol 1, Tab 2(H), 123 [emphasis added]; see also *Campus Clubs Policy*, "Introduction", CAR Vol 1, Tab 2(G), p 119: "The Student Association at Durham College & UOIT (SA) facilitates the creation and support of Campus Clubs to fulfill its mission of student service, advocacy and support. Campus Clubs act as a forum where students can gather for information, philanthropy, religious, cultural and social purposes. The SA recognizes and supports the formation of Campus Clubs as **an integral part of student life**." [Emphasis added]

event insurance coverage, and, by agreement with Durham College and UOIT, academic credit for students serving as Campus Club executives.[11]

6. In addition to the SA, both UOIT and Durham College also consider Campus Clubs to be a very important part of university and college life. UOIT's *Policy on the Recognition of Student Organizations* states:

> At UOIT, **student organizations play an important role in the life of the University and enrich its intellectual, social and cultural diversity**. Recognized Student Organizations are able to pursue social, cultural and other interests, and to organize and hold various activities for the benefit of their members.[12]

Similarly, Durham College's policy *Recognition of Student Organizations* states:

> Voluntary student organization are an important part of the Durham College community and **contribute significantly to the diversity of the college's intellectual, social, educational, and cultural co-curricular opportunities**.[13]

7. On occasion, Durham College and UOIT have withheld transfer of student fees to the SA due to f serious concerns regarding SA mismanagement. When this has occurred, both institutions have directly funded Campus Clubs to ensure their important activities continued to be carried out.[14]

8. Given the fact that Campus Clubs "contribute significantly to the **diversity** of the college's intellectual, social, educational, and cultural co-curricular opportunities", it is not surprising that both UOIT and Durham College expressly protect Campus Clubs from discrimination and censorship based on the expression of a club's beliefs and opinions. UOIT states its commitment in these terms:

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[11]Naggar Affidavit, paras 22-23, CAR Vol 1, Tab 2, pp 13-14; Affidavit of Jesse Cullen, affirmed March 10, 2016 ("Cullen Affidavit"), paras 21-26, CAR Vol 2, Tab 4, pp 185-186; *Clubs Procedure*, CAR Vol 1, Tab 2(H), p 126; *Campus Clubs Financial Procedure*, CAR Vol 1, Tab 2(I), p 133-38;

[12]*Policy on the Recognition of Student Organizations* ("UOIT Clubs Policy") "Purpose", CAR Vol 1, Tab 2(L), p 151.[Emphasis added]

[13]*Recognition of Student Organizations* ("Durham College Clubs Policy"), "Introduction", CAR Vol 1, Tab 2(K), p 143.[Emphasis added]

[14] See Toronto Star article "Durham College, UOIT deny cash to student association", CAR Vol 1, Tab 2(O), p 164.

> The University is respectful of the autonomy of student organizations and **will not attempt to censor, control or interfere with any Recognized Student Organization on the basis of its philosophy, beliefs, interests or opinions** expressed unless and until these lead to activities which are illegal, discriminatory, infringe the rights and freedoms of others within the University community, or are in violation of UOIT policies and procedures.[15]

Likewise, Durham College states:

> Under the terms of this policy the college **will not attempt to censor, control or interfere with any RSO** [Registered Student Organization, including SA Campus Clubs] **on the basis of its philosophy, beliefs, interests or opinions expressed unless and until these activities violate this policy**.[16]

9. The SA has agreed that "it shall be bound by, comply with and shall not enact any policies, rules or by-laws that conflict with the regulations, rules, policies and by-laws of the College" and that "[t]he regulation, rule, policy or by-law of the College shall govern in the event of a conflict between the regulations, rules, policies or by-laws of the College and those of the Student Association."[17]

10. In its *Student Rights and Responsibilities*policy, Durham College states:

> 2. Student rights include, but are not limited to, the right to:
> …
> b) Be free from discrimination.
> …
> f) Freedom of expression, individually or in groups, as provided by law.
> …
> h) Form, join and/or participate in any lawful group or organization for intellectual, social, economic, spiritual, political, cultural or recreational purposes.[18]

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[15] UOIT Clubs Policy, section 5.3, CAR Vol 1, Tab 2(L), p 152. [emphasis added]
[16] Durham College Clubs Policy section 4.3, CAR Vol 1, Tab 2(K), p 145. [emphasis added]
[17] Agreement between SA and Durham College, section 7.01 CAR Vol 2, Tab 4(E), pp 233-234,
[18] Durham College policy, *Student Rights and Responsibilities*, "Policy Statements", CAR Vol 2, Tab 4(E), pp 299-300.

11. This *Student Rights and Responsibilities* policy prohibits the banning of Campus Clubs on the basis of the club's beliefs or opinions. Further, the recognition of a Campus Club does not constitute an endorsement of that student club's beliefs or philosophy.[19]

12. The SA is specifically required by UOIT to have a policy for "[t]he recognition of Student Groups and the governance and operations of those Groups".[20]

13. The SA's *Campus Clubs Procedure*sets out a straightforward process for a group of students to apply to become a Campus Club, requiring:

- that the club's purpose not endorse or support activities or events that break SA policies, campus policies, or applicable laws;
- that the club not duplicate another group's purpose or name;
- that the club not be a sport or high-level physical activity club;
- that the club name be respectful and represent the club purpose; and,
- that the club be open to all students.[21]

There are no provisions that permit the SA to refuse to ratify a student group based on the beliefs or opinions of the group, or of its members.

14. Consequently, there are over 150 Campus Clubs at UOIT and Durham College that are recognized by the SA. These clubs create a vibrant diversity of beliefs and opinions, causes and activities, including religious, ethnic, academic, hobby, political, and advocacy clubs.[22]

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[19] UOIT Clubs Policy, section 5.4, CAR Vol 1, Tab 2(L), p 152; Durham College Clubs Policy, section 4.4, CAR Vol 1, Tab 2(K), p 145.

[20] UOIT *Student Association Accountability Policy*, section 6.3(b), CAR Vol 1, Tab 2(M), p 157; see also UOIT Clubs Policy, section 2 "Definitions", CAR Vol 1, Tab 2(L), p 151; Durham College Clubs Policy section 3.4.1 a) "Campus Clubs", CAR Vol 1, Tab 2(K), p 144; see also Durham College Clubs Policy section 4.6: "The college acknowledges SA recognized clubs and societies as legitimately constituted representative organizations of students. No organization has the right to exist or to continue to exist as a Durham College Recognized Student Organization without the express recognition granted by the SA."

[21] Campus Clubs Procedure, CAR Vol 1, Tab 2(H), p 124; see also SFTW Application, CAR Vol 1, Tab 2(A), pp 27-31.

[22] List of Campus Clubs, CAR Vol 2, Tab 4(K), pp 413-415; Transcript of Cross-Examination of Jesse Cullen, March 18, 2016 ("Cullen Transcript"), p 48, CAR Vol 3, Tab 12, p 748.

B. SA's Decision onApplication for Student Group Recognition as a Campus Club

15. On August 19, 2015, the Applicants submitted their application for "Speak for the Weak" ("SFTW") to be a Campus Club to the SA.[23] Such applications are normally handled by the SA's Clubs and Societies department.[24] However, on August 20, 2015, the SA' Clubs and Societies Coordinator, Chantal James, forwarded the Applicants' application to the SA Executive, not because it violated any of the above requirements for Campus Clubs, but because "there is a prolife component and it is their fundamental value."[25] Ms. James did note however that "there are several initiatives that do look very beneficial", and recommended that the SA set up a meeting with the Applicants "to go over the details a little more thoroughly for evaluation."[26] The SA Executives then engaged in "informal conversations" among themselves "discussing [the SA Executives'] view on the package and what kind of decision [they] were going to make."[27] Further, on August 24, 2015, the SA Executives met and discussed the Applicants' application for approximately 40 minutes.[28] As described by Reina Rexhmataj, then Vice-President of Equity for the SA, stated following the meeting that "[t]he SA decided that unless its concerns about the following were addressed, it would not accept the ratification of SFTW because:

- Its mandate conflicted with the mandate of the SA: to establish an anti-oppressive framework and works to build an environment free of systemic societal oppression and decolonization as established in the Letters Patent;
- Its mandate does not align with the values of the SA as we embrace a woman's legal right to reproductive freedom;
- The funds of the membership are prioritized toward equity seeking groups; and

[23]Naggar Affidavit, para 10, CAR Vol 1, Tab 2, p 11.
[24] Cullen Transcript, p 48, CAR Vol 3, Tab 12, p 748.
[25] Email from Chantal James, August 20, 2015, CAR Vol 3, Tab 5(B), p 493.
[26] Email from Chantal James, August 20, 2015, CAR Vol 3, Tab 5(B), p 493.
[27]Cullen Transcript, p 43, CAR Vol 3, Tab 12, p 747.
[28]Affidavit of Reina Rexhmataj, affirmed March 11, 2016 ("Rexhmataj Affidavit"), paras 8-9, CAR Vol 3, Tab 5, p 487.

- The main event of the group would be to attend a March that open [*sic*] discredits the LGBTQ+ community."[29]

16. On August 25, 2015, the SA emailed the Applicants, stating in part:

> The SA Executive Team would like to schedule an in person meeting next week to sit down and review the package in more detail with you due to the sensitive nature of the subject matter being addressed.[30]

The email did not provide the Applicants with any information setting out the above SA "concerns".[31] Rather, as stated by SA President, Jesse Cullen "the intention of that hearing was to orally present to them our decision on the ratification package."[32] Yet, as described by the SA, the meeting was not an ordinary day-to-day activity of the SA – it was an "oral hearing on a club ratification", and it was the only such hearing held by the SA Executives that year.[33]

17. On September 3, 2015, Christian Naggar and other SFTW leaders met with the SA Executives, ostensibly to review the Applicants' application in more detail.[34]Instead of discussing the application, Mr. Cullen informed the students that the SA had already made a decision not to ratify SFTW, because doing so would be "contrary to the SA's letters patent which maintain that abortion is a woman's right."[35]

18. Mr. Naggar stated that it was his understanding that the meeting was being held in order to clear any confusion regarding theclub, and review the application in further detail.But Mr. Cullen insisted that no clarification was needed, and that the SA had already "thoroughly reviewed the

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[29]Rexhmataj Affidavit, para 10, CAR Vol 3, Tab 5, p 488.
[30]Naggar Affidavit, para 11, CAR Vol 1, Tab 2, p 11; see also Email from Amy Blais, August 25, 2015, CAR Vol 1, Tab 2(B), p 33.
[31]Cullen Transcript, p 87, CAR Vol 3, Tab 12, p 758.
[32]Cullen Transcript, p 86, CAR Vol 3, Tab 12, p 758.
[33]Cullen Transcript, p 78-79, CAR Vol 3, Tab 12, p 756.
[34]Naggar Affidavit, paras 11-12, CAR Vol 1, Tab 2, pp 11-12.
[35] Naggar Affidavit, para 13, CAR Vol 1, Tab 2, pp 11-12; see also Minutes of September 3, 2015 Meeting, CAR Vol 3, Tab 8, p 512-13.

application several times" and "decided that the SA cannot support a club like Speak for the Weak."[36]

19. More than one month after this meeting, the SA Executive wrote to SFTW stating: "[a]s the democratically elected leaders, it is our responsibility to uphold the mandate of the SA to embrace the freedom of women and uphold a woman's legal right to reproductive freedom. Ultimately, we support a woman's right and freedom to choose her own path."[37]

20. In their letter, the SA Executives also expressed their disagreement with an event SFTW had listed in its application under "Event & Activities Ideas" (the fourth idea listed)[38]: the National March for Life. The SA Executives believed, without any apparent basis, that this March somehow "discredits the LGBTQ+ community".[39] In fact, the March for Life is focused on protecting unborn human life,[40]and says nothing about LGBTQ issues. Further, when Jesse Cullen was cross-examined, he acknowledged that this concern was rooted in an alleged affiliation between the organizer of the March for Life, the Campaign Life Coalition, and the "Institute for Marriage in the Family," which allegedly was "active on the issue of same sex marriage when that issue was being debated in Canada as actively opposing the rights of the LGBTQ community."[41]

21. The Applicants appealed the decision of the SA Executive to the SA Board of Directors, by way of a letter on October 29, 2015, setting out the relevant facts, explaining how the SA

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[36] Minutes of September 3, 2015 Meeting, CAR Vol 3, Tab 8, p 512-13.
[37] Letter dated October 6, 2015, CAR Vol 1, Tab 2(D), p 49. No policy was cited for the SA Executives' "responsibility" to "uphold a woman's legal right to reproductive freedom" other than its commitment to "building an environment free of systemic societal oppression and decolonization".
[38] SFTW Application, CAR Vol 1, Tab 2(A), p 27.
[39]Rexhmataj Affidavit, para 10, CAR Vol 3, Tab 5, p 488; SA President Jesse Cullen claims that this was the "main reason" the SA cited for their decision on September 3, 2015 refusing ratification. Cullen Affidavit, para 53, CAR Vol 2, Tab 4, p 194. However, on cross-examination, Mr. Cullen acknowledged that he did not make notes after the meeting, and did not record his recollection until 6 months after the meeting. Cullen Transcript, pp 74-76, CAR Vol 3, Tab 12, p 755.His recollection is contradicted by the Minutes of the September 3, 2015 hearing, typed by Christian Naggar relatively soon after the meeting. Minutes of September 3, 2015 Meeting, CAR Vol 3, Tab 8, pp 512-13; Naggar Transcript, pp 61-67, CAR Vol 3, Tab 10, pp 640-41.
[40] Cullen Transcript pp 71-72, CAR Vol 3, Tab 12, p 754.
[41] Cullen Transcript p 71, CAR Vol 3, Tab 12, p 754.

Executive's decision violated the rights of members of SFTW, and requesting that the Board exercise its authority to correct the decision.[42] The SA Board of Directors is empowered to "[a]dminister the affairs of the SA in all things".[43] The SA Board is further required to "govern lawfully, observing the principles of the Policy Governance model, with an emphasis on: … - encouragement of diversity in viewpoints".[44] However, counsel for the SA responded on November 23, 2015, stating that the SA maintained its decision to deny SFTW's application for ratification as a Campus Club for the reasons it stated orally on September 3, 2015, and in its letter dated October 6, 2015.[45]

22. With no other alternative, and having exhausted internal attempts to appeal, the Applicants filed their Notice of Application in this case on January 28, 2016.

C. Dissolution of the SA

23. The SA has a history of improper governance that has caused significant consternation and embarrassment to Durham College (and UOIT).In years 2013-2016, Durham College suspended its transfer of student fees to the SA four times because of "governance and related issues".[46]TheVice President, Student Affairs of Durham College, stated in anAffidavit:

> The Student Association's ongoing issues related to governance, supervision, conduct, contractual breaches, human rights proceedings and litigation are not in compliance with its stated mission….[47]

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[42] Letter dated October 29, 2015, CAR Tab 2(P), pp 167-173.
[43] SA *General Bylaw*, section 5.7(a), CAR Vol 1, Tab 2(E), p 58.
[44] SA Policy: *Governing Style*, CAR Vol 1, Tab 2(F), p 108.
[45] Letter from Andrea Sanche, November 23, 2015, CAR Tab 2(R), p 177.
[46] Affidavit of Meri Kim Oliver, sworn January 17, 2017, para 44 CAR Vol 3, Tab 9(A), p 543.
[47]Affidavit of Meri Kim Oliver, sworn January 17, para 103 CAR Vol 3, Tab 9(a), p560. Insight into the nature of the issues within the SA include can be gained from a letter sent by the College to the SA in April 24, 2014, CAR Vol 3, Tab 9(A), p 571: "Serious concerns have also been raised with respect to the SA's **failure to adhere to its own by-laws**, to basic democratic principles and its rules of procedure. In addition to these systemic concerns raised by the College, there have also been serious allegations of misconduct made against members of the SA's executive, including allegations of harassment, bullying, **discriminatory conduct, violations of SA policies** and the improper use of SA funds and resources." [Emphasis added]

24. On February 6, 2017, Justice Newbould issued an order implementing a "Consensual Framework" between the SA, UOIT and Durham College, and appointing a court officer over the SA.[48]Under the Consensual Framework, the SA was to be dissolved and two new student associations established, one for students of Durham College and another for students of UOIT. On October 13, 2017, Justice McEwen granted a "Dissolution and Discharge Order" that the SA be "wound up."[49] As had been agreed, the Court ordered that the new student associations assume "any interest in, and be responsible for any liabilities under, and shall abide by any final determination in respect of, any Outstanding Claims", including expressly the present claim before this Court by the Applicants.[50] The new student associations at both Durham College and UOIT have stepped into the shoes of the SA and are bound by this Court's determination of this Application.

PART III – ISSUES AND LAW

25. In deciding this application, the Court is asked to address two sequential issues:

A. Whether the Court has jurisdiction to review the SA's Decision to deny the Applicants' application for Club Status; and

B. Whether the SA's Decision to deny the Applicants' application for Club Status

   i. violated the SA's own bylaws and policies,

   ii. violated the principles of natural justice, or

   iii. violated the SA's duty of good faith.

[48] Court Order, appointing court officer over the SA, February 6, 2017, CAR Vol 3, Tab 9(B), pp 590-95.
[49] Dissolution and Discharge Order, October 13, 2017, CAR Vol 3, Tab 9(C), pp 614-620.
[50] Dissolution and Discharge Order, October 13, 2017, CAR Vol 3, Tab 9(C),, pp 616, 620.

26. The Applicants have filed a separate Applicants' Joint Memorandum of Law that sets out the legal principles to be applied in addressing these issues. Reference to those principles will be made in this factum.

A. The Court has Jurisdiction to Review the SA's Decision to Deny Club Status

27. The Ontario Superior Court of Justice has jurisdiction to review the decisions of student unions such as the SA.[51] In reviewing the decisions of student unions, Courts generally apply the principles of private administrative law.[52] Nevertheless, there is judicial recognition that a student union is not a "private club that would expect to conduct its business in private, and without a level of accountability."[53] Rather, there is in fact a "substantial public interest" in the services and responsibilities of a student union,[54] and this factor weighs in favour of a Court exercising jurisdiction more readily over its decisions, than over the decisions of a purely private and voluntary association, such as a religious group or a yacht club.

28. The test set out by the Supreme Court of Canada for jurisdiction in the case of "private" decision-makers comes from the review of the decisions of a religious group, where the Court stated: "the question is not so much whether this is a property right or a contractual right, but **whether it is of sufficient importance to deserve the intervention of the court**".[55]

29. The Applicants are fee-paying members of the SA, and have a contractual right to expect the SA to comply with its own binding rules and policies, when making decisions about club

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[51] See *Courchene v Carleton University Students' Association*, 2016 ONSC 3500 [*Courchene*]; *Association of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students Union*, [2008] O.J. No. 3344 [*APUS v UTMSU*]; *Rakowski v. Malagerio*, 2007 CanLII 2214 (Ont SCJ) [*Rakowski*] at para 30: "courts do get involved in the affairs of associations and clubs", particularly in cases "when the organization's processes and conduct lack the basic hallmarks of natural justice and fairness".

[52] See *APUS v UTMSU*; *Rakowski*; *UVSS v CFS*.

[53] *Courchene* at para 10.

[54] *Courchene* at para 10.

[55] *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 SCR 165 [*Hofer*], p 175. [emphasis added].

recognition that directly affect the Applicants. Further, the Applicants also have a right to freedom of expression and freedom of association on campus, a right the SA may not violate.[56]

30. The SA's Decision violates these rights of the Applicants and these rights and interestsare of "sufficient importance" to warrant the Court's review under private administrative law.

i. The importance of the rights and interests affected by the SA's decision to deny Club Status

31. Student life on a college or university campus is significantly affected by the actions of student unions, which play a critical part in providing students with valuable services and opportunities for extra-curricular engagement and interaction. In the case of the SA, one of its primary purposes is to create a "common framework" (i.e. Campus Clubs) "within which students can communicate, exchange information and share experience, skills and ideas."[57]The SA expressly recognizes Campus Clubs as "an integral part of student life." Further, UOIT and Durham College note that Campus Clubs enrich the university's "intellectual, social and cultural diversity" and "contribute significantly to the diversity of the college's intellectual, social, educational, and cultural co-curricular opportunities."[58]

32. Further evidence of the recognized, public importance of Campus Clubs can be seen in the decisions of both UOIT and Durham College to maintain direct funding to Campus Clubs when funding to the SA was otherwise cut off due to financial mismanagement.[59]

33. The decision of the SA to deny the Applicants' application for Club status is significantly important in terms of its rarity, its tangible impact and its intangible effect. The SA's decision on

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[56] Durham College policy, *Student Rights and Responsibilities*, "Policy Statements", CAR Vol 2, Tab 4(E), pp 299-300; Agreement between SA and Durham College, section 7.01 CAR Vol 2, Tab 4(E), p 233.
[57] SA Letters Patent, "Objects of the Corporation" (b), CAR Vol 1, Tab 2(C), p 45; Rexhmataj Transcript, pp 110-114, CAR Vol 3, Tab 11, pp 704-705.
[58] *Campus Clubs Procedure*, "Introduction", CAR Vol 1, Tab 2(H), p 123; see also *Campus Clubs Policy*, "Introduction", CAR Vol 1, Tab 2(G), p 119; UOIT Clubs Policy, "Purpose", CAR Vol 1, Tab 2(L), p 151. Durham College Clubs Policy "Introduction", CAR Vol 1, Tab 2(K), p 143.
[59] See Toronto Star article "Durham College, UOIT deny cash to student association", CAR Vol 1, Tab 2(O), p 164.

the Applicants' application was not a run-of-the-mill or day-to-day decision; rather it was a decision made after what was supposed to be an "oral hearing", the only such decision the SA had made in that year.[60]

34. The impact of the SA decision on the Applicants was severe, prohibiting them from utilizing numerous opportunities and resources SA Club Status provides to effectively engage their peers, such as using space for events, promoting of events, funding for events and activities, insurance, equipment and more.[61]For instance, the SA, in collaboration with Durham College and UOIT, has invested substantial student resourcesto provide meeting space specifically for Campus Clubs on the various campuses.[62] But on account of SA's decision, the Applicants are prohibited as a group from using it.

35. Finally, and what is the most significant effect of the decision, the SA specifically and intentionally targeted the beliefs and opinions expressed by the student Applicants in their application form, thereby engaging in viewpoint discrimination and attacking the "intellectual, social and cultural diversity" Campus Clubs are intended to bring to the campus.

36. Real diversity – intellectual, social and cultural – cannot exist on campus without respecting freedom of expression for everyone. And indeed, both UOIT and Durham College require that Campus Clubs are free from attempts to "censor, control or interfere" with them based on their "philosophy, beliefs, interests or opinions expressed".[63]Further, as a condition to receiving

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[60]Cullen Transcript, pp 78-79, CAR Vol 3, Tab 12, p 756.
[61]Naggar Affidavit, paras 22-23, CAR Vol 1, Tab 2, pp 13-14.
[62] See e.g. "Investment Agreement" between SA and Durham College, CAR Vol 2, Tab 4(E), pp 286-287, where the SA paid $500,000 to space "at the Willey location to be **used for student clubs, meetings**, as a communication hub, and for business affairs" and "space at the Whitby location to be **used for student clubs, meetings**, storage, business affairs, as a communication hub, general lounge/recreation and for social events." [Emphasis added] See also Student Centre Agreement, section 3, CAR Vol 2, p 251: "The Student Centre shall be dedicated primarily to serving the cultural, recreational, social, educational and organizational interests of the student body of the College and University on a non-profit basis." The Applicants are similarly prevented from utilizing this facility.
[63] UOIT Clubs Policy, section 5.3, CAR Vol 1, Tab 2(L), p 152 [emphasis added]; Durham College Clubs Policy section 4.3, CAR Vol 1, Tab 2(K), p 145.[emphasis added]

compelled student fees, the SA is bound to abide by the regulations, rules, policies and by-laws of Durham College, and to the extent its own policies conflict with those of Durham College,those policies of Durham College govern.[64]

37. At its root, the SA's decision to refuse SFTW Campus Club status was a direct violation of their right to "[f]reedom of expression, individual or in groups, as provided by law."[65] The SA pays lip service to the concept of freedom of expression, [66] but shows little to no understanding of its application.[67]

38. The *Canadian Charter of Rights and Freedoms* (the "*Charter*") applies to Durham College,[68] such that the *Charter* applies to protect the free expression rights of student on campus. Further, apart from the *Charter*, freedom of expression "… is one of the fundamental concepts that has formed the basis for historical development of the political, social and **educational** institutions of western society."[69]

39. To conclude, the SA's decision banned the Applicants from participating in the SA's common framework of Campus Clubs which it is required to provide for its members on account of the SA's disagreement with the Applicants' beliefs and opinions. The Applicants are fee paying members of the SA, and it is a serious matter to be prohibited from participating in a core part of the SA's mandate, simply because students serving as SA Executives consider the Applicants'beliefs and opinions to be "oppressive". The fact that this discrimination is taking

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[64] Agreement between SA and Durham College, section 7.01 CAR Vol 2, Tab 4(E), p 233; see also Cullen Transcript, pp 19-29, CAR Vol 3, Tab 12, pp 741-744.
[65] Durham College policy, *Student Rights and Responsibilities*, "Policy Statements", CAR Vol 2, Tab 4(E), pp 299-300.
[66]Rexhmataj Transcript, pp 34-36, CAR Vol 3, Tab 11, p 685,
[67] Rexhmataj Transcript, p 37, CAR Vol 3, Tab 11, p 686, affirming the right of a Campus Club to take a position different than that of the SA, while discussing its decision prohibiting the Applicants from forming a Campus Club because theyclaimed a contrary position on abortion to that of the SA.
[68]See *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570.
[69]*RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at para 12.

place on public college and university campuses where students have recognized rights to individual and group freedom of expression showcases the sufficient importance of this matter to warrant judicial oversight.

40. As will be discussed below, the manner in which the SA made this decision – in violation of its own bylaws and policies, in breach of the principles of natural justice, out of bias, and in bad faith – provides further cause for this Court to review the decision.[70]

ii. Comparative cases of courts' jurisdiction

41. In *Pal v Chatterjee*, the Ontario Superior Court of Justice reviewed the commencement of disciplinary proceedings in a private and voluntary religious organization. The Court noted that the membership rights in the religious organization "are of great importance to all members. They include the rights to vote, serve on committees, attend meetings and functions, and **use the facilities of the organization**".[71] In the present case, the SA's decision has impaired the ability of the Applicants to use the SA facilities to host events, promote those events and effectively participate in the "common frameworkwithin which students can communicate, exchange information and share experience, skills and ideas".[72] Judicial oversight is even more important when it comes to a student union receiving compelled dues frompublic college and university students, in contrast to the private and voluntary association referred to in *Chatterjee, supra*.

42. To become a teacher, doctor, lawyer, engineer, accountant, nurse or other professional, one must necessarily obtain a university degree or college diploma. To obtain a university degree or college diploma, students must necessarily pay fees to the student union established at the university or college which they attends. Any Canadian who wishes to pursue a profession has no choice but to

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[70]*Rakowski*, at para 30: "[C]ourts do get involved in the affairs of associations and clubs", particularly in cases "when the organization's processes and conduct lack the basic hallmarks of natural justice and fairness".
[71]*Pal*, at para 32. [Emphasis added]
[72]SA Letters Patent, "Objects of the Corporation" (b), CAR Vol 1, Tab 2(C), p 45.

pay student union dues. This makes student unions radically different from private and voluntary associations, and thereby more worthy of judicial oversight.

43. In *McLachlan v Burrard Yacht Club*, the BC Court of Appeal exercised jurisdiction to reverse the revocation of membership in a marina, where the petitioner "lost a right (to moor his boat at the marina) that was an important element of his social life and his family life".[73] While a person's social and family life are important, participation in "an integral part of student life" on a college and university campus is even more important. The Applicants sought to create a club which would have added to the "intellectual, social and cultural diversity" of their campus, and allowed them to engage in important discussions with their fellow students. In the formative and limited days of students' academic careers, depriving them of this opportunity in violation of the applicable rules, the principles of natural justice and good faith is sufficiently important to warrant this Court's review.

44. "Courts will intervene in the private activities of non-statutory bodies where the aggrieved parties have no other remedy available to them"[74] and "must intervene in the case of an unreasonable or arbitrary decision" involving the internal by-laws of a private entity.[75] The Applicants attempted, without success or opportunity to be heard, to appeal the SA's unreasonable and arbitrary decision, as described below. The Applicants have no other place to turn for relief than to this Court.

B. The SA's Decision Violated the Principles of Natural Justice, the SA's Policies, Bylaws and Rules, and the SA's Duty of Good Faith

45. In *Hofer*, the Supreme Court reiterated the standard of review a court should apply in reviewing the decisions of private associations: "first, whether the rules of the club have been

[73]2008 BCCA 271 [*McLachlan*] at para 9.
[74]*Lee v Yeung*, 2012 ABQB 40 [*Lee*] at para 52.
[75]*Ge c Canadian Federation of Students*, 2015 QCCS 19 at para 57 citing *Club de soccer de ville Sainte-Antoine v Association régionale de soccer des Laurentides*, 2005 CanLII 31366 (QC CS) at paras 28-29.

observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*."[76]

46. Each of these three areas will be considered in turn.

i. The SA exceeded its jurisdiction and failed to comply with its own bylaws, policies and procedures

47. The SA Executives only have the authority to make decisions authorized by its bylaws and rules. In cases of a dispute over the interpretation of the SA's bylaws and policies, "the doctrine of *contra proferentem* would require that it be resolved against the Association."[77] Further, the SA cannot justify its decision by subsequently enacting a provision.[78]The SA is not permitted to base its decision on irrelevant considerations that are not contemplated in the relevant bylaw or policy at the relevant time.[79]

48. The *Campus Clubs Procedure* and *Campus Clubs Policy* govern applications from Campus Clubs, and the structure within which Campus Clubs form, operate and develop. The *Procedure* lists the information to be included for "New Club Applications" and specifies the "Ratification Requirements".[80]

49. The SA has not alleged that the Applicants failed to meet any of the requirements listed in the *Campus Clubs Procedure*. Neither did the SA allege that the Applicants' proposed club would violate the *Campus Clubs Policy*.

50. Rather, the SA Executives rejected Speak for the Weak for not sharing the SA's view of "systemic societal oppression," a phraseappearing in the SA's Letters Patent[81] which they believe

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[76]*Hofer*, at para 10 citing *Baird v Wells* (1890), 44 Ch. D. 661, at p 670.
[77]*Mayan*, atparas 49-51.
[78]See *Courchene* at paras 20, 22.
[79]*University of Victoria Students' Society v Canadian Federation of Students*, 2011 BCSC 122 [*UVSS v CFS*] at para 58.
[80] CAR Vol 1, Tab 2(H), p 124.
[81] See Letter dated October 6, 2015, CAR Vol 1, Tab 2(D), p 49.

provides them with the authority to censor and discriminate against students in regard to their applications for Campus Club status by requiring that students' proposed club documents "not conflict with the SA's understanding of what systemic societal oppression is".[82]

51. To the SA Executives there is only one correct interpretation of what constitutes "systemic societal oppression," an interpretation they claim is supported by unspecified "scholars, academics, marginalized groups who experience oppression." This latter group apparently includes the SA president's partner, who happens to be a social worker with an "anti-oppression mandate."[83]

52. The SA Executive also claims an unwritten duty to uphold "a woman's legal right to reproductive freedom."[84] Thus, the SA's president stated that "any group making implication that their mandate would be to restrict that right or advocate for the restriction of that right would be a form of oppression against women, and so that would be in conflict with our bylaws."[85] There is no such provision anywhere in the SA's constituting documents, bylaws or policies.

53. These unwritten requirements, conveniently tailored to the SA Executives' views of the Applicants' beliefs and opinions, is *ultra vires* the SA. Further, there is no evidence that this unwritten requirement for Campus Clubs was an established practice before the SA applied it when rejecting the Applicants' application.

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[82] Ibid at p 32, CAR Vol 3, Tab 12, p 744.
[83] Cullen Transcript, pp 22-26, CAR Vol 3, Tab 12, pp 742-43.
[84] See Letter dated October 6, 2015, CAR Vol 1, Tab 2(D), p 49.
[85] Cullen Transcript, pp 40-41, CAR Vol 3, Tab 12, pp 746-47.

54. Sometime after the Decision was made, the SA designed a webpage to propagate its view of "systemic societal oppression,"[86] The SA's efforts to rely on that webpage to buttress its*ultra vires* Decision is invalid.[87]

55. After the SA made its Decision against the Applicants, the SA Executives evidently also put together a *Feminist Framework Policy* whichexpressed their own views against pro-life groups, which they had already applied to the Applicants' application.[88] If passed, the SA Executiveswould have used this policy to deny any future similar applications made by the Applicants for Campus Club status.[89] However, this policy was not approved by the SA Board.[90]

56. The SA overstepped its jurisdiction by imposing a new, unwritten and vaguely-defined ideological requirement to bar the Applicants' application for Club status. In so doing, the SA violated its *Campus Clubs Procedure Policy* and *Campus Clubs Policy.*

57. As SA members, the Applicants have the right to "access the services, research, information, materials and other resources of the SA."[91] Yet the SA has prohibited its own fee-paying student members access to the "common framework within which students can communicate, exchange information and share experience, skills and ideas," thus acting contrary to its own Letters Patent.[92]

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[86] See Rexhmataj Affidavit, para 5, CAR Vol 3, Tab 5, p 486; SA webpage "Anti-oppression", CAR Vol 3, Tab 5(A), p 491; Rexhmataj Response to Undertaking, November 10, 2017, CAR Vol 3, Tab 6, p 502; Rexhmataj Transcript, p 77-78, CAR Vol 3, Tab 11, p 696.

[87]See *Courchene* at paras 20-22; see also *UVSS v CFS*.

[88] Cullen Transcript, p 17-18, CAR Vol 3, Tab 12, p 741; see *Feminist Framework Policy*, CAR Vol 3, Tab 11(A), pp 729-31: "No SA resources, space, recognition or funding will be allocated to enhance groups/individuals whose primary/sole purpose is anti-choice activities. Such activities are defined as any campaigns, actions, distribution, solicitation, or lobbying efforts that seek to limit a woman's right to choose what they can or cannot do with their own body." . . . "Furthermore, no SA resources, space, recognition or funding will be allocated to enhance groups/individuals who are members of or directly affiliated with external organizations with the primary/sole purpose of anti-choice activities."

[89]Rexhmataj Transcript, p 103-06, CAR Vol 3, Tab 11, p 702-03.

[90] Ibid; Cullen Transcript, p 12, CAR Vol 3, Tab 12, p 739.

[91] SA General Bylaws, section 4.3(h), CAR Vol 1, Tab 2(E), p 56.

[92]SA Letters Patent, "Objects of the Corporation" (b), CAR Vol 1, Tab 2(C), p 45.

58. As the highest authority of the SA, the Board of Directors is required to "govern lawfully . . . with an emphasis on: . . . encouragement of diversity in viewpoints".[93] The SA violated this requirement, effectivelydemandingthat the Applicants adopt the beliefs and opinions of the SA Executives as a condition for having a Campus Club.

59. The SA is bound by, and must "comply with and shall not to enact any policies, rules or by-laws that conflict with", *inter alia*, students' rights to "[b]e free from discrimination", "[f]reedom of expression, individually or in groups, as provided by law" and "[f]orm, join and/or participate in any lawful group or organization for intellectual, social, economic, spiritual, political, cultural or recreational purposes."[94]

60. The SA must also comply with and not act contrary toDurham College's policy to "not attempt to censor, control or interfere with any RSO [Registered Student Organization, including SA Campus Clubs] on the basis of its philosophy, beliefs, interests or opinions expressed unless and until these activities violate this policy."[95] The SA has attempted to censor, control and interfere with Speak for the Weak on the basis of its philosophy, beliefs, and opinions.

61. The SA's Decision discriminate against the Applicants, violates their free expression rights, and prevents their involvement in an integral part of student life. The Decision however is *ultra vires* the SA, and in fact violates the SA's own obligations, purpose and policies.

ii. The SA failed to comply with the principles of natural justice

62. As a domestic tribunal, the SA was required to comply with the principles of natural justice in making the Decision affecting the Applicants' rights and interests. The SA was required to

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[93]Agreement between SA and Durham College, section 7.01, CAR Vol 2, Tab 4(E), p 233; SA policy *Governing Style*, CAR Vol 1, Tab 2(F), p 108.

[94] Agreement between SA and Durham College, section 7.01, CAR Vol 2, Tab 4(E), p 233; *Student Rights and Responsibilities*, "Policy Statements", CAR Vol 2, Tab 4(E), pp 299-300.

[95]Durham College Clubs Policy section 4.3, CAR Vol 1, Tab 2(K), p 145; Agreement between SA and Durham College, section 7.02. CAR Vol 2, Tab 4(E), p 234.

provide 1) notice, 2) opportunity to be heard and 3) a decision maker with an unbiased, open mind.[96]

1. Notice

63. Even the "elementary principles of right and justice" require that a person be "informed of the nature of the charge against him, and given an opportunity to answer the same."[97] An adequate and timely notice allows a person to consider his or her position and either change course or prepare a defense.[98]

64. On August 25, 2015, the Applicants received an email from the SA inviting them to an "in person meeting next week to sit down and review the package in more detail with you due to the sensitive nature of the subject matter being addressed."[99] The Applicants were entitled to rely on this representation. Christian Naggaron behalf of the Applicants promptly responded that they looked forward to "address[ing] any concerns regarding our ratification package."[100]

65. The SA did not inform the Applicants about the SA's concerns, even though the SA itself haddetermined precise concerns about Speak for the Weak prior to the meeting.[101] Neither were the Applicants given notice of the previous meetings SA Executives had held to discuss their application and "what kind of decision we [the SA Executives] were going to make".[102] The SA did not inform the Applicants that this "oral hearing" was the only such hearing the SA Executives

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[96]*Hofer* at para 80; *Polish National Union of Canada v Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134at para 66; *Farren v Pacific Coast Amateur Hockey Association*, 2013 BCSC 498, at para 19, citing *Barrie v Royal Colwood Golf Club*, 2001 BCSC 1181 at para 59; *Garcia v Kelowna Minor Hockey Association*, 2009 BCSC 200 at para 20.
[97]*Hofer* at para 81, quoting *Cohen v Hazen Avenue Synagogue* (1920), 47 NBR 400 (SC) at p 409.
[98] *Hofer* at para 83.
[99]Naggar Affidavit, para 11, CAR Vol 1, Tab 2, p 11; see also Email from Amy Blais, August 25, 2015, CAR Vol 1, Tab 2(B), p 33.
[100] Email from Christian Naggar, CAR Vol 1, Tab 2(B), p 34.
[101]Rexhmataj Affidavit, para 10, CAR Vol 3 Tab 5, p 488; Cullen Transcript, pp 87, CAR Vol 3, Tab 12, p 758.
[102] Cullen Transcript, p 43, CAR Vol 3, Tab 12, p 747; Rexhmataj Affidavit, paras 8-9, CAR Vol 3 Tab 5, p 488.

held that year, and that the application could be permanently denied at this meeting, which it was.[103]

66. Consequently, the Applicants were completely surprised at the "hearing",[104] which they had thought would be in the nature of an informal discussion to clear any confusion regarding their club, and review their application in further detail.[105]The failure of the SA to hold the proceeding as it had represented, and the holding of a different kind of "oral hearing" without notice, was a breach of procedural fairness and natural justice.

67. The SA's subsequent actions did not remedy its lack of notice to the Applicants. The SA appears to argue that the Applicants could have simply amended their application and resubmitted it.[106]But the SA's position, as expressed by its Executives, indicates that the SA would not have accepted a revised application.[107]Further, the SA Executives did not notify the Applicants of this alleged option.[108]

68. When the Applicants sought to appeal to the SA Board of Directors, the matter was discussed at the Board Meeting on November 13, 2015,[109] but the Applicants received no notice of the meeting, or an opportunity to make presentations.

69. In conclusion, the SA's notice of the September 3, 2015 "hearing" was defective. The SA failed to provide notice to the Applicants aboutthe nature of the SA's hostile position, and misrepresented the forthcoming meeting as being an informal discussion of concerns.

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[103]Cullen Transcript, pp 78-79, CAR Vol 3, Tab 12, p 756.
[104] Since the Applicants were not given the opportunity to be heard, as discussed below, it is inaccurate to properly described the September 3, 2015 meeting as a "hearing."
[105]Naggar Affidavit, para 14, CAR Vol 1, Tab 2, p 12.
[106]Rexhmataj Transcript, pp 73-77, CAR Vol 3, Tab 11, pp 695-696.
[107] See Letter dated October 6, 2015, CAR Vol 1, Tab 2(D), p 49; Cullen Transcript, pp 40-41, CAR Vol 3, Tab 12, pp 746-47.
[108]Rexhmataj Transcript, pp 73-77, CAR Vol 3, Tab 11, pp 695-696.
[109] Meeting Minutes of SA Board Meeting, November 13, 2015, CAR Vol 2, Tab 4(R), 450, 452-53. It is curious to note that all motions concerning the Applicants' application were made by members of the SA Executive, who had been the ones who made the decision against the Applicants in the first place.

2. Right to Be Heard

70. The SA failed to provide the Applicants with an opportunity to be heard,[110] which would have entailed providing them with an "opportunity to respond to the allegations" made against them.[111]

71. As noted above, the SA did not give the Applicants any specific information about the SA's concerns, prior to the September 3 meeting. The SA President Mr. Cullen indicated that the SAdid not need or desire clarification from the Applicants.[112] Therefore, at the meeting, the students' attempts to explain their position were stymied and discouraged by belittling and hurtful responses from the SA members.[113] The students eventually gave up trying to provide the SA with responses or explanations, with Mr. Naggar stating, "it sounds like the SA has made up it's [*sic*] mind and I don't think we're going to change your[directed at Mr. Cullen] mind at this meeting."[114]

3. Bias and Prejudgement

72. Natural justice required that theApplicants' application be heard by an unbiased tribunal.[115] The Supreme Court has noted that bias can be found in cases where "there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile".[116] The SA was required to not make a conclusion without first hearing

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[110] The SA's failure to give the Applicants an opportunity to be heard not only violates the natural justice requirement, it likewise violates the SA's policy *Global Ends and Second level*, which states that "Students will have … 2.2 **A voice.** They will know their rights. They will be heard." CAR Vol 1, Tab 2(F), p 91 [emphasis in original].
[111] *Hofer*, at p. 196.
[112] Minutes of September 3, 2015 Meeting, CAR Vol 3, Tab 8, p 512.
[113] Ibid at 513, implying that the students would "force women" in some way or cause them to "undergo a coat hanger abortion."
[114] Ibid.
[115] *Hofer* at para 80. See also *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 636.
[116] *Old St. BonifaceResidents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170, 1197.

from the Applicants.[117] In the context of a student union, the test has been described as whether it acted "in a fashion that meets the legitimate expectations of a fair-minded observer."[118]

73. There is ample evidence that SA staff and Executives were biased against the Applicants' beliefs and opinions. The SA Club and Society Coordinator, Chantal James, forwarded the Applicants' application to the SA Executive, not because it violated any existing requirements for Campus Clubs, but simply because "there is a prolife component and it is their fundamental value."[119] The SA's VP Equity Reina Rexhmataj raised the issue of whether the Applicants' application violated the SA's "anti-oppression principle", because "we embrace a woman's legal right to reproductive freedom" and she believed (incorrectly) that the "main event of the group would be to attend a March that open[ly] discredits the LGBTQ+ community."[120] At the meeting on September 3, 2015, the SA Manager of Outreach Services, Darshika Selvasivan, insinuated that the Applicants would somehow contribute to forcing young women to "have to undergo a coat hanger abortion" with which other SA staff and Executives agreed.[121]On questioning, SA President Mr. Cullen stated that he believes there is only one correct interpretation of the phrase "systemic societal oppression," and referenced his own partner, apparently a social worker, as an example of someone from whom the SA receives its perspective of "systemic societal oppression".[122] Mr. Cullen believes that the opinions of a student group applying for clubs status cannot "conflict with the SA's understanding of what systemic societal oppression is".[123]

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[117]*McLachlan*, at para 41.
[118]*Mowat v University of Saskatchewan Students' Union,* 2006 SKQB 462 [*Mowat*], para 60, aff'd 2007 SKCA 90.
[119] Email from Chantal James, August 20, 2015, CAR Vol 3, Tab 5(B), p 493.
[120]Rexhmataj Affidavit, paras 8, 10, CAR Vol 3, Tab 5, p 487-488.
[121] Minutes of September 3, 2015 Meeting, CAR Vol 3, Tab 8, p 512-13.
[122] Cullen Transcript, pp 23,24-26, CAR Vol 3, Tab 12, pp 742-43.
[123] Cullen Transcript, 32, CAR Vol 3, Tab 12, p 744.

74. The SA clearly communicated that its intention for the September 3 "hearing" was simply to "orally present to [the Applicants] our decision on the ratification package",[124] not to allow the Applicants to respond or address any of theSA Executives'concerns. Mr. Cullen informed the students that the SA had already made a decision not to ratify Speak for the Weak because he claimed (falsely) that doing so would be "contrary to the SA's letters patent which maintain that abortion is a woman's right."[125] Mr. Cullen asserted that "no clarification is needed. Everyone here has thoroughly reviewed the application several times and we've decided that the SA cannot support a club like Speak for the Weak."[126]

75. Even after the meeting, when the SA Executives surely realized that their Letters Patent donot in fact express that abortion is a woman's right, they simply doubled down on their Decision, seeking rather to apply an amorphous definition of "systemic societal oppression" to condemn their limited understanding of the Applicants position on abortion, as well as one of the Applicants' "Event and Activities Ideas"[127] to attend the National March for Life in Ottawa.

76. After the SA Executives made the Decision not to approve SFTW as a Campus Club, the SA failed to reconsider the matter properly on appeal, refusingto even allow the Applicants to clarify their position or alleviate the SA's concerns.[128]

77. In conclusion, the SA Executives made the Decision against the Applicants' application as a biased tribunal and in fact, they prejudged the matter before any "hearing" to the extent that any of the Applicants' submission would be futile. Like the executive counsel of the University of

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[124] Cullen Transcript, p 86, CAR Vol 3, Tab 12, p 758; see also Cullen Transcript, p 43, CAR Vol 3, Tab 12, p 747.
[125]Ibid at para 13; see also Minutes of September 3, 2015 Meeting, CAR Vol 3, Tab 8, p 512-13.
[126] Ibid; Naggar Affidavit, para 16, CAR Vol 1, Tab 2, p 12. See also Cullen Affidavit, para 45, CAR Vol 2, Tab 4, p192: "SFTW asked whether there is an opportunity to appeal. I advised them that with the current mandate, the SA would not approve ratification."
[127] SFTW application, CAR Vol 1, Tab 2(A), p 27.
[128] See Meeting Minutes of SA Board Meeting, November 13, 2015, CAR Vol 2, Tab 4(R), 450, 452-53, which show that all motions concerning the Applicants' application were made by members of the SA Executive.

Saskatchewan Students' Unions in *Mowat*, the SA Executive "simply ignored its own rules and imposed its own preordained outcome."[129]

iii. The SA acted in bad faith

78. Courts will review the decisions of a domestic tribunal such as a student union for bad faith, which can be found where the tribunal acts on improper motives, such as for an "unauthorized purpose" or based on "irrelevant considerations".[130]

79. The SA acted in bad faith by imposing on the Applicants an unwritten ideological requirement that their club documents "not conflict with the SA's understanding of what systemic societal oppression is".[131] Such a requirement is both unauthorized and irrelevant. As described above, the SA Executives have a vague and subjective definition of "systemic societal oppression" which is not written down definitively. Without an authoritative reference point that can be used by all parties, the SA deems oppressive "any restrictions on that freedom of a woman to terminate her pregnancy" and the SA therefore prohibits "any group making implication that their mandate would be to restrict that right or advocate for the restriction of that right" as "a form of oppression against women" and thus banned from being a Campus Club.[132]

80. No provision in the SA's policies or procedures permits this ideological test used by SA Executives. Further, after the Decision was made, the SA Executives sought unsuccessfully to pass a policy that would have applied to ban the Applicants from having a campus club.[133]

81. The SA imposedan additional requirement on the Applicants, namely that any groups with whom prospective Campus Clubs intend to affiliate (or in the case of the Applicants, organizations

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[129] *Mowat*, at paras 62-63.
[130] *Rakowski*, at para 56; CED (online), Judicial Review and Statutory Appeals (III.4.(d).(i).B) at §162.
[131] Cullen Transcript, p 32, CAR Vol 3, Tab 12, p 744.
[132] Cullen Transcript, pp 40-41, CAR Vol 3, Tab 12, p 746-47.
[133] See proposed *Feminist Framework Policy*, CAR Vol 3, Tab 11(A), pp 729-31; Cullen Transcript, p 17-18, CAR Vol 3, Tab 12, p 741; Rexhmataj Transcript, p 103-06, CAR Vol 3, Tab 11, p 702-03.

affiliated with an organization hosting an event the Applicants proposed Campus Club might attend[134]) must not violate the SA Executives' view of "systemic societal oppression."[135] The SA thus based the Decision further on irrelevant consideration. A review of the SA's list of approved clubs makes it clear that the SA Executives apply this supposed "requirement" arbitrarily.[136] For example, while the SA apparently took issue with the Institute for Marriage and the Family over its stance on same-sex marriage, the SA has no issue with the Catholic Students' Associations affiliation with the Catholic Church.[137]

82. Finally, the SA attempts to justify its discriminatory treatment of the Applicants by stating that they merely prioritize funding to "equity-seeking groups."[138] The Applicants' would consider themselves an equity-seeking group and the SA is not sure if it considers fetuses an marginalized or equity seeking group.[139] Whether the Applicants are, or are not, equity-seeking, this is another unwritten "requirement" the SA Executives contrived in order to deny the Applicants' application.

83. The SA admits that many current Campus Clubs (including the UOIT/DC Pre-Medical Association, the Student Law Association, the UOIT Pre-Dental Community, the Ridgeback Rides (UOIT/DC Car Club), the Arcade and Fighting Games Club, Lanwar X, the Laser Tag Club, the UOIT/DC Firearms Association, and the UOIT/DC Sports Business Association) are not equity-seeking groups, and they still receive SA approval as Campus Clubs along with the commensurate

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[134] Cullen Transcript p 71, CAR Vol 3, Tab 12, p 754.
[135] See Letter, dated October 6, 2015, para 4, CAR Vol 1, Tab 2(D), p 49; Cullen Transcript, pp 47-49, CAR Vol 3, Tab 12, p 748-749.
[136] List of Campus Clubs, CAR Vol 2, Tab 4(K), pp 412-14.
[137] Cullen Transcript, 49:?-50:?, CAR Vol 3, Tab 12, p 749.
[138] Letter, dated October 6, 2015, CAR Vol 1, Tab 2(D), p 49.
[139] Rexhmataj Transcript, pp 48-50, CAR Vol 3, Tab 11, p 688-89: The SA Executives do not know if the SA considers fetuses a marginalized or equity-seeking group, but that the SA is aware that some students consider unborn children to be a marginalized and equity-seeking group, and acknowledges that there are differences of opinion concerning abortion in the student population.

services,student engagement opportunities and funding.[140] The number of SA-approved Campus Clubs receiving services and benefits has continued to rise, and is around 150.[141]

84. In conclusion, the SA arbitrarily imposed additional arbitrary and unwritten requirements on the Applicants, such as 1) the Applicants' beliefs and opinions, 2) the alleged advocacy of an organization the SA claimed was affiliated with the organizer of an event the Applicants had suggested they would attend, and 3) whether the SA Executives consider the Applicants to be an "equity-seeking group". Thus, the SA Decision was based on irrelevant consideration, for unauthorized purposes, was made in bad faith and was not *bona fide*.

PART IV – ORDER

85. The Applicants request that this Court issue the declarations requested in their Notice of Application[142]: that the Decision of the SA was *ultra vires*, violated the SA's own bylaws and policies, failed to respect the Applicants' freedom of expression and association, violated the principles of natural justice, was made in bad faith based on irrelevant considerations and consequently is void.

86. While the SA is in the process of being wound up pursuant to a Court-ordered consensual framework, the two new student unions in place for UOIT and Durham College respectively, have been ordered to assume on behalf of the SA "any interest in, and be responsible for any liabilities under, and shall abide by any final determination in respect of, any Outstanding Claims", including expressly the present claim before this Court by the Applicants.[143]

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[140]Rexhmataj Transcript, pp 107-110, CAR Vol 3, Tab 11, pp 703-04.
[141] Cullen Transcript, p 48, CAR Vol 3, Tab 12, p 748.
[142] Notice of Application, para 1, CAR Vol 1, Tab 1, p 2.
[143]Dissolution and Discharge Order, October 13, 2017, C
AR Vol 3, Tab 9(C), pp 616-620.

87. The Applicants request that this Court order that the SA ratify SFTW as a Campus Club forthwith, or alternatively, that the SA reconsider SFTW's application for ratification with an open mind in good faith and in accordance with directions from this Honourable Court; and that the Court issue an order prohibiting the SA from limiting Durham College and UOIT students' and student groups' (including SFTW's) access to the services, research, information, materials and other resources of the SA on account of students' and students groups' opinions and beliefs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 21, 2017

Justice Centre for Constitutional Freedoms

PART V – TABLE OF AUTHORITIES

Case law

1. *Courchene v Carleton University Students' Association*, 2016 ONSC 3500.
2. *Association of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students Union*, [2008] O.J. No. 3344.
3. *Rakowski v. Malagerio*, 2007 CanLII 2214 (Ont SCJ).
4. *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 SCR 165.
5. *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570.
6. *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573.
7. *Pal et al v Chatterjee et al*, 2013 ONSC 1329.
8. *McLachlan v Burrard Yacht Club*, 2008 BCCA 271.
9. *Lee v Yeung*, 2012 ABQB 40.
10. *Ge c Canadian Federation of Students, 2015 QCCS 19*.
11. *Club de soccer de ville Sainte-Antoine v Association régionale de soccer des Laurentides, 2005 CanLII 31366 (QC CS)*.
12. *Mayan v World Professional Chuckwagon Association*, 2011 ABQB 140.
13. *University of Victoria Students' Society v Canadian Federation of Students*, 2011 BCSC 122.
14. *Polish National Union of Canada v Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134.
15. *Farren v Pacific Coast Amateur Hockey Association*, 2013 BCSC 498.
16. *Barrie v Royal Colwood Golf Club*, 2001 BCSC 1181.
17. *Garcia v Kelowna Minor Hockey Association*, 2009 BCSC 200.
18. *Cohen v Hazen Avenue Synagogue* (1920), 47 NBR 400 (SC).
19. *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.

20. *Old St. Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170.

21. *Mowat v University of Saskatchewan Students' Union,* 2006 SKQB 462.

Secondary Sources

1. CED (online), Judicial Review and Statutory Appeals.

Statutes

1. *Ontario Colleges of Applied Arts and Technology Act*, SO 2002 c 8, Sched F.