

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Applicants

and

THE STUDENT ASSOCIATION OF DURHAM COLLEGE AND UOIT

Respondent

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

Court File No. CV-16-544546

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 *Courts of Justice Act* and rule 14.05 of the *Rules of Civil Procedure*

Court File No. CV-16-550599

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KEVIN ARRIOLA and ALEXANDRA GODLEWSKI

Applicants

and

RYERSON STUDENTS' UNION

Respondent

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

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January 15, 2018

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FACTUM OF THE RESPONDENT, STUDENT ASSOCIATION OF DURHAM COLLEGE & UOIT

PART I - INTRODUCTION

1. This is not a case about freedom of expression or association. Rather, this is a case about the right of a private entity to make decisions according to its mandate. The issues raised in this application relate solely to private law: the court is asked to consider whether it can interfere with the decision of a private association. The private association in question is The Student Association of Durham College and UOIT (the “SA”). The impugned decision was to refuse to grant official status to the Applicants’ proposed student group, Speak for the Weak (“SFTW”). After the SA’s decision, the Applicants continued to meet, to solicit other students, to hand out pamphlets and to otherwise express their ideas on campus. Furthermore, they continued to be members of the SA, able to enjoy all the other benefits of membership.

2. The Applicants suggest that the SA made a biased, unprincipled decision, which was not supported by its policies. Nothing could be further from the case. The SA reviewed the Applicants’ application at great length. It considered whether the group’s mandate and proposed events conflicted with the SA’s principles, including its objects. The SA met with the Applicants, at a date of the former’s choosing, and discussed their concerns with the application, and their reasons for denying it. They provided these reasons in writing, and considered the Applicants’ request for an appeal of that decision. Ultimately, the SA upheld its rejection of the Applicants’ application as it believed to do otherwise would violate its policies.

3. The Applicants ask this Court to review the SA’s private decision. It is respectfully submitted that it does not have the jurisdiction to do so. If this Court finds that it does have such

jurisdiction, however, it must find that the SA made its decision in accordance with its rules and with the principles of natural justice.

PART II - SUMMARY OF FACTS¹

(i) *The Student Association's Governance Structure*

4. At all material times, the SA was the official student union representing and serving the interests of more than 20,000 full-time students at Durham College and the University of Ontario Institute of Technology (“**UOIT**”) (collectively referred to as the “**Institutions**”). The SA was incorporated in 1993 by Letters Patent pursuant to the *Ontario Corporations Act*.² It was a non-profit independent, democratic organization governed by a six-member Executive and a twenty (20) member Board of Directors (the “**Board**”). Both the Board and the Executive were elected annually by the students they represented.

5. The SA's Supplementary Letters Patent, dated December 21, 2007, were the SA's constituting documents and, by necessity of law, set out the SA's objects.³ The SA's objects were repeated in its General By-Law as a Statement of Principles (the “**By-Law**”). The objects and Statement of Principles delineated the powers of the SA within which confines it was permitted to operate and make decisions. These principles guided all its activities, and were the ultimate check and balance on its powers. In respect of the issues in this Application, these principles guided the SA's analysis of whether it ought to or could ratify the Applicants' group as an official student group (a “**Campus Club**”). Among other principles, the objects enshrine the following: the SA

¹ Unless otherwise stated, the facts are derived from the Affidavit of Jesse Cullen, sworn March 10, 2016 [**Cullen Affidavit**], Consolidated Appeal Record [**CAR**], Tab 4; the Affidavit of Reina Rexhmataj, sworn March 11, 2016 [**Rexhmataj Affidavit**], CAR, Tab 5; and the Supplementary Affidavit of Reina Rexhmataj, sworn March 17, 2017 [**Supplementary Rexhmataj Affidavit**], CAR, Tab 7.

² The Student Association of Durham College and UOIT Letters Patent, CAR, Tab 2C.

³ *Ibid.*

must “work toward building an environment free of systemic societal oppression and decolonization and to do all other things that are incidental or conducive to these purposes.”⁴

6. The rights of SA members, and the role of the Board and its Executive, were set out in the By-Law.⁵ All registered full-time students of the Institutions were full members of the SA.⁶ All registered part-time students who paid the applicable Membership fee were associate members.⁷ All SA members were expected to respect the goals and objectives set out in the Letters Patent and the then-current By-Law.⁸

7. The Board was comprised of the Executive and fourteen (14) Directors-at-Large, divided equally between students of each Institution.⁹ The Board was empowered to, among other things, approve and amend policies, propose changes to the By-Law, exercise general supervision over the disbursement of members’ fees to SA organizations, and generally exercise supervision over financial operations.¹⁰ The Executive had the power to review any matter relating to the property, revenue, business, and affairs of the SA. It was also empowered to consider all matters relating to fiscal policy, revenue and expenditure and could approve expenditures under \$10,000.¹¹

8. The SA’s governance structure and decision-making were also guided by its Governance Policies.¹² These policies directed internal Board governance. The Applicants absurdly cite the Governance Policies’ provision that the Board “encouragement of diversity of viewpoints” as

⁴ *Ibid.*; General By-Law, approved January 26, 2015, CAR at Tab 4G [By-Laws].

⁵ By-Laws, *ibid.*

⁶ *Ibid.* at by-law s. 4.1, Membership.

⁷ *Ibid.*

⁸ *Ibid.*, at by-law 4.3, 4.5.

⁹ *Ibid.* at by-law 5.1, Composition of the Board.

¹⁰ *Ibid.* at by-law 5.7, Powers of the Board.

¹¹ *Ibid.* at by-law 9, Standing Committees.

¹² Governance Policies, CAR, Tab 4H.

evidence of an obligation to encourage diversity in Campus Clubs. In actuality, this provision is a direction to the Board to ensure that its internal discussions allow for diverse views. Indeed, the evidence of the SA was that it made decisions collaboratively, including in respect of the issues in this Application.¹³ In further keeping with this direction, in considering the merits of the Applicants' application, the Board (and Executive) set aside their individual opinions in the interest of collective and principled decision-making.¹⁴

9. The SA considered itself an equity-seeking body. In this respect, the By-Law stipulated that the Executive position of VP Equity be tasked with "ensuring that all activities and endorsements of the Board reflect the anti-oppressive and positive space mandate of the SA."¹⁵ In respect of its anti-oppression lens, the SA set out its position in respect of discrimination and equality on its website.¹⁶

The Student Association is mandated to address issues of systemic and institutional oppression at our campus through engagement, mobilization and education.

Equity acknowledges identities that have been historically marginalized require a platform and support services to achieve equality. We strive to implement a framework of anti-oppression in all work we do to make the SA accessible for everyone.

[...]

By anti-oppression, we mean the practice of challenging all forms of oppression based on race, gender, sexuality, class, religion, immigration status, country of origin, age, physical ability and mental health status.

The reason we challenge these oppressions is simple, they perpetuate hierarchies that benefit privileged persons and groups. It is important that the SA recognizes that oppression exists on our campus which has real consequences.¹⁷

¹³ Transcript of the Cross-Examination of Reina Rexhmataj, March 17, 2016 [**Rexhmataj Transcript**] at Q. 60-64, CAR, Tab 11.

¹⁴ *Supra* note 12 at policy 2A.

¹⁵ By-Laws, *supra* note 4 at by-law 6.5, The Executives.

¹⁶ Webpage on Discrimination and Equality, CAR, Tab 5A.

¹⁷ Rexhmataj Affidavit, *supra* note 1 at para. 5.

10. Not only was the SA permitted and required to give meaning to its objects, but it was clear and consistent as to its interpretation of this meaning. The SA acknowledged that individual students could disagree with this definition.¹⁸ Nevertheless, this was the interpretation adopted by the SA, pursuant to its policies, and it was bound to apply it.¹⁹ The Applicants have not challenged the SA's interpretation of its objects or policies, nor have they offered a competing interpretation.

11. Contrary to the incorrect assertion in the Applicants' factum, the SA's evidence was that this webpage was posted "prior to December" of the 2015-2016 academic year (August 2015 to May 2016).²⁰ There is absolutely no evidence that this statement was posted online in relation to this Application (which was commenced on January 28, 2016) or SFTW's attempt to ratify. Although attempting to add colour to the SA's activities, the Applicants do not challenge its right to interpret its own policies, including this one.

12. As noted above, the Board is empowered to pass and amend policies, in accordance with its By-Law.²¹ In January 2016, the Executive brought several proposed motions before the Board, including various Issues Policies: an Anti-Racism Policy, a Feminist Framework Policy, a Post-Residency Fees Policy, a Public Transit Policy, and a Religious, Spiritual & Cultural Freedom Policy.²² The Board ratified the Anti-Racism Policy.²³ None of these policies were in place at the time the SA denied the Applicants' bid for ratification and are therefore completely irrelevant.

¹⁸ Rexhmataj Transcript, *supra* note 13 at Q. 129-132.

¹⁹ *Ibid.* at Q. 133-134.

²⁰ Answer to Undertaking of Rexhmataj, CAR, Tab 6; Rexhmataj Transcript, *supra* note 13 at Q. 267-269.

²¹ By-Laws, *supra* note 4, at by-law 5.7, Powers of the Board

²² Exhibit "A" to the Rexhmataj Transcript, *supra* note 13, CAR, Tab 11A.

²³ Rexhmataj Transcript, *supra* note 13, at Q. 358-359, 371.

13. The Applicants take no issue with the SA's right to propose and adopt these policies or any other. The Applicants do not argue that any of the SA's governing documents (the Letters Patent, the By-Law, the Campus Club policies) are *ultra vires* the SA or were improperly applied. In fact, the SA properly scrutinized and applied its policies in making its decision not to ratify SFTW.

(ii) The SA's Relationship to the Institutions

14. Durham College was established pursuant to the *Ontario Colleges of Applied Arts and Technology Act, 2002* and Ontario Regulation 34/03.²⁴ Durham College has two main campuses: one in Oshawa and a second in Whitby. UOIT was established pursuant to the *University of Ontario Institute of Technology Act, 2002*.²⁵ In 2003, UOIT opened its doors at Durham College's Oshawa campus.

15. As noted, the SA was an autonomous entity, separate and apart from the Institutions. Neither Institution had any control over the SA's activities and internal dealings. The VP, Student Affairs of Durham College asserted this uncontroverted fact:

The Institutions have no rights in, or over, the Student Association other than pursuant to contracts to which they may be a party. The Student Association is a separate, standalone legal entity that is wholly distinct from the Institutions, although the Student Association is party to certain agreements with the Institutions, as described below.²⁶

16. These agreements included various contracts between the SA and the Institutions, including, for example, those relating to the SA's rental of Durham College space. Most significantly, the SA had a Memorandum of Understanding with Durham College, which

²⁴ *Ontario Colleges of Applied Arts and Technology Act, 2002*, S.O. 2002, Ch. 8, Schedule F and Ontario Regulation 34/03, CAR, Tab 4A.

²⁵ *University of Ontario Institute of Technology Act, 2002*, S.O. 2002, Ch. 8, Schedule O, CAR, Tab 4B.

²⁶ Affidavit of Meri Kim Oliver, January 17, 2017, CAR, Tab 9A at para. 61 [**Oliver Affidavit**].

governed the collection of student fees, among other things.²⁷ The SA had an Operating Agreement with the UOIT for similar purposes.²⁸

17. Ultimately, given the Institutions' recognition of the SA's autonomy, both acknowledged that the SA could make its own rules about its internal affairs, including the policy and procedure relating to the ratification of student groups. For example, in its Recognition of Student Organizations Policy (the "**RSO Policy**"),²⁹ Durham College recognized the SA's exclusive authority to ratify Campus Clubs and to establish related policies and procedures.³⁰ It also agreed not to control or interfere with the SA (or with Campus Clubs or Societies), unless its activities violated its policy.³¹ The purpose of the RSO Policy was to directly govern Durham College's relationship with its students as "their actions do reflect on the college".³² The UOIT policy was substantially similar to the RSO Policy.³³

18. The Applicants incorrectly state that the RSO Policy, and other policies promulgated by the Institutions, constrained the SA's decision-making. As Durham College's affiant pointed out, the SA was a private body, autonomous from the Institutions save and except for any contractual (private law) obligations between them. Notably, the Applicants are not a party to those contracts and cannot attempt to enforce them. More significantly, however, there is a great difference between the obligations the Institutions owe the Applicants and the obligations owed by the SA. The contracts between the Institutions and the SA have no bearing on the latter, whatsoever.

²⁷ Memorandum of Understanding with Durham College, CAR, Tab 4E.

²⁸ Operating Agreement with UOIT, CAR, Tab 4F.

²⁹ Recognition of Student Organizations Policy, CAR, Tab 4D [**RSO Policy**].

³⁰ *Ibid.* at s. 3.4.1, 6.

³¹ *Ibid.* at s. 4.3. The definition of "RSO" includes the SA and any of its recognized Campus Clubs or Societies.

³² *Ibid.* at s. 1,2, 3.3.

³³ UOIT Policy on the Recognition of Student Organizations, CAR, Tab 2L.

(iii) Campus Clubs Policy and Procedure

19. At any time, SA members could form a club on campus (a “**Student Group**”). Members of a Student Group could apply to the SA to obtain ratification of their club as a Campus Club. SA members could also propose a new group, which would be formed solely for the purpose of ratification. As is set out explicitly in its Campus Clubs Policy (the “**Clubs Policy**”), the recognition and funding of Campus Clubs was a privilege and not a right of membership in the SA, with which statement the Applicant, Christian Naggar (“**Naggar**”), agreed.³⁴

20. To obtain status as a Campus Club, SA members had to access and complete the SA’s online ratification application package. The application process was set out in the Campus Clubs Procedure (the “**Clubs Procedure**”) and a proposed Campus Club had to comply both with the Procedure and with the Clubs Policy (which applied to groups once ratified).³⁵ The SA had the unilateral power to ratify groups as Campus Clubs.³⁶ Naggar acknowledged and agreed that ratification was entirely at the SA’s discretion.³⁷

21. The SA delegated decision-making power in respect of the ratification of Campus Clubs to the Clubs and Society Coordinator (the “**CS Coordinator**”) and Club and Society Office, but ratification decisions ultimately lay with the Executive. Procedurally, upon receipt of a completed ratification package, the SA’s Club and Society Office reviewed the application to ensure that it met the SA’s requirements, which are set out above. The CS Coordinator was required to provide the applicants with a response about the application’s status within 10 business days.³⁸ If the CS

³⁴ Campus Clubs Policy, CAR, Tab 4J, p. 1; Transcript of the Cross-Examination of Christian Naggar, March 17, 2016, CAR, Tab 10 [**Naggar Transcript**] at Q. 717-719.

³⁵ Campus Clubs Procedure, CAR, Tab 4I.

³⁶ *Ibid.* at p. 5.

³⁷ Naggar Transcript, *supra* note 34 at Q./ 720.

³⁸ Campus Club Procedure, *supra* note 35.

Coordinator and Club and Society Office had any concerns about a club ratification package, they forwarded the matter to the Executive.³⁹ As noted, the Executive had ultimate responsibility and oversight over its committees and over decisions made in respect of ratification of Campus Clubs.

22. Substantively, the ratification package had to comply with the Club Procedure and Club Policy. Among other things, the Club Procedure provided that the proposed Campus Club's "purpose for being must not contain any endorsement or support for activities or events that break SA policies, campus policies, or any applicable laws."⁴⁰ The Club Policy also stipulated that "Campus Clubs must adhere to all SA, Durham College, and UOIT Codes of Conduct and rules".⁴¹ Clearly, to determine whether a proposed group could or should be ratified as a Campus Club necessitated an investigation as to whether its purpose or events contravened the SA's policies. The SA's policies included its Letters Patent and By-Law.

23. Whether or not the proposed Campus Club's views were widely shared was not a factor in the ratification process.⁴² The Campus Club did not have to reflect positions taken by the SA or its individual members.⁴³ Indeed, the SA did not have "views"; the SA had policies and by-laws.⁴⁴ Not surprisingly, as elected representatives, individual members of the Executive and Board had their own views on a multitude of issues.⁴⁵ Even though an Executive might have disagreed with the policies or by-laws, she was still bound by them.⁴⁶ The focus of the Executive's analysis was not the predilection of any one of them; instead, the Executive assessed whether a group's

³⁹ Transcript of the Cross-Examination of Jesse Cullen, March 18, 2016, CAR, Tab 12 at Q. 130-132 [**Cullen Transcript**].

⁴⁰ Campus Clubs Procedure, *supra* note 35.

⁴¹ Campus Clubs Policy, *supra* note 34.

⁴² Cullen Transcript, *supra* note 39 at Q. 262.

⁴³ Rexhmataj Transcript, *supra* note 13 at Q. 123.

⁴⁴ Cullen Transcript, *supra* note 39 at Q. 264.

⁴⁵ *Ibid.* at Q. 265.

⁴⁶ *Ibid.* at Q. 264.

proposal, considered holistically, complied with or contravened the SA's policies. The SA was obliged to determine whether the group's mandate and proposed events violated its policies, and did so to the best of its abilities and as diligently, transparently, and fairly as possible.⁴⁷

24. Campus Club status afforded SA members a handful of privileges that Student Groups could not access. Both Campus Clubs and Student Groups could recruit members, meet and hold events on campus, use meeting rooms, engage in social media, distribute pamphlets, post posters, advertise, and all number of other activities. Campus Clubs had these rights and could also access SA funding, be listed on the SA website, reserve rooms and space held by the SA, use the SA's audio-visual and other equipment, seek advice and assistance from SA Officers and full-time staff, and apply for recognition by their Institution (i.e. Durham College or UOIT) for their participation in extra-curricular activities.⁴⁸

(iv) Speak for the Weak's Application

25. On August 19, 2015, on behalf of the Applicants, Naggar applied to the SA, seeking ratification of SFTW as a Campus Club.⁴⁹ Prior to completing the application, Naggar reviewed the policies and procedures relating to Campus Clubs, which were posted on the SA's website.⁵⁰ He also asked the SA for a draft constitution, with which he was provided. Additionally, he sought the assistance of Clarissa Canaria of the National Campus Life Network, which assists students to set up pro-life clubs.⁵¹ Naggar provided her with the Campus Policy and Campus Procedure, among other things.

⁴⁷ *Ibid.* at Q. 269-273.

⁴⁸ Cullen Affidavit at paras. 20-26.

⁴⁹ Ratification Package of SFTW, CAR, Tab 4M.

⁵⁰ Naggar Transcript, *supra* note 34 at Q. 94-98.

⁵¹ *Ibid.* at Q. 240-260.

26. On August 20, 2015, the CS Coordinator, Chantal James (“**Chantal**”), emailed the Executive to ask it to review the Applicants’ ratification package.⁵² In her email, Chantal flagged that the proposed group’s fundamental value appeared to be “pro-life”. She also wrote that “there are several initiatives that do look very beneficial”. Naggar admits that he has no evidence that Chantal was biased against SFTW and, in fact, he agreed that she appeared to have an open mind.⁵³ He also agreed that Chantal’s escalation of the matter to the Executive was in keeping with the SA’s policies and procedures.⁵⁴ In fact, at the same time, the Executive was also asked to review another club: a proposed Firearms/Gun Club.⁵⁵ Consequently, Naggar admits that SFTW, a “pro-life” club, was treated the same as a completely different club, whose mandate and events had nothing to do with that issue.⁵⁶ Other than these two groups, there is no evidence of how many ratification packages the Executive was asked to review in the 2015-2015 academic year.

27. The Executive met on an *ad hoc* basis to review the Applicants’ package, and agreed to discuss it formally at its next executive meeting, which was to be held on August 24, 2015.⁵⁷ At that meeting, for approximately forty minutes the Executive collaboratively discussed the application. The Executive thoroughly reviewed its mandate and the events that the students intended to organize, endorse, and attend.⁵⁸ The SA’s VP Equity queried whether the mandate and events violated the SA’s policies; in particular, it’s anti-oppression principle, which she was tasked with safeguarding. The Executive also researched the March for Life rally, which the Applicants proposed to attend as the SFTW group activity. After this review and discussion, the Executive

⁵² Email from Chantal James to the Executive, August 20, 2015, CAR, Tab 5B.

⁵³ Naggar Transcript, *supra* note 34 at Q. 483-484.

⁵⁴ *Ibid.* at Q. 490-496.

⁵⁵ Minutes of Executive Meeting, August 25, 2015, CAR, Tab 7.

⁵⁶ Naggar Transcript, *supra* note 34 at Q. 547-553.

⁵⁷ Cullen Transcript, *supra* note 39.

⁵⁸ *Ibid.* at Q. 155-158.

determined that the group organizing that rally, Campaign for Life Coalition (“CLC”), held values and professed a mandate that was not in alignment with the SA’s Statement of Principles. Ultimately, the Executive determined that based on the content of the ratification package, it had concerns about SFTW, which it wished to raise with the students involved. The Executive further determined that unless these concerns were satisfactorily addressed and ameliorated, it would not ratify SFTW as a Campus Club.⁵⁹ The Executive determined that it would meet with the Applicants to discuss their application.

28. Following the meeting, the Executive approached the then-Outreach Services Manager, Darshika Selvasivam, the Diversity Office at Durham College, and the UOIT Administrator to ensure that it was on-side its agreements with both Institutions.⁶⁰ The Institutions confirmed that they respected the SA’s autonomy and the decision it made in respect of the SFTW and Firearms/Gun Club applications.⁶¹

(v) The Executive Meets with SFTW

29. On August 25, 2015, Amy Blais (“Amy”), the Administrative Assistant for the Clubs and Societies Office, emailed Naggar.⁶² Amy advised him that the Executive wanted to meet with the Applicants in-person to discuss their application package in more detail. She requested that he provide her with the Applicants’ availability for a meeting with the Executive. She also advised that she would be happy to facilitate planning the meeting, and invited questions or comments.

30. Naggar responded to Amy on behalf of the Applicants. He advised that they were available to meet on September 3, 2015 (the “**September Hearing**”). The Executive agreed to Naggar’s

⁵⁹ Rexhmataj Affidavit at para. 10.

⁶⁰ Cullen Transcript, *supra* note 39 at Q. 17-18.

⁶¹ Rexhmataj Transcript, *supra* note 13 at Q. 342, 347.

⁶² Email from Amy Blais to SFTW, August 25, 2015, CAR, Tab 4N.

proposed date. At that time, Nagger knew that he would be able to speak at the September Hearing, ask questions, address concerns, and make comments.⁶³ He also knew that based on the Club Procedure, the Applicants' ratification package could already have been denied.⁶⁴

31. Several members of the Executive attended the September Hearing, including its then-President, Jesse Cullen ("**Jesse**"). Jesse advised that the Executive had reviewed the Applicants' ratification package, including its proposed events. The Applicants confirmed that their major club event was going to be attending the March for Life, which was organized by CLC.⁶⁵ Jesse noted that the Executive had investigated both SFTW and the CLC. They had determined that the latter opposes same-sex marriage and discredits the LGBTQ+ community by asserting opposition to a so-called "gay agenda". Given that the SA explicitly supported the LGBTQ+ community, and that its mandate included anti-oppression and equality, supporting SFTW, and, implicitly, its alignment with CLC, would be contrary to its mandate.⁶⁶

32. The Applicants raised their concern that the SA was "pro-abortion" or that its position on abortion conflicted with the position of SFTW. Jesse advised them that SFTW's position on abortion conflicted with the SA's object, which was to create an environment free from systemic societal oppression.⁶⁷ He confirmed that the SA provided services to women who wanted to terminate their pregnancies as well as to women who wished to continue them. The Applicants asked if the SA provided referrals to potential fathers. Jesse advised that the SA aided any student who was a member of the SA. Ms. Selvsivam noted that some of the services the Applicants

⁶³ Nagger Transcript, *supra* note 34 at Q. 196-200.

⁶⁴ *Ibid.* at Q. 213-227.

⁶⁵ Cullen Transcript, *supra* note 39 at Q. 165-167.

⁶⁶ *Ibid.* at Q. 146-151.

⁶⁷ *Ibid.* at Q. 208, 226-228.

sought to provide through SFTW were already provided by the SA, including counselling and support for students facing unplanned pregnancies.⁶⁸

33. The Applicants asked whether they could appeal the Executive's decision. Jesse advised them that if it kept its current mandate, the SA would not approve ratification; if the Applicants addressed its concerns, the SA would do further due diligence.⁶⁹ The Applicants took no steps to address the SA's concerns and indicated no interest in removing the March for Life as an event.

34. Jesse concluded the September Meeting by adding that the SA's decision not to ratify SFTW as a Campus Club did not prevent the Applicants from organizing on campus, including in the public areas of the SA's Student Centre. He noted that they were free to gather, hand out materials, and engage in other activities.

35. Following the September Hearing, the Applicants asked for meeting minutes, which had not been taken. Jesse prepared a letter to the Applicants, reiterating in a written decision the oral decision conveyed during the September Hearing (the "**Written Decision**").⁷⁰ In it, he confirmed that the Executive's decision was based on the SA's policies; specifically, its mandate to eliminate systemic societal oppression and decolonization.

36. On October 29, 2015, the Executive received a letter from Marty Moore, counsel for the Applicants, in which he advised that if the SA did not reverse its decision not to ratify SFTW, he

⁶⁸ Naggar Transcript, *supra* note 34 at Q. 314-317.

⁶⁹ Rexhmataj Transcript, *supra* note 13 at Q. 324-325.

⁷⁰ Letter to Speak for the Weak dated October 6, 2015, CAR, Tab 40.

would commence legal proceedings.⁷¹ The SA's lawyer responded to Mr. Moore, advising that the SA would consider his written submission and aim to respond by November 20, 2015.

37. On November 13, 2015 the entire Board met to discuss the Executive's decision to refuse to ratify SFTW as a Campus Club. The Board unanimously upheld the Executive's decision.⁷² On November 23, 2015, Ms. Sanche wrote to Mr. Moore to confirm that the SA had decided to maintain its refusal to ratify SFTW as a Campus Club.⁷³

(vi) *SFTW Continued to Freely Operate on Campus*

38. On February 1, 2016, LifeSiteNews posted an article about this Application to its website.⁷⁴ Included in the article was a photograph of SFTW members meeting on the Durham College campus with advisors from NCLN. In the article, Naggar spoke freely to LifeSiteNews about this Application.

39. SFTW's Facebook page and Twitter feed contained numerous posts about SFTW's on-campus activities, including meeting and associating with other students at both Institutions, openly and without any constraints by the SA. SFTW describes its activity as "activism".⁷⁵ On no occasion did SFTW complain about the SA interfering with its ability to speak freely and associate on campus. On February 10, 2016, SFTW posted:

This week, in less than 3 hours of activism, our amazing members engaged fellow students in 64 conversations about abortion which resulted in 14 new sign-ups to SFTW! Stay tuned for more events and chances to get involved after reading week!

⁷¹ Letter from Marty Moore of the Justice Centre for Constitutional Freedoms dated October 29, 2015, CAR, Tab 4P.

⁷² Minutes of Board Meeting, November 13, 2015, CAR, Tab 4R.

⁷³ Letter from Andrea Sanche to Marty Moore, dated November 23, 2015, CAR, Tab 4S.

⁷⁴ Article posted on LifeSiteNews website, dated February 1, 2016, CAR, Tab 4T.

⁷⁵ Speak for the Weak Facebook page, CAR, Tab 3U; Speak for the Weak Twitter page, CAR, Tab 4V.

40. On January 11, 2016, SFTW posted that it had a “great time dialoguing with students at UOIT and Durham College about Canada’s lack of abortion laws today!” On February 8, 2016, SFTW posted an update that it had “dozens of conversations with Durham College and UOIT students about the reality and horror of abortion. It was a great day!” SFTW also posted several photographs on its Facebook page, showing students gathering in the hallways, meeting, and talking. Naggar agreed that the Applicants met several times on campus to discuss and conduct SFTW business.⁷⁶

41. The Applicants allege that they have been harmed as they have been prevented from using Campus Club space, which was the beneficiary of “substantial student resources”. The \$500,000 investment they reference was earmarked for “student clubs, meetings, as a communication hub, and for business affairs” as well as for storage and general lounge/recreation and social events. There is no evidence before the court that the Applicants cannot use this space as SA members. Frankly, it is preposterous to assert that they cannot do so. Furthermore, there is no evidence that the investment was made and the space constructed. While the Applicants cannot use space set aside for Campus Clubs, all other SA space is available to them as members including everything listed above but for “student club” space. The inability to benefit from Campus Club status does not infringe any of the Applicants’ rights and certainly no rights that can or should be asserted against the SA.

42. In addition to providing no evidence as to the SA’s interference with its activities, the Applicants admit that they have no evidence of any bias of any members of the Board or the

⁷⁶ Naggar Transcript, *supra* note 34 at Q. 642-692.

Executive.⁷⁷ Likewise, they cannot point to any conflict of interest, including membership in pro-choice or pro-LGBTQ organizations. Naggar has had no personal conflict with the Executive that held office at the material time.⁷⁸ Further, he was not prevented from continuing to be a member of two Campus Clubs: Campus Church and the Catholic Students' Association.⁷⁹

43. Naggar did not run for office, lobby the SA to pass specific policies he endorsed, campaigned for others who share his views, or brought motions before the SA to advocate for his positions.⁸⁰ He has not exercised his rights as an SA member, with which rights the SA's decision did not interfere or take away. The Applicants did not reapply for ratification in the 2015-2016 school year. There is no evidence as to whether they sought ratification in subsequent years.

(vii) October 2017: The Dissolution and Winding-Up of the SA

44. In January 2017, Durham College brought an Application seeking the dissolution and winding up of the SA, and the creation of separate student associations for each Institution. The Applicants rely on this Application as evidence of "a history of improper governance". This completely mischaracterizes Durham College's rationale for seeking its relief. Although it is respectfully submitted that a perceived dispute between Durham College and the SA is not relevant to the question of the SA's ratification of SFTW, the SA wishes to address the inaccurate spectre of wrongdoing created by the Applicants.

45. Durham College sought a wind-up because it believed that the "integration that previously existed between the Institutions when UOIT was established in 2002, which was also reflected in a

⁷⁷ *Ibid.* at Q. 511-524.

⁷⁸ *Ibid.* at Q. 514-515.

⁷⁹ *Ibid.* at Q. 527-529.

⁸⁰ *Ibid.* at Q. 785-811.

joint Student Association, no longer exists”.⁸¹ Simply, the “establishment of separate student associations for each Institution is the next logical step in this transition”.⁸² Durham College maintained that UOIT students were over-represented in the SA. It believed that fees it collected from its students and transferred to the SA were “disproportionately used for events that benefit UOIT students”.⁸³ It was concerned that without equal representation, as required in the By-Law, its students’ needs would not be given equal weight. Likewise, providing funding to a majority UOIT organization was against Durham College’s interests.⁸⁴

46. Thus, the suspension of fees referenced in the Applicants’ factum relates to Durham College’s belief that the SA did not represent its students. In 2016-2017 and other years, the SA was unable to form a Board in compliance with the By-Law and thereafter, when it did there were insufficient Durham College members.⁸⁵ This raised concern with Durham College, especially as it transferred fees to the SA without accompanying student representation.⁸⁶ Contrary to the Applicants’ statement, it is *not* the case that the transfer of student fees was suspended from 2013-2016. In the academic year 2015-2016 (the year at issue in this Application), the transfer of funds took place in the normal course.⁸⁷ Additionally, the Applicants baldly assert that the Institutions “directly funded Campus Clubs to ensure that their important activities continued to be carried out.” There is no evidence as to the Institutions’ rationale for continuing funding.⁸⁸

⁸¹ Oliver Affidavit at para. 4.

⁸² *Ibid.* at para. 5.

⁸³ *Ibid.* at para. 34.

⁸⁴ *Ibid.* at paras. 32-35.

⁸⁵ *Ibid.* at Exhibit “Q”, see note 13.

⁸⁶ *Ibid.* at para. 55, Exhibit “O”.

⁸⁷ *Ibid.* at para. 44.

⁸⁸ *Toronto Star* article, September 27, 2013, CAR, Tab 20.

47. As of October 13, 2017, the SA has been wound up and dissolved.⁸⁹

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

48. The Respondent submits that the following issues must be determined by this Court:

- (a) Do administrative law principles apply to the SA?
- (b) Should the Court intervene in the SA's decision to deny the Applicants' application for campus club status?

(A) ADMINISTRATIVE LAW PRINCIPLES DO NOT APPLY TO STUDENT UNIONS

49. Administrative law regulates government power and ensures its appropriate use.⁹⁰ The Supreme Court of Canada has repeatedly reaffirmed that private disputes are redressed by way of private law, not public law.⁹¹ If an entity is private, administrative law principles and remedies do not apply.⁹² Instead, powers exercised by private corporations are governed by private law such as contract, property, or tort.⁹³ Administrative law is applicable to the decision under scrutiny if a court concludes that the decision-maker is public.⁹⁴

50. The SA was a private corporation. It is not an agent of the government, nor is it controlled by a public entity. It was autonomous, entirely separate from the "public" Institutions whose students were its members; it was viewed as such even by those same Institutions. The Institutions had no rights in or over the SA. They could not and would not dictate the SA's decisions,

⁸⁹ Affidavit of Michelle Gusdal, CAR, Tab 9.

⁹⁰ Halsbury's Laws of Canada (online), *Administrative Law* (2013 Reissue), I. Overview of Administrative Law, 1. Definition, at HAD-1, Book of Authorities [**BOA**], Tab 1.

⁹¹ *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 27, BOA, Tab 2.

⁹² *Setia v Appleby College*, 2013 ONCA 753, at para 22 [**Appleby College**], BOA, Tab 3; *Grant v Ryerson Students' Union*, 2016 ONSC 5519 at para 35 [**Grant**], BOA, Tab 4.

⁹³ Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf consulted on 9 December 2015), (Carswell: Toronto, 2015), ch 1 at 20, BOA, Tab 5.

⁹⁴ *Appleby College*, at paras 20, 32.

especially in respect of what student groups would be ratified, and why or why not. This decision is a private one, unconstrained by public law, involving only the application of private discretion.

51. As a private corporation, the SA had broad powers under the *Corporations Act* to pass by-laws regulating “the conduct in all other particulars of the affairs of the corporation,” in addition to “incidental powers to act for the benefit of the corporations”, and to do “... all such things as are incidental or conducive to the attainment of the above objects and of the objects set out in the letters patent”. The SA’s powers were private. Scrutiny of its exercise of those powers entails applying private rather than public law.

52. The SA respectfully submits that this Court does not have jurisdiction over its decision to deny SFTW Campus Club status. In the alternative, if this Court finds that it has jurisdiction to intervene in the SA’s decision, this jurisdiction arises from its power to review a decision of a domestic or private tribunal.

(B) THE COURT SHOULD NOT INTERVENE IN THE SA’S DECISION TO DENY SFTW’S APPLICATION FOR CAMPUS CLUB STATUS

(i) *The Court has No Jurisdiction over the SA’s Decision*

53. Courts may exercise limited supervisory jurisdiction over the decisions of a domestic tribunal where its decision interferes with or affects a member’s property or civil rights.⁹⁵ In this context, “civil rights” means a person’s proprietary rights or the right to work or earn a livelihood.⁹⁶ This often amounts to expulsion from the group or association.⁹⁷ Where a member’s

⁹⁵ *Street v B.C. School Sports*, 2005 BCSC 958, [*Street*], at para 36 BOA, Tab 10, citing *Peerless (Guardian ad litem of) v. B.C. School Sports* (1998), 157 D.L.R. (4th) 345 (B.C. C.A.) BOA, Tab 17; see also *Rakowski v Malagerio et al*, [2007] OJ No 369, 2007 CarswellOnt 539, (Ont. SCJ), [*Rakowski*], at para 39, BOA, Tab 9.

⁹⁶ *Lee v The Showmen's Guild of Great Britain*, [1952] 2 QB 329 (CA) [*Lee*], pp 342, 343, BOA, Tab 11.

⁹⁷ See, for example, *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] SCJ No 87 (SCC), [*Hofer*], BOA, Tab 12; *Appleby College*, BOA, Tab 3; *Street*, BOA, Tab 10.

property or civil rights are not affected by the decision of a domestic tribunal, the court has even more limited, if any, jurisdiction.

54. The SA's decision to refuse to ratify SFTW as a Campus Club did not affect the Applicants' civil or property rights. The Applicants continued to be members of the SA and to receive all the rights of membership; the results of the SA's decision did not lead to their expulsion. Nagger, for instance, continued to be a member of at least two Campus Clubs, and received all benefits that flowed from such memberships. Neither the Applicants' relationships with their respective Institutions nor their rights to work or earn a livelihood were affected. Their only deprivation was the privileges afforded Campus Clubs, and those privileges would not have impacted either of these rights. Additionally, the SA's decision did not affect the Applicants as students as they continued in their studies. As is set out above, moreover, the Applicants continued to operate on campus as SFTW even after its ratification was denied.

(ii) The Court should not Intervene in the SA's Decision

55. Should this Honourable Court determine that it will review the SA's decision, deference is owed to the SA as a private tribunal. It is not the Court's role to conduct a review of the factual merits of a domestic tribunal's decision or to rehear the evidence and decide how the matter ought to have been decided.⁹⁸ Rather, the Court's limited supervisory role is to review the processes by which a domestic tribunal governs itself.⁹⁹ The Court may consider whether the private tribunal acted within its jurisdiction, complied with the principles of natural justice, and acted in good faith.

⁹⁸ *Courchene v Carleton University Students' Assn Inc*, 2016 ONSC 3500 at para 20, BOA, Tab 12.

⁹⁹ *Hofer*, BOA, Tab 10; *Street* at paras 45-46; *Changoor v. IBEW, Local 353*, 2015 ONSC 2472 (Div Ct) [*Changoor* Div. Ct.] at paras 6, 8, BOA, Tab 14.

56. In this case, when the SA denied the Applicants' application for Campus Club status, it (a) acted within its jurisdiction, (b) complied with the principles of natural justice, and (c) acted in good faith. Consequently, the SA respectfully submits that this Court should not intervene in its decision.

57. Justice Stewart's recent decision in *Grant v. Ryerson Students' Union* directly on point.¹⁰⁰ In that case, just like in this one, a group of student union members asked this court to intervene when the RSU denied them Student Group status. Justice Stewart weighed all the circumstances of the case and declined to review the RSU's decision. It is respectfully submitted that this was the correct approach and that it ought to be followed in this case.

58. The Applicants rely heavily on the decision in *Lakeside Colony of Hutterian Brethren v. Hofer* to suggest that it is not whether the decision in question affects civil or property rights, but whether the decision affects rights that are of "sufficient importance to deserve the intervention of the court". In *Hofer*, the Supreme Court agreed that it was well-settled that unless some property or civil right is affected, the courts will not intervene in private decision-making. In *Hofer*, rights of membership were of sufficient importance to elicit the Supreme Court's intervention because it was through membership that the defendants obtained property and civil rights. *Hofer* did not open the door to the review of private decisions affecting other rights, especially not *Charter* (or public) rights like freedom of expression and association. The Applicants' assertion that these rights were affected by the SA's decision, moreover, is supported neither by the facts nor the law.

(iii) The SA's Decision was Made in Accordance with its Rules

¹⁰⁰ *Grant*.

59. Whether a domestic tribunal acted within its jurisdiction depends on whether the facts adduced before the domestic tribunal were “reasonably capable of being held to be a breach of the rules.”¹⁰¹ As stated by the Court in *Lee*: “The whole point of giving jurisdiction to a committee is so that they can determine the facts and decide what is to be done about them.”¹⁰²

60. The SA, through the CS Coordinator and Clubs and Society Office, reviewed all ratification applications and determined whether to approve or deny them or to refer them to the Executive for further review. These parties’ analysis inherently involved assessing whether the proposed group conformed with the SA’s policies and By-Law, including its Clubs Policy and Clubs Procedure. The Clubs Policy required proposed groups to adhere to all SA, Durham College, and UOIT Codes of Conduct and rules. Further, the Clubs Policy prescribed that a group’s purpose could not contain any endorsement or support for activities or events that breached SA policies, campus policies, or any applicable laws.¹⁰³ The SA was empowered to pass these policies by application of the *Corporations Act* and in keeping with its Letters Patent.

61. The Applicants have not challenged the SA’s policies. They have not alleged that they were improperly passed or that the Board did not have the power to pass them. They have taken no steps to introduce their own policies or to advocate for changes to the existing policies.

62. The SA did not act with an unauthorized purpose. Its actions – including those of the CS Coordinator, the Board, and the Executive – were authorized by its By-Law and policies. The SA did not exceed its jurisdiction by considering, and finding, that the SA’s activities were in violation of its anti-oppression mandate, which is an object of the corporation, set out in its Letters Patent.

¹⁰¹ *Lee* at p. 345.

¹⁰² *Ibid.*

¹⁰³ Campus Club Procedure, Ratification Requirements; Campus Club Policy, Policy Statements.

The SA assessed the SFTW, as it was required to do, and made the factual determination that its mandate and anticipated events violated its policies. It is not the Court's role to intervene in these finding of fact.¹⁰⁴

63. The Applicants conflate the obligations of the Institutions with those of the SA. The SA is an autonomous legal entity that must follow its own Letters Patent, By-Law, and policies when making decisions, which it did in this case.

64. The SA supports freedom of thought, belief, opinion and expression.¹⁰⁵ The SA supports the Applicants' rights to hold and express beliefs that differ with or contravene the SA's policies. The SA will not, however, pursuant to its existing policies, grant Campus Club status to a group that, in its discretion, it determines contravenes its policies.

(iv) The SA Complied with the Principles of Natural Justice

65. The SA's review of the Applicants' ratification package complied with the principles of natural justice. The Applicants were given timely notice of the SA's decision, were provided with the opportunity to make representations, and were provided with unbiased tribunals both at the Executive and Board levels.

Notice

66. The SA was required to give notice that permitted the Applicants an opportunity to consider their position and ensure attendance and contribution to discussion at the meeting. The Applicants had such notice at all stages. First, the Clubs Procedure made it clear that the SA would

¹⁰⁴ *Hofer* at para 10; *Street* at para. 45-46; *Changoor* Div. Ct. at paras 6, 8.

¹⁰⁵ Cullen Affidavit at para. 52.

respond to their submission within 10 business days. Naggar knew this prior to submitting the ratification package. Further, the SA responded within 4 business days of the SFTW's submission.

67. In her email of August 25, 2015, Amy invited the Applicants to select their own meeting date, which they did. The date they suggested, to which the SA agreed, was set for 10 days after Amy's email. This provided the Applicants with enough notice to prepare for a review the ratification package, and any questions that the SA might ask. In fact, Naggar admits that they did prepare.¹⁰⁶ The SFTW Executives discussed the upcoming meeting; specifically, the possibility that the outcome of the meeting might be that ratification was denied. Naggar consulted with Ms. Canaria of National Campus Life Network. The nature and detail of Applicants' preparation confirms that they were aware of the issues that would be discussed at the meeting; it was not a surprise to them that the details of their package were the subject matter of the meeting.

68. After the SA delivered its Written Decision, confirming its decision not to ratify SFTW as a Campus Club, Mr. Moore delivered his letter, appealing the SA's decision. Following, Ms. Sanche gave Mr. Moore notice that the SA would consider his correspondence. On November 23, 2015, Ms. Sanche wrote to Mr. Moore to confirm that the SA had decided to maintain its refusal to ratify SFTW as a Campus Club. The Applicants received no notice that Mr. Moore's letter would be discussed at the November 13, 2015 Board meeting as no such notice was required.¹⁰⁷

69. At all material times, and evidenced by their own internal discussions, the Applicants were aware of the subject matter of the September Hearing, and had ample opportunity to prepare.

Opportunity to Make Representations

¹⁰⁶ Naggar Transcript, *supra* note 34 at Q. 231-269.

¹⁰⁷ By-Law, *supra* note X at by-law 7.

70. Members must be given an opportunity to respond to the specific allegations made against them.⁴⁵ There is some flexibility in the scope of the opportunity required by natural justice.⁴⁶

71. The Applicants were given an opportunity to make submissions at the September Hearing. The meeting lasted almost half an hour. The Applicants, the Executive, and other members of the SA spoke and answered questions posed by each other. The SA raised its concerns with the SFTW application and provided the Applicants with an opportunity to respond. The responses did not include removal of the offending parts of the application. At the September Hearing, the Applicants were advised orally that their ratification package was denied.

72. Subsequently, the SA provided SFTW with the Written Decision. In response, Mr. Moore made lengthy written submissions to the Board, setting out SFTW's request that the Board reconsider the Executive's decision. The Board considered Mr. Moore's submissions and upheld the Executive's decision to deny ratification. SA members, including the Applicants, are only permitted to speak at Board meetings at the Chair's discretion.¹⁰⁸

73. In total, the Applicants had the opportunity to make both oral and written submissions, of which they availed themselves. At each stage, the Applicants knew that a decision would be made about the status of their application. The SA satisfied the requirement to afford the Applicants the opportunity to make representations.

The SA's Decision was not Biased

74. Decisions of a domestic tribunal will only be disputed where the tribunal demonstrates actual bias.¹⁰⁹ Courts have recognized that given the structure of voluntary associations, it is

¹⁰⁸ By-Law, *supra* note 4 at by-law 4.3, Rights of Full Members.

¹⁰⁹ *Changoor v IBEW, Local 353*, 2014 ONSC 4558 (Ont SCJ) at para. 25, upheld in *Changoor* Div Ct, at para 9.

almost inevitable that the decision makers will have at least an “indirect interest” in the decision being made.¹¹⁰

75. The SA did not demonstrate any bias when it reviewed the Applicants’ application. The CS Coordinator, the Executive, and the Board spent considerable time and effort considering the application. Members of the Executive met twice to discuss the application and, separately, met with the Institutions to discuss it. The Executive met with the Applicants to express its concerns and rationale for denying ratification. The Board also met to review the Applicants’ appeal submission, which it ultimately denied. As an elected body with varying personal views, the SA did its utmost to consider, collaboratively, whether ratifying SFTW was in keeping with the SA’s policies, including its objects set out in its Letters Patent.

76. The SA did not discriminate against the Applicants. It carefully considered the SFTW application and assessed whether the proposed club complied with the SA’s policies. It did not simply dismiss the application outright without consideration.

(i) The SA’s Decision was Made Bona Fide and without Bad Faith

77. The SA’s decision was not arbitrary or unfair. The SA complied with its policies, including to ensure that the mandate of any Campus Club was in alignment with the SA’s anti-oppression mandate. The requirement that Campus Clubs comply with SA policies was known to the Applicants. It was set out clearly in the SA’s policies. It was also within the SA’s power to interpret its own policies, which were properly enacted and which are not challenged by the Applicants. Further, the Applicants were given ample opportunity to challenge the SA’s interpretation of the notion of anti-oppression and to provide their own analysis, which they did

¹¹⁰ *Hofner*, at para 85.

not do. There is no evidence to suggest that the CS Coordinator, the Executive, or the Board had a closed or pre-determined mind. Their many meetings and consultations with advisors, including lawyers, demonstrates the contrary.

78. The Applicants knew that the SA would also review SFTW's proposed events and was empowered to refuse to authorize them. It was within the SA's purview and was not improper that the SA raise SFTW's major event as an issue working against ratification. The SA's concerns with SFTW's affiliations, moreover, was not evidence of bias but evidence of a detailed investigation into the nature and purpose of the proposed club. Contrary to the Applicants' bald assertions that the SA "has no issue with the Catholic Students' Associations [*sic*] affiliation with the Catholic Church", there is simply no evidence before the court about the ratification process of any other group, including the Catholic Students' Association.

79. The SA's interpretation of anti-oppression is to prioritize equity-seeking groups, not to manufacture them. Some of the SA's 85 Campus Clubs are not members of equity-seeking groups, strictly speaking, but many others are. The SA prioritizes funding those groups. It is also within the purview of the SA to define an "equity-seeking group"; if the Applicants disagree with this interpretation, they can lobby the SA to amend it. The SA is also empowered to determine how to distribute funds, and chooses to do so in keeping with its policy and with its object of "building an environment free of systemic societal oppression and decolonization." Funding equity-seeking groups is incidental to achieving this purpose.

(C) THE SA NEED NOT CONSIDER *CHARTER* VALUES WHEN DECIDING WHETHER TO RATIFY A CAMPUS CLUB

80. The *Charter* applies to an entity's activities if the entity itself is "government" or if the activity in question is itself governmental in nature.⁶⁵ The Supreme Court of Canada has confirmed

that even universities are not “organs of the government”, even though, like many other private organizations, they are subject to government regulations and in large measure depend on government funds.¹¹¹ As a non-profit corporation, the SA is even further removed from any type of government intervention or oversight. Recently, in *Grant*, Justice Stewart of this Court stated that “as a general principle which still prevails, the Charter does not apply to a private corporation’s internal decisions affecting its members.”¹¹²

81. Although the Applicants rely on section 2(b) and 2(d) of the *Charter* as a basis for the relief they seek,¹¹³ they have failed to show that the SA is bound by the *Charter*. In any event, the Applicants rights have not been impinged. After the SA’s decision, they continued to meet as SFTW and discuss group business. They also gathered, publicly and solicited new members. They publicly demonstrated their ideas and engaged in public campaigns on campus, as is clearly evidenced by their social media postings. The Applicants’ rights to associate and express themselves have not been restricted by the SA’s decision. The only impact of the SA’s restriction was to refuse to extend to the students the handful of benefits enjoyed by Campus Clubs. At least one of the Applicants, moreover, enjoyed those benefits because of his membership in other Campus Clubs.

(D) THE APPLICANTS HAVE NOT EXHAUSTED THEIR REMEDIES

82. The Applicants did not like the SA’s decision. Therefore, they ask this Court to weigh in on the decision-making of the SA, a private body akin to any other corporation. The Applicants ask the Court to take steps along a fraught path, whereby the decisions of all student associations and

¹¹¹ *McKinney v University of Guelph*, [1990] 3 S.C.R. 229 (SCC) at para. 41, BOA, Tab 20.

¹¹² *Grant* at para 49.

¹¹³ Notice of Application, CAR, Note 1 at para 26.

other private entities will be subject to court review. This is not the role of the Court: "...this court cannot be made a court of appeal from decisions of such tribunals."¹¹⁴

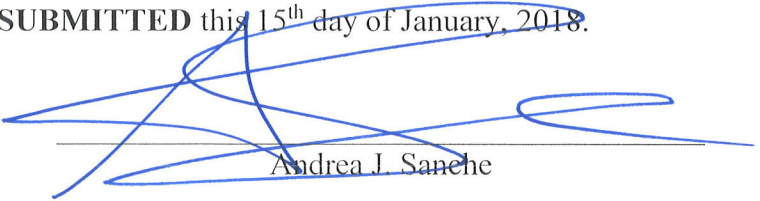
83. The Board and its Executive were elected by members of the SA to serve as their representatives. They were empowered to make decisions on financial issues, as well as to pass policies and revise the By-Law. SA members, generally, had the right to nominate candidates for elections or to stand for election. They also had the right to speak and vote at General Meetings. They can also lobby the SA to consider certain positions or new policies. Their remedy is political in nature.¹¹⁵ They have not availed themselves of this remedy, and this Court certainly cannot grant it to them.

PART IV - ORDER REQUESTED

84. The Respondent requests that this Honourable Court dismiss the application in its entirety, with costs to the Respondent.

85. In the alternative, should this Court intervene in the SA's decision and determine that the decision was improperly made, the Respondent submits that the decision should be remitted to the SA for reconsideration.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2018.



Andrea J. Sanche

¹¹⁴ *Lee* at p 341.

¹¹⁵ *Grant* at para 52.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. Halsbury’s Laws of Canada (online), *Administrative Law* (2013 Reissue), I. Overview of Administrative Law, 1. Definition, at HAD-1.
2. *Dunsmuir v. New Brunswick*, 2008 SCC 9.
3. *Setia v. Appleby College*, 2013 ONCA 753.
4. *Grant v. Ryerson Students’ Union*, 2016 ONSC 5519.
5. Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf consulted on 9 December 2015), (Carswell: Toronto, 2015), ch 1.
6. *Rakowski v. Malagerio*, [2007] OJ No 369, 2007 CarswellOnt 539, (Ont SCJ).
7. *Lee v. The Showmen’s Guild of Great Britain*, [1952] 2 QB 329, (CA).
8. *Street v. B.C. School Sports*, 2005 BCSC 958.
9. *Peerless (Guardian ad litem of) v. B.C. School Sports* (1998), 157 D.L.R. (4th) 345, 1998 CanLII 6538 (BC CA).
10. *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] SCJ No 87, 1992 CarswellMan 138 (SCC).
11. *Polish National Union of Canada v Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134.
12. *Courchene v. Carleton University Students’ Assn Inc*, 2016 ONSC 3500.
13. *Changoor v. IBEW, Local 353*, 2014 ONSC 4558 (Ont SCJ).
14. *Changoor v. IBEW, Local 353*, 2015 ONSC 2472, (Ont Div Ct).
15. *Association of Part-Time Undergraduate Students of the University of Toronto v University of Toronto Mississauga Students’ Union and Erindale Part-Time Undergraduate Students’ Association*, 2008 CanLII 43054 (Ont SCJ).
16. *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728.
17. *Mayan v. World Professional Chuckwagon Association*, 2010 ABQB 140.
18. *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31.
19. *Eldridge v. British Columbia*, [1997] 3 SCR 624 (SCC).
20. *McKinney v. University of Guelph*, [1990] 3 SCR 229 (SCC).

21. *Lobo v. Carleton University*, 2012 ONSC 254.
22. *Lobo v. Carleton University*, 2012 ONCA 498.
23. *Lavigne v. OPSEU*, [1991] 2 SCR 211.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Corporations Act, RSO 1990, c C38

Incidental powers

23.(1) A company possesses, as incidental and ancillary to the objects set out in the letters patent or supplementary letters patent, power,

- (a) to carry on any other business capable of being conveniently carried on in connection with its business or likely to enhance the value of or make profitable any of its property or rights;
- (b) to acquire or undertake the whole or any part of the business, property and liabilities of any person carrying on any business that the company is authorized to carry on;
- (c) to apply for, register, purchase, lease, acquire, hold, use, control, license, sell, assign or dispose of patents, patent rights, copyrights, trade marks, formulae, licences, inventions, processes, distinctive marks and similar rights;
- (d) to enter into partnership or into any arrangement for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concession or otherwise with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction that the company is authorized to carry on or engage in or any business or transaction capable of being conducted so as to benefit the company, and to lend money to, guarantee the contracts of, or otherwise assist any such person or company, and to take or otherwise acquire shares and securities of any such company, and to sell, hold, reissue, with or without guarantee, or otherwise deal with the same;
- (e) to take or otherwise acquire and hold shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as to benefit the company;
- (f) to enter into arrangements with any public authority that seem conducive to the company's objects and obtain from any such authority any rights, privileges or concessions;
- (g) to establish and support or aid in the establishment and support of associations, institutions, funds or trusts for the benefit of employees or former employees of the company or its predecessors, or the dependants or connections of such employees or former employees, and grant pensions and allowances, and make payments towards insurance or for any object similar to those set forth in this clause, and subscribe or guarantee money for charitable, benevolent, educational or religious objects or for any exhibition or for any public, general or useful objects;

(h) to promote any company for the purpose of acquiring or taking over any of the property and liabilities of the company, or for any other purpose that may benefit the company;

(i) to purchase, lease or take in exchange, hire or otherwise acquire any personal property and any rights or privileges that the company may think necessary or convenient for the purposes of its business;

(j) to construct, improve, maintain, work, manage, carry out or control any roads, ways, tramways, branches, sidings, bridges, reservoirs, watercourses, wharves, factories, warehouses, electric works, shops, stores and other works and conveniences that may advance the company's interests, and to contribute to, subsidize or otherwise assist or take part in the construction, improvement, maintenance, working, management, carrying out or control thereof;

(k) to raise and assist in raising money for, and to aid by way of bonus, loan, promise, endorsement, guarantee or otherwise, any person or company with whom the company may have business relations or any of whose shares, securities or other obligations are held by the company and to guarantee the performance or fulfilment of any contracts or obligations of any such person or company, and in particular to guarantee the payment of the principal of and interest on securities, mortgages and liabilities of any such person or company;

(l) to draw, make, accept, endorse, discount, execute and issue bills of exchange, promissory notes, bills of lading, warrants and other negotiable or transferable instruments;

(m) to sell, lease, exchange or dispose of the undertaking of the company or any part thereof as an entirety or substantially as an entirety for such consideration as the company thinks fit, and in particular for shares or securities of any other company having objects altogether or in part similar to those of the company, if authorized so to do by a special resolution;

(n) to sell, improve, manage, develop, exchange, lease, dispose of, turn to account or otherwise deal with the property of the company in the ordinary course of its business;

(o) to adopt such means of making known the products of the company as seems expedient, and in particular by advertising in the press, by circulars, by purchase and exhibition of works of art or interest, by publication of books and periodicals or by granting prizes and rewards or making donations;

(p) to cause the company to be registered and recognized in any foreign country or province or territory of Canada, and to designate persons therein according to the laws of such foreign country or province or territory to represent the company and to accept service for and on behalf of the company of any process or suit;

(q) to allot and issue fully-paid shares of the company in payment or part payment of any property purchased or otherwise acquired by the company or for any past services rendered to the company;

(r) to distribute among the shareholders of the company in money, kind, specie or otherwise as may be resolved, by way of dividend, bonus or in any other manner considered advisable, any property of the company, but no such distribution shall decrease the capital of the company unless made in accordance with this Act;

(s) to pay all costs and expenses of or incidental to the incorporation and organization of the company;

(t) to invest and deal with the money of the company not immediately required for its objects in such manner as may be determined;

(u) to do any of the above things and all things authorized by the letters patent and supplementary letters patent as principals, agents, contractors, trustees or otherwise, and either alone or in conjunction with others;

(v) to do all such other things as are incidental or conducive to the attainment of the above objects and of the objects set out in the letters patent and supplementary letters patent.

Powers may be withheld

(2) Any of the powers set out in subsection (1) may be withheld or limited by the letters patent or supplementary letters patent.

By-laws

68 (1) The directors may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

- (a) the allotment and issue of shares, the making of calls thereon, the payment thereof, the issue of share certificates, the forfeiture of shares for non-payment, the sale of forfeited shares, the transfer and the registration of transfers of shares;
- (b) the declaration and payment of dividends;
- (c) the qualification and remuneration of the directors;
- (d) the time for and the manner of election of directors;
- (e) the appointment, remuneration, functions, duties and removal of agents, officers and employees of the company and the security, if any, to be given by them to it;
- (f) the time and place and the notice to be given for the holding of meetings of the shareholders and of the board of directors, the quorum at meetings of shareholders, the requirements as to proxies, and the procedure in all things at shareholders' meetings and at meetings of the board of directors;
- (g) the conduct in all other particulars of the affairs of the company.

By-laws

129.(1) The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

- (a) the admission of persons and unincorporated associations as members and as members by virtue of their office and the qualification of and the conditions of membership;
- (b) the fees and dues of members;
- (c) the issue of membership cards and certificates;
- (d) the suspension and termination of memberships by the corporation and by the member;
- (e) the transfer of memberships;
- (f) the qualification of and the remuneration of the directors and the directors by virtue of their office, if any;
- (g) the time for and the manner of election of directors;
- (h) the appointment, remuneration, functions, duties and removal of agents, officers and employees of the corporation and the security, if any, to be given by them to it;
- (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members' meetings and at meetings of the board of directors;
- (j) the conduct in all other particulars of the affairs of the corporation.

CHRISTIAN NAGGAR et al.

-and-

THE STUDENT ASSOCIATION OF DURHAM COLLEGE AND
UOIT

Applicants

Respondent

Court File No. CV-17-575212

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
OSHAWA

RESPONDING PARTY'S FACTUM

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