

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DIANE ZETTEL, CAMERON GRANT AND CHAD HAGEL

Applicants

and

UNIVERSITY OF TORONTO MISSISSAUGA STUDENTS' UNION

Respondent

APPLICATION UNDER section 97 of the *Court of Justice Act* and rule 14.05 of the *Rules of Civil Procedure*.

APPLICANTS' FACTUM

December 21, 2017

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PART I – OVERVIEW

1. The issue before this Court is whether student union executives are permitted to intentionally obstruct and prevent students from acquiring student club status, while being clearly motivated by disagreement with those students' beliefs and opinions.

2. At the University of Toronto Mississauga ("UTM"), freedom of expression is expressly held to be one of the three "most crucial of all human rights."¹ Significantly, the first mission of the University of Toronto Students' Union ("UTMSU") is to safeguard the rights of students, including their freedom of expression, regardless of their "personal or political beliefs."²

3. In this case, UTMSU specifically decided that the Applicants' student group, UTM Students for Life ("SFL"), could no longer be a recognized campus club and access the benefits of the student union because the student union executives objective to the "political" beliefs of the Applicants. When confronted with this blatant discrimination in violation of their own Letters Patent and policies, UTMSU then promptly applied a high level of scrutiny to SFL's documents and found technical discrepancies they then required the Applicants to correct.

4. The Applicants in turn promptly acted to correct the discrepancies. However, when the Applicants met to elect a fourth executive of SFL (a requirement UTMSU insisted must be fulfilled before their application for club status could be further considered), UTMSU's VP Campus Life, Russ Adade, invited four other UTMSU associates (including a Board member) and a fifth individual who had expressed opposition to SFL and the Applicants views, to attend the meeting. Not only that, but Mr. Adade further invited those five individuals to vote in SFL's election of a fourth executive. All five individuals voted against the required election, thereby blocking the

¹ University of Toronto "Purpose of the University", CAR Vol II, Tab 8(B), p 603.

² UTMSU *Constitution and Bylaws*, "Mission Statement", CAR Vol 1, Tab 2(D), p 56 [Emphasis added].

Applicants from meeting UTMSU's additional requirements and preventing further consideration of the Applicants' application.

5. Repeated attempts to appeal to the UTMSU Board of directors received no response.

6. UTMSU ignores its outrageous obstruction of the Applicants' attempts to satisfy its own requirements, and also maintains the basis of their Decision, discriminating against the Applicants and other club members on the basis of their personal and political beliefs.

7. Given no other avenue for recourse, judicial intervention is required to protect the rights of the Applicants and their fellow students to be free from ideological coercion and obstruction by their own student union which they are compelled to fund as a condition of attending university.

PART II – FACTS

A. The Parties

8. UTM Students for Life (“SFL”) is a student group established by students at UTM, including the Applicants, which, *inter alia*, seeks to encourage discussion on topics important to their belief system, including respect for the value of human life at all stages.³

9. The University of Toronto Mississauga Students' Union (“UTMSU”) is a student government organization representing all full-time undergraduate students enrolled in the University of Toronto Mississauga,⁴ approximately 13,300 students.⁵ UTMSU is funded by mandatory fees collected from students by the University of Toronto Mississauga, which the university then transfers to UTMSU.⁶ Students are not provided with an exemption from, or other opportunity to opt out of, paying student union dues.

³ Affidavit of Diane Zettel, sworn January 9, 2016 (“Zettel Affidavit”), para 6, Consolidated Application Record (“CAR”) Vol 1, Tab 2, p 14.

⁴ UTMSU *Constitution and Bylaws*, “Membership”, section 1, CAR Vol 1, Tab 2(D), p 63.

⁵ UTM “About Us” webpage, CAR Vol 2, Tab 8(A), p 601.

⁶ UTMSU *Constitution and Bylaws*, “Membership”, section 3, CAR Vol 1, Tab 2(D), p 63.

10. The first purpose of UTMSU in its Letters Patent and quoted in its Constitution and Bylaws is “[t]o safeguard the individual rights of the student, regardless of race, colour, creed, sex, nationality, place of origin, or **personal or political beliefs**”.⁷

11. UTMSU encourages students, whatever their interest or beliefs, to join or start clubs to represent students who share those interests.⁸ Campus clubs are assessed annually on the basis of 12 specific guidelines.⁹ UTMSU also has 18 specific requirements for recognized clubs.¹⁰ Each club must apply for and receive UTMSU recognition every academic year,¹¹ in order to receive valuable benefits and services. All student groups wishing to avail themselves of UTMSU services or participate in UTMSU events must be first recognized by UTMSU.¹² UTMSU recognition provides student clubs with the right to:

- Request financial assistance from UTMSU
- Request project aid from UTMSU
- Request the use of a club office, possibly furnished with a desk and a chair. UTMSU does not guarantee requests. In addition, clubs must be prepared to share office space with another club. The office distribution is at the discretion of the Clubs’ Coordinator.
- Have free advertising of club events by means of the Club poster wall, CFRE Radio, the online forums and calendar found at <http://www.utmsu.ca>.
- Have the use of a mailbox in the UTMSU office.
- Use and reserve rooms, equipment, food and beverage services on campus upon request in compliance with UTMSU policies:
 - Tables and rooms must be booked through UTMSU Equipment and food and beverage service must be booked through the appropriate departments on campus.
 - Club privileges may be revoked if the club does not pay their invoices or if rules and regulations outlined by UTMSU, Conference Services, Audio/Visual Department, or Food Services are not followed.¹³

⁷ UTMSU *Constitution and Bylaws*, “Mission Statement”, CAR Vol I, Tab 2(D), p 56 [Emphasis added].

⁸ See *Clubs’ Handbook*, “Club Constitution”, CAR Vol I, Tab 2(C), p 36.

⁹ *Union Clubs’ Policy*, “Recognition Guidelines”, CAR Vol I, Tab 2(B), pp 26-27.

¹⁰ *Clubs’ Handbook*, “Requirements for UTMSU Recognized Clubs”, CAR Vol I Tab 2(C), pp 34-35.

¹¹ *Union Clubs’ Policy*, “Recognition Guidelines”, CAR Vol I, Tab 2(B), p 26.

¹² *Union Clubs’ Policy*, CAR Vol I, Tab 2(B), p 26.

¹³ *Clubs’ Handbook*, “Club Privileges Recognized by UTMSU”, CAR Vol I, Tab 2(C), p 41.

12. No provision in UTMSU's Letters Patent, Constitution, Bylaws or policies grants UTMSU authority to withhold club recognition based on a student group's ideology, political or moral orientation, or the shared beliefs or viewpoints of club members.

B. UTMSU's Decision

13. SFL applied for and received club recognition from UTMSU in August 2014.¹⁴ On June 1, 2015, SFL sent UTMSU the required application for club re-recognition, including the same constitution that UTMSU had previously approved.¹⁵

14. On July 20, 2015, the UTMSU Clubs Committee, chaired by UTMSU Vice President of Campus Life, Russ Adade, met and approved all the club applications for re-recognition, except for the application of SFL.¹⁶ Members of the Committee expressed concern about the perceived "political nature" of SFL, and one Committee member made the motion "to send this club to consideration of the board due to its political nature, and provide time to members of the existing club to re-represent themselves to the board members."¹⁷ However, Francesco Otello-Deluca, UTMSU Vice President Internal, rejected the motion to provide the Applicants with an opportunity to be heard, stating:

I don't think its [*sic*] necessary to have this whole presentation thing. If the clubs committee feels that this club does not represent the UTMSU then they will not be a UTMSU recognized club.¹⁸

15. Mr. Adade agreed with Mr. Otello-Deluca, and moved to table the discussion of SFL's application to a future Clubs Committee Meeting.¹⁹

¹⁴ Zettel Affidavit, para 6, CAR Vol 1, Tab 2, p 14.

¹⁵ Zettel Affidavit, para 7, CAR Vol 1, Tab 2, p 14; see also SFL Constitution approved by UTMSU in August 2014, CAR Vol 1, Tab(A), pp 22-24.

¹⁶ Zettel Affidavit, para 8, CAR Vol 1, Tab 2, p 14; Clubs Committee Minutes for July 20, 2015, CAR Vol 1, Tab 2(E), pp 89-90.

¹⁷ Clubs Committee Minutes for July 20, 2015, CAR Vol 1, Tab 2(E), p 90.

¹⁸ Clubs Committee Minutes for July 20, 2015, CAR Vol 1, Tab 2(E), p 90.

¹⁹ Clubs Committee Minutes for July 20, 2015, CAR Vol 1, Tab 2(E), p 90.

16. At Clubs Committee meetings on August 17 and 19, 2015, there were unrecorded and *in camera* discussions about SFL.²⁰ SFL was not notified of, or given an opportunity to make representations at, these meetings.²¹

17. At the August 19 meeting, the Clubs Committee decided against re-ratifying SFL as a campus club. The decision to reject SFL's renewal as a campus club (the "Decision"), cited unspecified "adverse effects it will have on membership of UTMSU", perceived opposition to "the core documentation policy manual", "clear implications it will have on our relations with our sister unions, and affiliated organizations to which as an organization we must place highest interest in".²² The Decision contains neither evidence nor explanation as to how the renewal of SFL would do any of these things, and was incoherent in its rationale.

18. On cross-examination, Mr. Adade provided this explanation:

Q. What specific UTMSU policies were you concerned that [SFL] did not comply with?

A. It was just the fact that, like, in regards to the club being pro-life -- in regards to that, it kind of conflicted in terms of UTMSU. Even though it doesn't state in the UTMSU policy that they are specifically a pro-life club [*sic*], it is just that, in regards of UTMSU affiliation with, like CFS, they always be a part of a motion that has passed in regard CFS's mandate. CFS is a pro-choice organization. It was conflicting just in terms of, like, what kind of UTMSU's standpoint, viewpoints were on.²³

²⁰ Minutes of the Clubs Committee meetings on August 17 and 19, 2015, CAR Vol 1, Tab 2(F), pp 95-97.

²¹ Zettel Affidavit, para 9, CAR Vol 1, Tab 2, p 14.

²² Minutes of the Clubs Committee, August 19, 2015, CAR Vol 1, Tab 2(F), p 97: "I motion that you rule item 4 of the clubs committee meeting agenda number 3 out of order, due to the adverse effects it will have on membership of UTMSU. And in clear contrast opposes to the core documentation policy manual as adopted, and clear implications it will have on our relations with our sister unions, and affiliated organizations to which as an organization we must place highest interest in the institution instead of a single occasion."

²³ Transcript of Cross-Examination of Russ Adade, March 15, 2016 ("Adade Transcript"), 6:19-7:8, CAR Vol 2, Tab 11, pp 680-81.

19. UTMSU is a member of the Canadian Federation of Students (“CFS”), whose membership includes student unions across Canada.²⁴ In 2008, CFS had passed a motion encouraging its member student unions not to recognize student clubs with pro-life views.²⁵

20. Mr. Adade communicated the Decision to the UTMSU Board of Directors in his August report, stating:

Students For Life, which has been recognized by UTMSU in the past, was not recognized for the up-coming school year due to their stance on Abortion, in terms of being Pro-Life and using their platform to tell women what they should do in those situations.²⁶

21. Neither Mr. Adade nor any other UTMSU representative had ever raised concerns with the Applicants about their previous years’ activities engaging with students, or any alleged instance of students with SFL “telling women what to do”.²⁷

22. The first notice the Applicants received indicating that UTMSU had any objections to their club was on August 26, 2015, when Mr. Adade emailed them to say that their application for re-ratification had been denied.²⁸ Mr. Adade informed the Applicants that he, the chair of the Clubs Committee, had denied their application for club recognition because, he alleged, SFL’s mandate was in direct conflict with the mission statement of UTMSU.²⁹ Mr. Adade indicated that the Decision had been ratified by the UTMSU Board of Directors, but that the Applicants could request that the Board re-vote on the application.³⁰

²⁴ Zettel Affidavit, para 10, CAR Vol 1, Tab 2, p 15.

²⁵ See Excerpts of Opening Plenary Minutes, May 22-25, 2008, “k. Motion to Create Organizing Kit”, CAR Vol 1, Tab 2(H), p 108: “Be it resolved that member locals that refuse to allow anti-choice organizations access to their resources and space be supported”.

²⁶ Executive Report from Vice President Campus Life, July 22-August 20, 2015, “Clubs Committee”, CAR Vol 1, Tab 2(I), p 112.

²⁷ Transcript of Cross-Examination of Francesco Otello-Deluca, March 15, 2016 (“Otello-Deluca Transcript”), 11:5-11:7, 12:10-12:17 CAR Vol 2, Tab 10, pp 629-630; Transcript of Cross-Examination of Russ Adade, March 15, 2016 (“Adade Transcript”), 10:14-11:5, CAR Vol 2, Tab 11, pp 681-682.

²⁸ Zettel Affidavit, para 12, CAR Vol 1, Tab 2, p 15; Email from Russ Adade, CAR Vol 1, Tab 2(J), p 115.

²⁹ Zettel Affidavit, para 12, CAR Vol 1, Tab 2, p 15; Email from Russ Adade, CAR Vol 1, Tab 2(J), p 115.

³⁰ Ibid.

23. Four times, on September 1, 4, 10 and 21, 2015, the Applicants emailed Mr. Adade, requesting that he explain to SFL what in their club mandate was in conflict with UTMSU's mission statement.³¹

24. Mr. Adade did not reply until September 23, 2015, when he told the Applicants that SFL's constitution directly conflicted with UTMSU's mission statement because "you are telling folks especially women what to do with their bodies."³² Mr. Adade further stated that "you folks can't put them down for making a decision that doesn't fit with your mandate."³³ Mr. Adade did not provide any examples of SFL members "telling folks, especially women what to do with their bodies" or "put[ting] them down".³⁴ Mr. Adade once again informed the Applicants that they could request that the Board of Directors re-vote on the Decision.³⁵

C. The Applicants' Attempts to Appeal the Decision

16. In emails dated September 29 and October 13, 2015, the Applicants asked UTMSU Vice President Internal, Francesco Otello-DeLuca, to inform them of the date of the next UTMSU Board meeting, so they could appeal the Decision.³⁶

17. On October 16, 2015, Mr. Otello-DeLuca replied, stating that the next Board meeting would be the week of October 26, 2015, with the specific date and time to be determined. Mr. Otello-DeLuca further stated that he would keep the Applicants posted on "whether a board meeting is the right space for an appeal."³⁷ The Applicants were, by now, about six weeks into

³¹ Emails from SFL, September 1, 4, 10 and 21, 2015, CAR Vol 1, Tab 2(K), pp 117-118.

³² Email from Russ Adade, September 23, 2015, CAR Vol 1, Tab 2(L), p 120.

³³ Email from Russ Adade, September 23, 2015, CAR Vol 1, Tab 2(L), p 120.

³⁴ Zettel Affidavit, para 14, CAR Vol 1, Tab 2, p 16.

³⁵ Zettel Affidavit, para 14, CAR Vol 1, Tab 2, p 16.

³⁶ Zettel Affidavit, para 15, CAR Vol 1, Tab 2, p 16; Emails from SFL, September 29 and October 13, 2015, CAR Vol 1, Tab 2(M), p 122.

³⁷ Emails from Otello-DeLuca, October 16, 2015, CAR Vol 1, Tab 2(N), p 124.

the school year, and had lost their opportunity to participate in clubs week and related opportunities that other campus clubs benefit from each September.

18. On October 19, 2015, the Applicants, through their counsel, sent a letter to UTMSU's Board of Directors outlining how the Decision violated students' freedom of expression and association and UTMSU's duties under its Letters Patent, Constitution and Bylaws, and urging the Board to reverse the Decision.³⁸

19. On October 26, 2015, Mr. Adade, who had earlier directed the Applicants to appeal to the UTMSU Board, now told them that the Clubs Committee (which had made the Decision in the first instance) would hear the appeal of the Decision.³⁹ The Applicants explained that they had a legitimate expectation and right to have the UTMSU Board of Directors decide the appeal of the Decision, but that they were willing to meet with the Clubs Committee.⁴⁰

D. UTMSU's Attempt to Change the Basis of the Decision

20. On November 3, 2015, Mr. Adade informed the Applicants that the hearing before the Clubs Committee would be on November 6, 2015. Mr. Adade contradicted his prior assertions that SFL's pro-life position had occasioned the Decision, saying instead:

The reasoning behind the decision of the clubs committee to revoke club status for your club is due to the violations and discrepancies we found within your constitution in relation to the clubs handbook and UTMSU operational policy as it pertains to clubs.⁴¹

21. Prior to this November 3 email, SFL had never been advised that its constitution was deficient in any way. In fact, SFL had been approved in 2014 with the same constitution that Mr. Adade now claimed was the reason for the cancellation of club status.⁴²

³⁸ Letter from Counsel, October 19, 2015, CAR Vol I, Tab 2(O), p 126-131.

³⁹ Email from Russ Adade, October 26, 2015, CAR Vol I, Tab 2(P), p 133.

⁴⁰ Email from SFL, October 29, 2015, CAR Vol I, Tab 2(Q), p 135.

⁴¹ Email from Russ Adade, November 3, 2015, CAR Vol I, Tab 2(R), p 137.

⁴² Zettel Affidavit, para 21, CAR Vol I, Tab 2, p 17.

22. In response to this claim that their SFL club constitution was flawed, the Applicants held a SFL meeting on November 5, passed motions making eight amendments to their constitution, and forwarded a copy of their amended constitution to Mr. Adade.⁴³

23. On November 6, 2015, Ms. Zettel and Mr. Grant met with the UTMSU Clubs Committee.⁴⁴ Ms. Zettel and Mr. Grant explained why the Decision violated their rights and UTMSU's own policies.⁴⁵ The Clubs Committee did not dispute that the basis of the Decision was SFL's beliefs and opinions.⁴⁶ However, the Clubs Committee refused to consider Ms. Zettel's and Mr. Grant's presentation on why the Decision was wrong.⁴⁷ Instead, the Clubs Committee ordered that SFL elect a fourth (additional) executive member and then have the four SFL executives ratify the amendments previously made to SFL's constitution, with a UTMSU representative present.⁴⁸ No UTMSU rule requires that clubs have all their executive positions filled in order for constitutional amendments to be effective, or that a UTMSU representative be present.

E. UTMSU's Interference with SFL's Election

24. On November 23, 2015, Ms. Zettel, Mr. Grant, Mr. Hagel and SFL member Marigrace Noronha met with the intention of electing Ms. Noronha as the fourth executive member of SFL.⁴⁹ Mr. Adade was also present at the meeting.⁵⁰ Before the meeting started however, five other individuals entered the meeting room: Salma Fakhry (Associate to UTMSU Vice President

⁴³ Zettel Affidavit, para 22, CAR Vol I, Tab 2, p 17; Minutes for Constitution Amendment Meeting, November 5, 2015, CAR Vol I, Tab 2(U), p 145-47; UTM Students for Life Club Constitution, amended November 5, 2015, CAR Vol I, Tab 2(V), p 149-53.

⁴⁴ Zettel Affidavit, para 23, CAR Vol I, Tab 2, p 18.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Zettel Affidavit, para 25, CAR Vol I, Tab 2, p 18: Notice of the meeting had been given to all SFL members of the meeting, but since the meeting was held merely to address technical issues in SFL's constitution and organization, no other SFL members attended the meeting. Aside from the SFL's membership list, the only other person who was notified of the meeting was Mr. Adade. Ibid.

⁵⁰ Zettel Affidavit, para 25, CAR Vol I, Tab 2, p 18.

University Affairs and Academics), Taman Khalaf, Ariana Serapigia, Hashim Yussuf (Associate to Vice President University Affairs and Academics) and Nyasha Chikowore (collectively the “Non-Members”).⁵¹ The Non-Members were not members or supporters of SFL, nor had they previously been involved with SFL.⁵² Instead, the Non-Members stated: “We’re here with Russ [Mr. Adade].”⁵³ Before the meeting, Mr. Adade had given the Non-Members “a brief rundown, like this is how there [*sic*] general meeting is set up in regards to the agenda.”⁵⁴

25. The Non-Members had previously expressed “issues and concerns” and “opposition to SFL” because of its “mandate and what the club stands for”.⁵⁵ They had expressed their view that “women should have the right to do what they please with their own body” and that they didn’t feel comfortable with the Applicants “expressing viewpoints about being pro-life.”⁵⁶ Mr. Adade invited the Non-Members to the SFL club meeting (“If you folks feel that strongly about it, you should go to the general meeting”),⁵⁷ and further welcomed them to vote in the meeting. At the meeting, the non-members raised their objection to SFL’s “stance of being a pro-life club.”⁵⁸

26. The SFL Constitution requires that club members have “signed up.”⁵⁹ In order to place an individual’s name on the Clubs’ membership list, they must provide their full name, student number and e-mail (or some alternative method of contact with the students).⁶⁰ The Non-Members did not provide this information to the Applicants or ask to join SFL as members, either before or

⁵¹ Zettel Affidavit, para 26, CAR Vol I, Tab 2, p 18.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Adade Transcript, 65:10-20, CAR Vol II, Tab 11, p 695.

⁵⁵ Adade Transcript, 45:6-48:5, 61:18-62:7, CAR Vol II, Tab 11, pp 690-91, 694.

⁵⁶ Adade Transcript, 63:15-65:9, CAR Vol II, Tab 11, p 695.

⁵⁷ Adade Transcript, 65:2-4, CAR Vol II, Tab 11, p 695.

⁵⁸ Adade Transcript, 66:25-68:12, CAR Vol II, Tab 11, p 695-96

⁵⁹ UTM Students for Life Club Constitution, amended November 5, 2015, section 3.3, CAR Vol I, Tab 2(V), p 149-53; see also UTM Students for Life Club Constitution, as of April 2, 2014, section 3.3, CAR Vol I, Tab 2(A), p 22.

⁶⁰ Adade Transcript, 53:3-54:12, CAR Vol II, Tab 11, p 692.

after the meeting.⁶¹ The Non-Members had no right to participate in an SFL club vote, but Mr. Adade insisted that they be permitted to do so.

27. During the meeting, Mr. Grant nominated Ms. Noronha for Vice President of SFL, supported by Ms. Zettel and Mr. Hagel.⁶² The vote was taken by secret ballot and the result was that the motion to elect the required fourth executive was defeated by a vote of 5-4.⁶³

28. In short, UTMSU actively and deliberately sabotaged SFL's efforts to comply with the UTMSU demand.

F. UTMSU Ignores SFL's Communications

29. On November 24, 2015, counsel for the Applicants sent a letter to the UTMSU Board of Directors, setting out Mr. Adade's bad faith abuse of process, and requesting that the Board take action immediately to stop the violations of the Applicants' rights, no later than November 30, 2015.⁶⁴

30. The UTMSU Board did not respond to the Applicants' counsel's letters of October 19 or November 24.⁶⁵

31. Rather, on December 1, 2015, Mr. Adade sent the Applicants an email that entirely ignored their counsel's November 24 letter, admonishing SFL for not having more of its members attend the November 23 meeting.⁶⁶ On behalf of the Clubs Committee, Mr. Adade advised SFL that they would have to attempt to elect a fourth executive once again, and go through the very same process

⁶¹ Zettel Affidavit, para 26, CAR Vol I, Tab 2, p 18; Otello-Deluca Transcript, 111:24-115:20, CAR Vol II, Tab 10, 655-656.

⁶² Zettel Affidavit, para 27, CAR Vol I, Tab 2, p 19; Minutes for General Meeting, November 23, 2015, CAR Vol I, Tab 2(W), p 155-56.

⁶³ Ibid. Mr. Adade did not vote, so therefore it is clear that each of the Non-Members voted against the election of a fourth executive for SFL, which the Clubs Committee had stated that SFL must have.

⁶⁴ Letter from Counsel, November 24, 2015, CAR Vol I, Tab 2(X), pp 158-62.

⁶⁵ Zettel Affidavit, para 31, CAR Vol I, Tab 2, p 19.

⁶⁶ Zettel Affidavit, para 32, CAR Vol I, Tab 2, pp 19-20; Email from Russ Adade, December 1, 2015, CAR Vol I, Tab 2(Y), pp 164-65.

that Mr. Adade and the Non-members had deliberately thwarted on November 23, 2015.⁶⁷ By this time, the Applicants had lost three months of the eight-month school year, for their club to exist on campus.

32. On December 15, 2015, the Applicants' counsel advised the UTMSU Board of Directors and the UTMSU Executive in an email that, given the abuse of process, bad faith and unresponsiveness of UTMSU described above, the Applicants had no choice but to commence a court application against UTMSU to defend the Applicants' rights.⁶⁸

PART III – ISSUES AND LAW

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

- A. Whether the Court has jurisdiction to review UTMSU's Decision to deny the Applicants' application for Club Status; and
- B. Whether UTMSU's Decision to deny the Applicants' application for Club Status
 - i. violated UTMSU's own Letters Patent, Constitution, Bylaws or policies,
 - ii. violated the principles of natural justice, or
 - iii. violated UTMSU's duty of good faith.

34. 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

35. The Ontario Superior Court of Justice possesses jurisdiction to review the decisions of student unions such as UTMSU.⁶⁹ In reviewing the decisions of student unions, courts generally

⁶⁷ Ibid.

⁶⁸ Email from Counsel, December 15, 2015, CAR Vol I, Tab 2(Z), p 167.

⁶⁹ 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*,

apply the principles of private administrative law.⁷⁰ A student union is not a “private club that would expect to conduct its business in private, and without a level of accountability.”⁷¹ Rather, there is a “substantial public interest” in the services and responsibilities of a student union,⁷² and this factor weighs in favour of the 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.

36. The test set out by the Supreme Court of Canada for jurisdiction in the case of “private” decision makers does in fact come 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**”.⁷³

37. The Applicants are fee paying members of UTMSU, and therefore have a contractual right to expect that UTMSU will comply with its Letters Patent, Constitution, Bylaws and policies in making decisions, particularly decisions that directly affect the Applicants. Further, as students at the second largest division of the University of Toronto, the Applicants also have a right to freedom

[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”.

⁷⁰ See *APUS v UTMSU*; *Rakowski*; *UVSS v CFS*.

⁷¹ *Courchene* at para 10.

⁷² *Ibid.*

⁷³ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 SCR 165 [*Hofer*], p. 175 [emphasis added].

of expression on campus,⁷⁴ which UTMSU is obligated to protect regardless of their “personal or political beliefs.”⁷⁵

38. The Applicants have legal rights in relation to UTMSU. The Applicants submit that the rights and interests at stake, their own as well as those of other dues-paying students, are of “sufficient importance” to warrant the Court’s review. This issue thus calls for consideration of the importance of the matter and a comparative analysis of other court decisions that have found jurisdiction for review under private administrative law.

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

39. Student life on a university campus is significantly affected by the actions of the student union, which plays a critical part in providing students with valuable services and with opportunities for extra-curricular engagement and interaction. In the case of UTMSU, one of its primary purposes is to create a “common framework within which students can communicate, exchange information and share experience, skills and ideas,”⁷⁶ that common framework being recognized campus clubs.⁷⁷

40. Recognition as a Campus Club is one of the core benefits students receive from their UTMSU membership and forced dues. In fact, “all groups wishing to avail themselves of Union

⁷⁴ University of Toronto “Purpose of the University”, CAR Vol II, Tab 8(B), p 603: “The University of Toronto is dedicated to fostering an academic community in which the learning and scholarship of every member may flourish, with vigilant protection for individual human rights, and a resolute commitment to the principles of equal opportunity, equity and justice. Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.”

⁷⁵ UTMSU *Constitution and Bylaws*, “Mission Statement”, CAR Vol I, Tab 2(D), p 56: “As stated in the Letters Patent the Mission Statement of the Union is: 1. To safeguard the individual rights of the students, regardless of race, colour, creed, sex, nationality, place of origin, or personal or political beliefs”.

⁷⁶ UTMSU *Constitution and Bylaws*, “Purposes of the Union”, CAR Vol I, Tab 2(D), p 57.

⁷⁷ See *Union Clubs’ Policy*, CAR Vol I, Tab 2(B), p 26: “The Union must maintain a policy and mechanism for the recognition of campus organizations.”

services and to participate in Union sponsored events, must be first recognized by the Union.”⁷⁸ Thus, in order for the Applicants to freely advertise to their fellow classmates on UTMSU poster boards, the Clubs Poster Wall, CFRE Radio, online forums and the UTMSU calendar, they must have UTMSU recognition.⁷⁹ In order for them to book space in their own UTMSU student centre, reserve equipment and receive food and beverage services on campus, the Applicants must have UTMSU recognition⁸⁰ (or plenty of extra money to pay for services they already pay for through their dues).⁸¹ In order for the Applicants to apply for club office space, they must have UTMSU recognition.⁸² UTMSU has over 100 recognized Campus Clubs, which draw from an annual clubs budget of \$120,000. Each club receives a minimum of \$350 per year, which is not an insignificant sum to cash-strapped students seeking to engage their peers in extra-curricular events. Some clubs receive \$5,000 or more,⁸³ depending on their applications for funding requests.⁸⁴

41. However, the most significant and important effect of UTMSU’s Decision against the Applicants is that it specifically and intentionally targets the Applicants’ personal and political beliefs, thereby eliminating them from UTMSU’s “common framework within which students can communicate, exchange information and share experience, skills and ideas”. By directly violating the first mission of UTMSU and one of its core purposes, the Decision deprives UTMSU members of authentic diversity and freedom of expression, which are “the most crucial of all human rights” and necessary hallmarks of a flourishing academic community.⁸⁵

⁷⁸ Ibid.

⁷⁹ *Clubs’ Handbook*, “Club Privileges Recognized by UTMSU”, CAR Vol I, Tab 2(C), p 41.

⁸⁰ Ibid.

⁸¹ Otello-Deluca Transcript, 45:21-46:13, CAR Vol II, Tab 10, p 638. Booking a room can cost up to \$125 per event.

⁸² Ibid.

⁸³ Ibid at 44:11-45:20; Otello-Deluca Affidavit, para 21, CAR Vol II, Tab 4, p 191.

⁸⁴ *Clubs’ Handbook*, “UTMSU Financial Assistance System”, CAR Vol I, Tab 2(C), p 41.

⁸⁵ UTMSU *Constitution and Bylaws*, “Mission Statement” and “Purposes of the Union”, CAR Vol I, Tab 2(D), pp 56-57; University of Toronto “Purpose of the University”, CAR Vol II, Tab 8(B), p 603.

42. Separate and 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.”⁸⁶ Further, freedom of expression is not simply a right for the speaker, it is also a right for the hearers, who regardless of their views are enriched by hearing the beliefs and opinions of others.⁸⁷ The Decision not only deprives the Applicants (and the 74 other club members) of “the most crucial of all human rights”, it also deprives the other 13,000 student members of UTMSU of their right to the enriching experience of receiving a diverse perspective. Real diversity – intellectual, social and cultural – cannot exist on a campus without freedom of expression.

43. The national importance of this issue is revealed by the fact that the UTMSU executives did not base their Decision on UTMSU policies, but rather on the policies of the Canadian Federation of Students (“CFS”). CFS has revealed its intention to discriminate against students such as the Applicants simply on the basis of their differing belief on abortion.⁸⁸ It is apparent that students with a pro-life view are also targeted on other campuses⁸⁹ and that where discrimination against one view succeeds, discrimination against other views is likely to follow.⁹⁰

44. As will be discussed below, the manner in which UTMSU made the Decision – in violation of its own bylaws and policies, in breach of the principles of natural justice, and in bad faith – provides further cause for this Court to review the Decision.⁹¹

⁸⁶ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at para 12.

⁸⁷ *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at pp 766-67; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120 at paras 40-41 citing *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at pp 1339-1340.

⁸⁸ Excerpts of Opening Plenary Minutes, May 22-25, 2008, CAR Vol I, Tab 2(H), p 108:

⁸⁹ See *Naggar et al v The Student Association at Durham College and UOIT*, Court File No. CV 16-550599.

⁹⁰ See *Grant v Ryerson Students Union*, 2016 ONSC 5519 (concerning a pro-life campus club at Ryerson) and *Arriolo v Ryerson Students Union*, Court file no.CV 16-550599 (concerning a men’s issues campus club at Ryerson).

⁹¹ *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”.

45. In light of the requirement that all students at Canada's public universities must pay dues to their student union, and in light of the necessity of attending university in order to pursue a career, and in light of the importance of free expression to Canadian society, the Applicants submit that the rights and interests at issue in this case are sufficiently important to warrant this Court's review under private administrative law.

46. In *Pal v Chatterjee*, for example, the Ontario Superior Court of Justice, reviewed the commencement of disciplinary proceedings in a private and voluntary religious organization, where it 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**".⁹² In the present case, the UTMSU Decision prevents the Applicants from accessing UTMSU advertising, the use of UTMSU space, equipment, food and beverage services, club office and locker space and significant base funding and financial aid (up to \$5,000). For UTMSU to suggest that the Applicants just pay for their own access to similar opportunities and services⁹³ ignores the reality of financial barriers faced by university and college students. This UTMSU position also ignores the fact that the Applicants have already paid for the above benefits through remitting their mandatory fees. UTMSU provides funding so students can engage in the "common framework within which students can communicate, exchange information and share experience, skills and ideas", without being prevented by financial inequality. The Decision excludes the Applicants from this common framework, purely on the basis of these students' beliefs and opinions. This Decision, especially in the context of mandatory union membership at a public university, is at least as significant of a matter as a membership decision in a purely private and voluntary religious organization.

⁹² *Pal*, at para 32.

⁹³ Otello-Deluca Affidavit,

47. 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”.⁹⁴ While a person’s social and family life are important, the Applicants submit that participation in a “common framework within which students can communicate, exchange information and share experience, skills and ideas” on a university campus is even more important, and therefore more worthy of this Court’s review. In the formative and limited days of students’ academic careers, depriving them of this opportunity, in direct violation of UTMSU’s Mission Statement, the principles of natural justice and the duty of good faith, is sufficiently important to warrant this Court’s review.

ii. *The Applicants are not required to further attempt to exhaust the internal remedies of UTMSU*

48. “[C]ourts will intervene in the private activities of non-statutory bodies where the aggrieved parties have no other remedy available to them”⁹⁵ and that courts “must intervene in the case of an unreasonable or arbitrary decision” (stated in a case concerning the Canadian Federation of Students).⁹⁶

49. UTMSU claims that “SFL has not exhausted its remedies”.⁹⁷ However, the Applicants attempted to appeal the Decision and comply with every direction from UTMSU, only to have UTMSU executives, employees and a board member intentionally prevent them from carrying out those same directions.

50. The Applicants have gone above and beyond any reasonable expectation in seeking to exhaust internal remedies. The Applicants recognize that where there is an “adequate alternative

⁹⁴ *McLachlan*, at para 9.

⁹⁵ *Lee v Yeung*, 2012 ABQB 40 [*Lee*] at para 52.

⁹⁶ *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 para 28-29.

⁹⁷ Otello-Deluca Affidavit, paras 88-90, CAR Vol II, Tab 4, pp 208-09.

remedy” such as an internal appeal, it must be exhausted before turning to the Court.⁹⁸ The **exceptional circumstances** of this case warrant, and indeed require, this Court’s oversight without further futile attempts to comply with further undefined requirements imposed by Mr. Adade, Mr. Otello-DeLuca or other members of the Clubs’ Committee. Past behaviour is the best indicator of future behaviour, and no doubt UTMSU will, apart from this Court’s intervention, thwart and sabotage the Applicants’ sincere efforts to comply with UTMSU’s demands. While the denial of the Applicants’ right to natural justice (further described below) does not in itself constitute “exceptional circumstances”,⁹⁹ UTMSU’s outrageous actions thwarting the Applicants’ attempts to comply with UTMSU’s own requirements constitute “exceptional circumstances.” Such behaviour goes beyond UTMSU’s bad faith (also described below). Rather, UTMSU’s obstruction of SFL’s vote compromises the integrity of the Clubs’ Committee’s review, and in fact, since it was left un-remedied by the Board, the integrity of UTMSU itself. Due to the actions detailed above, UTMSU has lost jurisdiction to further handle the issue of SFL’s application for club status and the intervention of the court is required.

51. After writing the UTMSU Board two letters of appeal, without receiving any response, counsel for the Applicants then emailed the UTMSU Board indicating that they had left the Applicants “no choice but to commence a court action against UTMSU in order to defend their legal rights.”¹⁰⁰ The Applicants have no other place to turn for relief than to this Court.

⁹⁸ *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, para 64, citing *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

⁹⁹ See *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, para 53.

¹⁰⁰ Email to UTMSU Board of Directors, December 15, 2015, CAR Vol I, Tab 2(Z), p 167.

B. UTMSU’s Decision Violates the Principles of Natural Justice, the UTMSU’s Letters Patent, Constitution, Bylaws and Policies, and UTMSU’s Duty of Good Faith

52. In *Hofer*, the Supreme Court reiterated the standard of review courts apply in reviewing the decisions of private associations: “first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.”¹⁰¹

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

i. UTMSU failed to comply with its own Letters Patent, Constitution, Bylaws and Policies

54. UTMSU executives only have the authority to make decisions authorized by its Letters Patent, Constitution, Bylaws and Policies. If UTMSU’s Decision against the Applicants was not authorized by, or in fact violated, the provisions of its Letters Patent, Constitution, Bylaws and Policies, that Decision is *ultra vires* and must be reversed.¹⁰² Further, in cases of a dispute over the interpretation of the provisions in UTMSU’s documents, “the doctrine of *contra proferentem* would require that it be resolved against the Association.”¹⁰³ UTMSU is not permitted to base its decision on irrelevant considerations.¹⁰⁴

1. UTMSU’s reliance on CFS’ policy violates its own prevailing policies

55. The first provision of UTMSU’s “Mission Statement” requires that UTMSU protect student rights regardless of “personal or political beliefs”,¹⁰⁵ and yet UTMSU refused to re-ratify the Applicants Campus Club precisely because of their “personal and political beliefs.”¹⁰⁶

¹⁰¹ *Hofer*, at para 10 citing *Baird v Wells* (1890), 44 Ch. D. 661, at p 670

¹⁰² *Mayan v World Professional Chuckwagon Association*, 2011 ABQB 140; *Ge c Canadian Federation of Students*, 2015 QCCS 19; *Kwantlen University College Student Association v Canadian Federation of Students—British Columbia Component*, 2011 BCCA 133 [*KUCSA v CFS-BC*]

¹⁰³ *Mayan*, at paras 49-51.

¹⁰⁴ *University of Victoria Students’ Society v Canadian Federation of Students*, 2011 BCSC 122 [*UVSS v CFS*] at para 58.

¹⁰⁵ *UTMSU Constitution and Bylaws*, “Mission Statement”, CAR Vol I, Tab 2(D), p 56.

¹⁰⁶ *Otello-Deluca Transcript*, 81:15-85:23, CAR Vol II, Tab 10, p 647.

56. UTMSU is charged by its own “Purposes” to create a “**common** framework where students can communicate, exchange information, and share experience, skills and ideas”.¹⁰⁷ However, by its Decision, UTMSU has branded Campus Clubs an **exclusive** framework, only attainable by those students who endorse all the viewpoints that UTMSU endorses.¹⁰⁸

57. UTM is part of the University of Toronto,¹⁰⁹ which recognizes that freedom of speech is one of “the most crucial of all human rights” in a university context.¹¹⁰ Yet, in complete disregard of this crucial right it is charged to protect, UTMSU based its Decision against the Applicants squarely on the expression of their pro-life views:

Students For Life, which has been recognized by UTMSU in the past, was not recognized for the up-coming school year due to their stance on Abortion, in terms of being Pro-Life and using their platform to tell women what they should do in those situations.¹¹¹

58. What could lead UTMSU to so directly violate their own Mission Statements, Purpose and the crucial rights of university students? UTMSU executive Francesco Otello-Deluca makes an unsupported statement that “[a]s a member of CFS, UTMSU endorses CFS’s policies, including the Women Students’ Issues policies.”¹¹² On cross-examination, Mr. Otello-Deluca states that he is not certain what CFS policies UTMSU has stood by, or will stand by in the future.¹¹³ In regard to the Women’s Students’ Issues Policy, he states: “I know for certain that the members of UTMSU

¹⁰⁷ UTMSU *Constitution and Bylaws*, “Purposes of the Union”, CAR Vol I, Tab 2(D), p 57 [emphasis added].

¹⁰⁸ Otello-Deluca Transcript, 31:11-19, CAR Vol II, Tab 10, p 634:

Q. In regards to student groups, they must endorse all the policies that UTMSU endorses, as well, in order to receive the benefits?

A. To receive club status, they must comply with our mandates, yes.

Q. In compliance, you mean endorsing those policies?

A. Yes.

¹⁰⁹ UTM “About Us” webpage, CAR Vol II, Tab 8(A), p 601: “Established in 1967, the University of Toronto Mississauga is the second-largest division of U of T”.

¹¹⁰ University of Toronto, “Purpose of the University”, CAR Vol II, Tab 8(B), p 603.

¹¹¹ Executive Report from Vice President Campus Life, July 22-August 20, 2015, “Clubs Committee”, CAR Vol I, Tab 2(I), p 112;

¹¹² Otello-Deluca Affidavit, para 11, CAR Vol II, Tab 4, p 189.

¹¹³ Otello-Deluca Transcript, 22:1-11, CAR Vol II, Tab 10, 632.

who do identify as women and do identify as female are in support of this policy. We as a whole support this policy.”¹¹⁴ However, Mr. Otello-Deluca is unable to cite any UTMSU policy or statement which labels UTMSU as a pro-choice organization, though he claims it is.¹¹⁵ Despite this obvious uncertainty and vagueness, Mr. Otello-Deluca affirms that Campus Clubs must “comply with”, “agree with” and not take a position contrary to a policy UTMSU has chosen (in an undetermined manner) to stand for. He requires that all Campus Clubs not contradict the “mandate of the union”, which may be based on some unwritten, unclear and undisclosed endorsement of another entity’s policy.¹¹⁶

59. UTMSU’s attempt to base its Decision on CFS policy is *ultra vires*. It is also contrary to UTMSU’s own policies to facilitate real diversity of expression on campus.

2. UTMSU violated its “Warning System” for removal of club status

60. UTMSU’s *Clubs’ Handbook* provides that “[a] written warning will be presented to any club or club executive that fails to abide by the regulations announced by the Clubs’ Coordinator and/or outlined in this handbook.”

61. Although UTMSU claims to have received complaints about SFL,¹¹⁷ it failed to provide any notice or warning to SFL prior to refusing to reinstate its club status in August 2015. This, in spite of UTMSU’s acknowledged “duty to discuss that and see if there is any action that could be taken” regarding complaints.¹¹⁸

¹¹⁴ Ibid.

¹¹⁵ Otello-Deluca Transcript, 29:1-16, CAR Vol II, Tab 10, 634.

¹¹⁶ Otello-Deluca Transcript, 24, CAR Vol II, Tab 10, 633.

¹¹⁷ Otello-Deluca Transcript, 11:5-7, 12:10-17, 74:20-25, 75:17-76:76, CAR Vol II, Tab 10, p 629-30, 645-46; Adade Transcript, 20:1-5, CAR Vol II, Tab 11, p 684.

¹¹⁸ Otello-Deluca Transcript, 74:11-19, CAR Vol II, Tab 10, p 645

3. UTMSU violated the membership and voting provisions of the Clubs' Handbook and SFL's constitution

62. UTMSU has created an outlandish interpretation of the membership and voting provisions listed in its handbook, apparently in an attempt to justify the bad faith voting of UTMSU's own personnel in SFL's vote to elect a fourth executive. On cross-examination, Mr. Otello-Deluca claims that all UTMSU members are automatically members of every campus club, "unless stated differently within the specific club constitution."¹¹⁹ In his affidavit,¹²⁰ Mr. Otello-Deluca appears to base his understanding on the interpretation of the following phrase:

[A] general meeting must occur where all members of the club are informed and invited through mass e-mail. The majority of the attendees to this general meeting must then vote in favour of the modification for it to be subsequently accepted.¹²¹

Rather than interpret the second sentence in light of the context of the paragraph, recognizing that since notification of the meeting is provided to "members of the club", the "attendees to this general meeting" would be some portion of the "members of the club", Mr. Otello-Deluca claims any attendee of the meeting can vote.¹²²

63. Such an interpretation leads to some rather absurd results, foremost of which is that people who are hostile to a club's beliefs or purpose are entitled to be members of that same club. This interpretation would mean, for example, that every conservative student on campus is automatically entitled to vote at a meeting of the campus NDP.¹²³ This means that students opposed to the mandate of a specific club could flood such a club's meeting and vote in negative changes.¹²⁴ While Mr. Otello-Deluca then recognizes the benefit of not letting opponents know

¹¹⁹ Otello-Deluca Transcript, 49:15-51:1, CAR Vol II, Tab 10, p 645

¹²⁰ Otello-Deluca Affidavit, para 28, CAR Vol II, Tab 4, p 193.

¹²¹ *Clubs' Handbook*, "Club Constitution", CAR Vol I, Tab 1(C), p 36.

¹²² Otello-Deluca Affidavit, para 28, CAR Vol II, Tab 4, p 193.

¹²³ Otello-Deluca Transcript, 56:20-23, CAR Vol II, Tab 10, p 641.

¹²⁴ Otello-Deluca Transcript, 56:24-59:4, CAR Vol II, Tab 10, p 641.

about one's club meetings,¹²⁵ when it comes to the repeated requirement in the *Clubs' Handbook* to notify all "members of the club", Mr. Otello-Deluca narrows his prior interpretation to include only those "who physically went to go sign up for that club."¹²⁶

64. Likewise, Mr. Otello-Deluca would require that any members on a club's membership list must have chosen to sign up for the club, and he further doubts whether a person who doesn't support the mandate of the club could be a listed member.¹²⁷

65. Regardless of a contorted interpretation of the *Clubs' Handbook* provisions of membership and voting, UTMSU recognizes that a Club's constitution prevails in stating these requirements: "whether a UTMSU member can vote at a Student Group's general meeting depends on the Student Group's constitution."¹²⁸

66. SFL's constitution requires that members have "signed up".¹²⁹ In regard to the five individuals who attended the SFL meeting to vote against the UTMSU-required election of a fourth executive, none of them asked to sign up as a member of SFL, nor did any of them become club members. Rather, they merely "signed in" at the meeting.¹³⁰

67. UTMSU violated the *Clubs' Handbook* and SFL's constitution by permitting the five non-members to vote, and to block the election of SFL's required fourth executive.

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

68. UTMSU, in its capacity as a domestic tribunal, is required to comply with the principles of natural justice in making the Decision affecting the Applicants' rights and interests. While the

¹²⁵ Otello-Deluca Transcript, 59:5-11, CAR Vol II, Tab 10, p 641.

¹²⁶ Otello-Deluca Transcript, 59:12-60:18, CAR Vol II, Tab 10, p 641-42.

¹²⁷ Otello-Deluca Transcript, 60:19-62:2, CAR Vol II, Tab 10, p 642.

¹²⁸ Otello-Deluca Affidavit, para 27, CAR Vol II, Tab 4, p 192; Otello-Deluca Transcript, 49:15-51:1, CAR Vol II, Tab 10, p 639.

¹²⁹ See SFL Constitutions, section 3.3, CAR Vol I and Vol II, Tabs 2(A), 2(V), 4(G) and 5(A), pp 22, 149, 408 and 575,

¹³⁰ Zettel Affidavit, para 27, CAR Vol I, Tab 2, p 19; Adade Transcript, 50:16-51:25, CAR Vol II, Tab 11, p 691-92.

precise content of the requirements of natural justice vary in context, those principles are generally held to require 1) notice, 2) an opportunity to be heard and 3) a decision maker with an unbiased, open mind.¹³¹

1. Notice and Opportunity to be Heard

69. Even the “elementary principles of right and justice” require that a person “have been informed of the nature of the charge against him, and given an opportunity to answer the same.”¹³² An adequate and timely notice allows a person to consider his or her position and either change course or prepare a defense.¹³³

70. UTMSU refused to provide the Applicants with any notice about UTMSU’s concerns with SFL until *after* UTMSU had conducted meetings on July 20, August 17 and August 19, 2015 related to SFL’s application, and *after* UTMSU had provided a written report to the UTMSU Board which had then allegedly ratified the Decision.¹³⁴ UTMSU in fact refused a motion of one of its Clubs’ Committee members to “provide time to members of the existing club to re-represent themselves to the board members.”¹³⁵ Mr. Otello-Deluca, a UTMSU Board member, supported by UTMSU VP Campus Life, Mr. Adade, rejected the notion of providing the Applicants with notice, or with an opportunity to be heard, and refused to recognize that SFL had any procedural rights, stating, “[i]f the clubs committee feels that this club does not represent the UTMSU then they will not be a UTMSU recognized club.”¹³⁶

¹³¹ *Hofer* at para 80. *Polish National Union of Canada v Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134 at 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.

¹³² *Hofer* at para 81, quoting *Cohen v Hazen Avenue Synagogue* (1920), 47 NBR 400 (SC) at p 409.

¹³³ *Hofer* at para 83.

¹³⁴ Executive Report from Vice President Campus Life, July 22-August 20, 2015, “Clubs Committee”, CAR Vol I, Tab 2(I), p 112; Email from Russ Adade, CAR Vol I, Tab 2(J), p 115.

¹³⁵ Clubs Committee Minutes for July 20, 2015, CAR Vol I, Tab 2(E), p 90.

¹³⁶ *Ibid.*

71. Further, after twice giving the Applicants notice that they would be able to appeal to the UTMSU Board,¹³⁷ UTMSU disregarded the Applicants' legitimate expectations to appeal to the Board, requesting instead that the Applicants' meet with the same Clubs' Committee which had already made the Decision against them.¹³⁸ Then on November 3, 2015, three days before the Applicants' appeal hearing before the Clubs Committee, UTMSU completely changed the basis for its Decision, stating "[t]he reasoning behind the decision of the clubs committee to revoke club status for your club is due to the violations and discrepancies we found within your constitution".¹³⁹

72. The Applicants attempted to address UTMSU's new found technical concerns, but they sensed the disingenuousness in UTMSU's altered reasoning. At the hearing on November 6, 2015, they attempted to address with the Clubs Committee how the Decision had violated their rights and UTMSU's own policies.¹⁴⁰ The Committee however, refused to consider the Applicants' submissions, insisting on only addressing the new found technical violations.¹⁴¹

73. Likewise, the UTMSU Board refused to hear or consider the Applicants' submissions. Three times, the Applicants sent direct communications to the UTMSU Board,¹⁴² which did not consider the appeal or provide any response.¹⁴³

74. UTMSU disregarded the Applicants' procedural rights, refusing even to consider the Applicants' attempt to exercise their basic right "to respond to the allegations" against them.¹⁴⁴

¹³⁷ Email from Russ Adade, CAR Vol I, Tab 2(J), p 115; Email from Russ Adade, September 23, 2015, CAR Vol I, Tab 2(L), p 120.

¹³⁸ Email from Russ Adade, October 26, 2015, CAR Vol I, Tab 2(P), p 133.

¹³⁹ Email from Russ Adade, November 3, 2015, CAR Vol I, Tab 2(R), p 137.

¹⁴⁰ Zettel Affidavit, para 23, CAR Vol I, Tab 2, p 18.

¹⁴¹ Ibid.

¹⁴² Zettel Affidavit, paras 17, 30 and 33, CAR Vol I, Tab 2, pp 16, 19 and 20; see CAR Vol I, Tabs 2(O), 2(X) and 2(Z).

¹⁴³ Otello-Deluca Transcript, 104:6-107:19, CAR Vol II, Tab 10, p 653. The only response was a letter from UTMSU counsel on December 21, 2015, directing that further communications be provided to her. CAR Vol II, Tab 4(CC), p 516.

¹⁴⁴ *Hofer*, at p. 196.

2. Bias and Prejudgement

75. Natural justice required that the hearing of the Applicants' application take place before an unbiased tribunal.¹⁴⁵ The Supreme Court has noted that bias could 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".¹⁴⁶ Thus, a domestic tribunal such as UTMSU must not make a conclusion without first hearing from the Applicants.¹⁴⁷ 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"¹⁴⁸

76. Mr. Adade, the UTMSU VP Campus Life and chair of the Clubs Committee, indicated that before taking those positions, he had "got the feeling they [some people] kind of felt uncomfortable with the club", that "the posters they were putting up around campus were making people feel uncomfortable" and that "they [SFL] were creating a space that wasn't very comfortable for everyone".¹⁴⁹ He explained that when he was just a student, some students were "basically telling me how they felt in regards to [the Applicants'] club and their stance on abortions and being a pro-life club."¹⁵⁰ Once he reviewed the club application he recalled these prior discussions he had had about the club.¹⁵¹ In his communication with both the Board and the Applicants, Mr. Adade showed bias against the Applicants on the basis of their personal and political beliefs, stating that they were "telling folks especially women what to do with their bodies" and claiming that they were "put[ing] them down for making a decision that doesn't fit with your mandate."¹⁵²

¹⁴⁵ *Hofer* at para 80. See also *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 636.

¹⁴⁶ *Old St. Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170, 1197.

¹⁴⁷ *McLachlan*, at para 41.

¹⁴⁸ *Mowat v University of Saskatchewan Students' Union*, 2006 SKQB 462, para 60, aff'd 2007 SKCA 90.

¹⁴⁹ Adade Transcript, 3:22-4:25, 8:7-10:7, CAR Vol II, Tab 11, pp 680-81.

¹⁵⁰ Adade Transcript, 18:17-19:8, CAR Vol II, Tab 11, pp 683-84.

¹⁵¹ Adade Transcript, 10:8-13, CAR Vol II, Tab 11, pp 681.

¹⁵² Zettel Affidavit, para 14, CAR Vol I, Tab 2, p 16.

77. The UTMSU Clubs' Committee refused to structurally remedy the bias that existed on the Committee. There was clearly awareness on the Clubs' Committee that the Board should decide the Applicants' application, given the fact that a motion was so made, and that Mr. Adade twice indicated to the Applicants' that they had a right to appeal to the Board. However, it is clear that certain dominant members of the Clubs Committee, including Mr. Otello-Deluca, refused any such avenue to remedy bias, stating instead that "[i]f the clubs committee feels that this club does not represent the UTMSU then they will not be a UTMSU recognized club."¹⁵³

78. There was clearly pre-judgement of the Applicants' application, as the Decision had been ratified in August of 2015, before the Applicants were even aware that their club's status would not be renewed. For the Applicants to be forced to appeal the Decision made by the Club's Committee to the Clubs' Committee itself, particularly in light of the above statements, fails to "meet the legitimate expectations of a fair-minded observer?"¹⁵⁴ The Decision and actions of UTMSU toward the Applicants were impermissibly prejudged and biased.

C. UTMSU acted in bad faith to prevent the Applicants' from electing a fourth executive.

79. 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".¹⁵⁵

80. As described by the Ontario Superior Court of Justice, "[o]ne of the hallmarks of bad faith is where a process is put in place, ostensibly for a legitimate purpose, but really for another oblique, illegitimate or collateral purpose".¹⁵⁶

¹⁵³ Ibid.

¹⁵⁴ *Mowat v University of Saskatchewan Students' Union*, 2006 SKQB 462, para 60, aff'd 2007 SKCA 90.

¹⁵⁵ *Rakowski*, at para 56; CED (online), Judicial Review and Statutory Appeals (III.4.(d).(i).B) at §162.

¹⁵⁶ *Pal*, at para 46.

81. In this case, the Clubs' Committee expressly based its Decision solely on the Applicants' personal and political beliefs and opinions. However, when the Applicants sent a written appeal to the UTMSU Board of Directors outlining how the Decision was improper, the Clubs' Committee then disingenuously stated that in fact, the Decision was based on certain technical "violations and discrepancies" within SFL's constitution.¹⁵⁷

82. The Clubs' Committee then used this new objection to shield its Decision from appeal, by insisting that the Applicants take laborious steps to amend technical issues, all while UTMSU remained determined to ban SFL as a Campus Club on account of its beliefs and philosophy. This is thus an oblique, illegitimate and collateral abuse of process.

83. The most glaring evidence of UTMSU's bad faith can be seen in the fact that four people who worked for UTMSU and opposed SFL (including a UTMSU Board member), and a fifth person also expressly opposed to SFL, were invited and permitted to vote in SFL's meeting to prevent the election of a fourth executive by Mr. Adade, who had demanded the election of the fourth executive. There was no reason for these individuals to vote against the election of a fourth SFL executive, other than to prevent SFL from meeting UTMSU's requirement.

84. In summary, therefore, both the Decision and UTMSU's subsequent actions were made in bad faith and not *bona fide*.

PART IV – ORDER

85. The Applicants therefore request that this Court issue the declarations listed in their Notice of Application¹⁵⁸: that the Decision of UTMSU was *ultra vires*, violated UTMSU's own bylaws and policies, failed to respect the Applicants' freedom of expression and association, violated the

¹⁵⁷ See email from Russ Adade, November 3, 2015, CAR Vol I, Tab 2(R), p 137.

¹⁵⁸ Notice of Application, paras 1-9, CAR Vol 1, Tab 1, p 2.

principles of natural justice, was made in bad faith based on irrelevant considerations, and consequently is void.

86. The Applicants also maintain their request that this Court order that UTMSU ratify SFL as a Campus Club forthwith, or alternatively, that UTMSU be required to reconsider SFL'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 UTMSU from preventing UTM students' and student groups' (including SFL's) access to the services, research, information, materials and other resources of UTMSU on account of students' and students groups' opinions and beliefs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 21, 2017



Justice Centre for Constitutional Freedoms

LIST 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. *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573.
6. *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712.
7. *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2000] 2 SCR 1120.
8. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326.
9. *Pal et al v Chatterjee et al*, 2013 ONSC 1329.
10. *McLachlan v Burrard Yacht Club*, 2008 BCCA 271.
11. *Lee v Yeung*, 2012 ABQB 40.
12. *Ge c Canadian Federation of Students*, 2015 QCCS 19.
13. *Club de soccer de ville Sainte-Antoine v Association régionale de soccer des Laurentides*, 2005 CanLII 31366 (QC CS).
14. *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541.
15. *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.
16. *Baird v Wells* (1890), 44 Ch. D. 661.
17. *Mayan v World Professional Chuckwagon Association*, 2011 ABQB 140.
18. *Kwantlen University College Student Association v Canadian Federation of Students—British Columbia Component*, 2011 BCCA 133.
19. *University of Victoria Students' Society v Canadian Federation of Students*, 2011 BCSC 122.

20. *Polish National Union of Canada v Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134.
21. *Farren v Pacific Coast Amateur Hockey Association*, 2013 BCSC 498.
22. *Barrie v Royal Colwood Golf Club*, 2001 BCSC 1181.
23. *Garcia v Kelowna Minor Hockey Association*, 2009 BCSC 200.
24. *Cohen v Hazen Avenue Synagogue* (1920), 47 NBR 400 (SC).
25. *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623.
26. *Old St. Boniface Residents Association Inc v Winnipeg (City)*, [1990] 3 SCR 1170.
27. *Mowat v University of Saskatchewan Students' Union*, 2006 SKQB 462.

Secondary Sources

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