

**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-17-575212

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Applicants

and

THE STUDENT ASSOCIATION AT DURHAM COLLEGE AND UOIT

Respondent

APPLICATION 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*

**RESPONDENTS' JOINT MEMORANDUM OF LAW**

November 15, 2017

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## RESPONDENTS' JOINT MEMORANDUM OF LAW

### HISTORY OF THE APPLICATIONS

1. On 7 February 2017, the Honourable Justice Lederer ordered, on consent, that these Applications be heard together.
2. To assist this Honourable Court, the parties jointly suggested to the Court that the Applicants would prepare a Joint Memorandum of Law and the Respondents would prepare a Joint Memorandum of Law to be used for all three Applications. The Court agreed and so ordered.
3. This Joint Memorandum of Law is submitted on behalf of the three Respondents: the University of Toronto Mississauga Students' Union ("UTMSU"), the Student Association at Durham College and UOIT ("UOIT")<sup>1</sup>, and the Ryerson Students' Union ("RSU") (collectively, the "**Respondents**" or the "**Student Unions**"). This Memorandum of Law is an overview of the legal principles upon which the Respondents will rely when arguing the Applications; it does not set out the facts or respond to the facts or factual arguments raised by the Applicants in the Applicants' Joint Memorandum of Law. These factual arguments will be raised in the Respondents' respective factums, which will be filed on 10 January 2018.

### SUMMARY OF LEGAL PRINCIPLES

4. Each Student Union is a private corporation incorporated under the Ontario *Corporations Act* and is a private - or domestic - tribunal. As private entities, the actions of the Student Unions must be reviewed by engaging principles of private, as opposed to public or administrative, law. Canadian courts have consistently recognized that, as private entities, the decisions of student unions will be reviewed by the courts only where the decision interferes with or affects a member's

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<sup>1</sup> UOIT has been dissolved and wound-up by order of this Court. A new entity, the University of Ontario Institute of Technology Student Union ("UOITSU") has agreed to respond to this Application.

property or civil rights. Importantly, factual determinations made by a student union are not reviewable by the court.

#### **A. ADMINISTRATIVE LAW PRINCIPLES DO NOT APPLY TO STUDENT UNIONS**

5. Administrative law regulates government power and ensures its appropriate use.<sup>2</sup> The Supreme Court of Canada has repeatedly reaffirmed that private disputes are redressed by way of private law, not public law.<sup>3</sup> If an entity is private, administrative law principles and remedies do not apply.<sup>4</sup> Rather, powers exercised by private corporations are governed by private law such as contract, property or tort.<sup>5</sup>

6. In order to determine if administrative law is applicable to the decision under scrutiny, courts must assess whether the decision-maker is public or private.<sup>6</sup> In making this determination, courts must weigh all the circumstances of the case.<sup>7</sup> The Ontario Court of Appeal has listed a number of factors that courts may consider in analysing whether a decision-maker is public or private, including:

- (a) the nature of the decision-maker;
- (b) the extent to which the decision is founded in and shaped by law as opposed to private discretion;

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<sup>2</sup> 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.

<sup>3</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 27, BOA, Tab 2.

<sup>4</sup> *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.

<sup>5</sup> 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.

<sup>6</sup> *Appleby College*, at paras 20, 32, BOA, Tab 4.

<sup>7</sup> *Appleby College*, at para 33, BOA, Tab 4.

- (c) the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- (d) the broader importance of the matter to the general public; and
- (e) the suitability of public law remedies.<sup>8</sup>

7. Whether one or a combination of factors tips the balance in favour of a public or private law character depends on the facts of each case.<sup>9</sup>

8. The Respondent Student Unions are not public decision-makers nor are they creatures of statute; rather, the Student Unions are private corporations incorporated under the *Corporations Act*. The Student Unions are not agents of the government, nor are they directed, controlled or significantly influenced by a public entity. As such, administrative law principles ought not to be engaged when deciding these Applications.

9. Moreover, the Student Unions have broad powers to act independently and without external influence. Section 129(1) of the *Corporations Act* gives the Student Unions the power to pass By-Laws regulating “the conduct in all other particulars of the affairs of the corporation,” while section 23 gives the Student Unions “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 ...”<sup>10</sup> In adopting by-laws and policies, the Student Unions are completely autonomous. The Student Unions are not beholden to any government Minister, department, or agency in developing their rules. The governance of the Student Unions is completely private.

<sup>8</sup> *Appleby College*, at para 34, BOA, Tab 3.

<sup>9</sup> *Appleby College*, at para 33, BOA, Tab 3.

<sup>10</sup> *Corporations Act*, s 23(1)(v), s 68(1)(g).

10. Similarly, the Student Unions' decisions to grant or deny student group status to one or more of its members are private decisions, and are not subject to administrative law rules or remedies. These decisions are not founded in or shaped by public law; the decisions to deny its members student group status involve private discretion.

11. This Court's jurisdiction to intervene in the Student Unions' decisions, if any, arises from the Court's power to review a decision of a domestic or private tribunal.

**B. PRIVATE CORPORATIONS ARE FREE TO ENACT MORALLY-BASED POLICIES**

12. Private corporations have the power to enact their own by-laws, policies, and rules free from judicial scrutiny. Pursuant to the Ontario *Corporations Act*, the directors of a corporation may pass by-laws to regulate the affairs of the corporation.<sup>11</sup>

13. As private corporations, student unions have these same powers. For example, in *Rakowski v Malagerio*, this Court found that it was within the student union's letters patent, mission statement and role in the college's community to enact a policy that prevented students who were members of a non-sanctioned student association to run for Director positions.<sup>12</sup>

14. The Applicants have not challenged the validity of the Respondents' respective policies. Accordingly, the only question for this Honourable Court is whether the Respondents acted in accordance with their policies when they denied the Applicants student group status.

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<sup>11</sup> *Corporations Act*, RSO 1990, c C38, s 129(1).

<sup>12</sup> *Rakowski v Malagerio et al*, [2007] OJ No 369, 2007 CarswellOnt 539, (Ont. SCJ), [*Rakowski*], BOA, Tab 6.

**C. THE COURT'S JURISDICTION TO REVIEW THE DECISION OF A PRIVATE TRIBUNAL IS NARROW**

15. The court has limited jurisdiction to review the decision of a private tribunal. This was set out in the seminal case of *Lee v The Showmen's Guild of Great Britain*, where Lord Denning, acknowledging that the court cannot be made a court of appeal from decisions of domestic tribunals, carved out a very narrow supervisory jurisdiction over domestic tribunals.<sup>13</sup>

16. Courts may exercise this limited supervisory jurisdiction over the decisions of a domestic tribunal where the domestic tribunal's decision interferes with or affects a member's property or civil rights.<sup>14</sup> In this context, "civil rights" means a person's proprietary rights or the right to work or earn a livelihood.<sup>15</sup> This often amounts to expulsion from the group or association.<sup>16</sup> Where a member's property or civil rights are not affected by the decision of a domestic tribunal, the court has even more limited, if any, jurisdiction.

17. The decision in *Lee* has been consistently followed and upheld by Canadian courts. In *Lakeside Colony of Hutterian Brethren v Hofer* the Supreme Court of Canada found that it had jurisdiction over the domestic tribunal of a Hutterite colony where the domestic tribunal had expelled members from the colony.<sup>17</sup> This expulsion engaged the members' property rights as the members lost their right to live in and be supported by the colony. In essence, the members were stripped of their property and their civil identity.<sup>18</sup> Similarly, in *Polish National Union of Canada*

<sup>13</sup> *Lee v The Showmen's Guild of Great Britain*, [1952] 2 QB 329 (CA) [*Lee*], p 341, BOA, Tab 7.

<sup>14</sup> *Street v B.C. School Sports*, 2005 BCSC 958, [*Street*], at para 36 BOA, Tab 8, citing *Peerless (Guardian ad litem of) v B.C. School Sports* (1998), 157 D.L.R. (4th) 345, 1998 CanLII 6538 (BC CA), BOA, Tab 9; see also *Rakowski*, at para 39, BOA, Tab 6.

<sup>15</sup> *Lee*, pp 342, 343, BOA, Tab 7.

<sup>16</sup> See, for example *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] SCJ No 87, 1992 CarswellMan 138 (SCC), [*Lakeside Colony*], BOA, Tab 10; *Appleby College*, BOA, Tab 3; *Street*, BOA, Tab 8.

<sup>17</sup> *Lakeside Colony*, BOA, Tab 10.

<sup>18</sup> *Lakeside Colony*, para 7.



*v Branch 1 the Polish National Union of Canada*, this Court found that it had jurisdiction over the decision of a union that engaged a union branch's rights to own property.<sup>19</sup>

18. More recently, in *Grant v Ryerson Students' Union [RSU]*, this Court refused to review the decision of the RSU to deny student group status of a pro-life organization:

In my view, the RSU is a private entity and does not engage principles of administrative law. Accordingly, the decision to grant or deny Student Group status to the group of which the Applicants are members is likewise a private one and within the powers of the organization to make.

To the extent it might be accepted that this Court has jurisdiction in certain limited cases to review decisions that are made in accordance with the internal affairs of associations or clubs if a pressing principle of natural justice is involved, I do not regard this as being one of those cases.

As a result, I consider that this court should decline to review the RSU decision to deny Student Group status to SFLR.<sup>20</sup>

19. The Respondents submit that the decision to deny student group status to the Applicants is not a decision that engages or affects civil or property rights. The Respondents' decisions did not affect or revoke its members' rights as members, nor did they prevent their members from forming a group, from meeting, from organizing on campus, or from reapplying for student group status.

20. This will be expanded in the Respondents' factum. In the event that the Respondents are wrong on this point, the Respondents submit that the test to be followed by this Honourable Court is as set out below.

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<sup>19</sup> *Polish National Union of Canada v Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134, BOA, Tab 11.

<sup>20</sup> *Grant* paras 41-43, BOA, Tab 4.

21. Where civil or property rights are engaged, the court's review of decisions of a private or domestic tribunal are limited to an examination of whether that tribunal:

- (a) exceeded its jurisdiction or acted contrary to its rules;
- (b) acted contrary to the rules of natural justice; or
- (c) acted in bad faith.<sup>21</sup>

22. It is not the function of the reviewing court to rehear the evidence and decide how the matter ought to have been decided.<sup>22</sup> In essence, it is not the function of the reviewing court to revisit the domestic tribunal's findings of fact.<sup>23</sup>

23. This limited jurisdiction "respects the expertise, autonomy and independence of unions over their internal affairs, while maintaining judicial oversight over the fair application of the union's own rules."<sup>24</sup>

24. In the 2016 decision of *RSU*, the Honourable Justice Stewart acknowledged that the court may have jurisdiction in "certain limited cases to review decisions that are made in accordance with the internal affairs of associations or clubs if a pressing principle of natural justice is involved."<sup>25</sup> Justice Stewart did not regard a student union's denial of student group status to be one of those cases and did not intervene in the RSU's decision to deny student group status to a pro-life organization.<sup>26</sup>

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<sup>21</sup> *Courchene v Carleton University Students' Assn Inc*, 2016 ONSC 3500 at para 19 [*Courchene*], BOA, Tab 12.

<sup>22</sup> *Courchene* at para 20, BOA, Tab 12.

<sup>23</sup> *Courchene* at para 20, BOA, Tab 12.

<sup>24</sup> *Changoor v IBEW, Local 353*, 2014 ONSC 4558 (Ont SCJ), para 5, [*Changoor* Ont SCJ], BOA, Tab 13, cited with approval in: *Changoor v IBEW, Local 353*, 2015 ONSC 2472, (Ont Div. Ct.), at para 6, BOA, Tab 14.

<sup>25</sup> *Grant*, at para 42, BOA, Tab 4.

<sup>26</sup> *Grant*, at para 42, BOA, Tab 4.

25. Contrary to the Applicants' assertion that Justice Stewart's conclusion was "bare without any reasoned analysis" and "should be accorded little weight," Justice Stewart engaged in a thorough analysis and concluded that the RSU was a private corporation, not controlled by any government ministry, department or agency in developing its rules, making it a private entity that does not engage principles of administrative law.<sup>27</sup> Notably, Justice Stewart found that "even though the RSU operates on a public university campus, it is a private corporation with broad powers to act independently."<sup>28</sup>

***(i) A Domestic Tribunal's Decision Must be Made in Accordance with its Rules***

26. 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."<sup>29</sup> 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."<sup>30</sup>

27. In assessing whether a domestic tribunal has exceeded its jurisdiction, the courts will look to the tribunal's own by-laws, policies and rules and see whether its decision was made in accordance with those by-laws, policies and rules.

28. For example, in *Courchene v Carleton University Students' Assn Inc*, Carleton University's student union disqualified a candidate from running in student elections based on its application of the "Voting Day Policy". The Court engaged in a limited review of the decision and found that the union's Board had applied the incorrect Voting Day Policy. The Court therefore

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<sup>27</sup> *Grant*, at paras 38-40, BOA, Tab 4.

<sup>28</sup> *Grant*, at para 38, BOA, Tab 4.

<sup>29</sup> *Lee*, at p 345, BOA, Tab 7.

<sup>30</sup> *Lee*, at p 345, BOA, Tab 7.

intervened and found that the Board of the student union exceeded its jurisdiction by applying the incorrect policy.<sup>31</sup>

29. The Applicants rely on *Courchene* to suggest that the Student Unions' decisions at issue are not immune from this court's review. This is an incorrect recitation of the law. The Student Unions' decisions to deny student group status are not the type of decisions made by student unions (or private tribunals, more generally) that are subject to court review. In the few cases where student unions' decisions were reviewed by the court, they were reviewed in terms of process and compliance with policies. These applications explicitly do not challenge the Respondents' compliance with their policy. The outcome of decisions made in accordance with internal rules are simply not reviewable. As the Supreme Court has stated:

... It is not incumbent on the court to review the merits of the decision to expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without mala fides.<sup>32</sup>

30. In another student union case - *Association of Part-Time Undergraduate Students of the University of Toronto* - the Court intervened when the referendum of one student union affected the rights, fees and membership of another student union.<sup>33</sup> The Court found that the student unions acted outside of their jurisdiction when they changed the membership and fee requirements through a referendum without following the procedures in their by-laws and constitution.<sup>34</sup>

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<sup>31</sup> *Courchene*, at para 20, BOA, Tab 12.

<sup>32</sup> *Lakeside*, at para 10, BOA, Tab 10.

<sup>33</sup> *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) at para 19-20, [Association of Part-Time Undergraduate Students] BOA, Tab 15.

<sup>34</sup> *Association of Part-Time Undergraduate Students*, at para 21, BOA, Tab 15.

**(ii) *Principles of Natural Justice Requires that the Process be Fair***

31. Courts have consistently recognized that the “content of the principles of natural justice is flexible and depends on the circumstances in which the question arises.”<sup>35</sup> In the specific context of domestic tribunals, natural justice requires:

- (a) notice;
- (b) an opportunity to make representations; and
- (c) an unbiased tribunal.<sup>36</sup>

32. The process employed by a domestic tribunal does not need to be as structured as the process necessary in a court or statutory tribunal.<sup>37</sup> The question to be asked is not whether the process is perfect, but whether the process has been fundamentally fair.<sup>38</sup>

**Notice**

33. Notice must be adequate and timely, sufficient to give the person an opportunity to consider their position and to ensure attendance and contribution to discussion at the meeting.<sup>39</sup> However, the courts must not examine notices too particularly or too meticulously. Rather, “if in substance they convey to the members of the committee what is going to be done, that is sufficient.”<sup>40</sup>

34. In *Lakeside Colony*, Mr. Hofer was given no specific notice of what was to be discussed at the colony meetings in which the colony planned to determine how to discipline Mr. Hofer.

<sup>35</sup> *Lakeside Colony*, para 80, BOA, Tab 10.

<sup>36</sup> *Polish National Union*, para 66, BOA, Tab 11.

<sup>37</sup> *Changoor Ont SCJ.*, para 19, BOA, Tab 13.

<sup>38</sup> *Street*, at para 86, BOA, Tab 8.

<sup>39</sup> *Lakeside Colony*, para 83, BOA, Tab 10.

<sup>40</sup> *Lakeside Colony*, at para 82, Tab 10.

Additionally, Mr. Hofer was given no notice of the subsequent meetings of the Ministers in which his expulsion was confirmed. Overall, the Court found that there “were really only a few moments of notice that expulsion was being considered before the issue was actually decided.”<sup>41</sup> The Supreme Court found that the minimal notice and lack of specifics in the notice violated the requirements of natural justice.<sup>42</sup>

35. In *Polish National*, the decision to suspend membership and eliminate a Branch of the Union was made in the absence of the member and the president of the Branch. The only notice given to the Branch members was that there was to be a special meeting of the Head Executive Board to “discuss some very important matters regarding the Polish National Union of Canada and the Polish Voice”.<sup>43</sup> Mr. Alesandrowicz, the president of Branch 1, advised Mr. Bukin, the president of the Head Executive Board, that he could not attend. The meeting proceeded in Mr. Alesandrowicz’s absence and Mr. Bukin suspended Mr. Alesandrowicz’s Union membership and his status as Branch 1 president. The Superior Court concluded that there was a complete lack of natural justice in the Board’s decision to suspend Union membership, stating that there was no evidentiary foundation for the assertion that Mr. Alesandrowicz or Branch 1 knew or should have known that their status was in jeopardy at the special meetings called by the Board.<sup>44</sup>

### **Opportunity to Make Representations**

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

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<sup>41</sup> *Lakeside Colony*, at para 166, BOA, Tab 10.

<sup>42</sup> *Lakeside Colony*, at para 170, BOA, Tab 10..

<sup>43</sup> *Polish National*, at para 24, BOA, Tab 11.

<sup>44</sup> *Polish National*, at para 72, BOA, Tab 11.

<sup>45</sup> *Polish National Union*, at para 66, BOA, Tab 11; *Lakeside Colony*, at para 84, BOA, Tab 10.

37. In *Association of Part-Time Undergraduate Students of the University of Toronto*, the student union was not consulted before proposals that affected its membership and fees were enacted. The Court found that, at a minimum, the union should have had the opportunity to respond to the proposals for changes to its membership and fees.<sup>47</sup>

38. In *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston [Hart]*,<sup>48</sup> the Court refused to review the Respondent's decision to remove the Applicant - Father Hart - from office. The Respondent corporation (the Archdiocese) provided Father Hart with oral and written notice of its concerns, and in each case, afforded him opportunities to respond. Father Hart claimed that he requested a meeting with the Archdiocese, which request was denied. The Court found that the Archdiocese had denied Father Hart's meeting request, but that this refusal was not unfair because canon law did not provide for such a meeting. Ultimately, the Court refused to intervene in the Archdiocese's decision because although Father Hart could have availed himself of a fair review process under the Archdiocese's rules, he utterly failed to exhaust this internal appeal processes before commencing his action.

### **Unbiased Tribunal**

39. Similar to administrative tribunals, decisions of a domestic tribunal must not be tainted with bias.<sup>49</sup> However, unlike administrative tribunals whose decisions are reviewed on the "reasonable apprehension of bias" standard, a domestic tribunal's decision will only be suspect where the tribunal demonstrates actual bias.<sup>50</sup> Courts have recognized that, given the structure of

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<sup>46</sup> *Lakeside Colony*, at para 84, BOA, Tab 10.

<sup>47</sup> *Association of Part-Time Undergraduate Students*, at para 23, BOA, Tab 15.

<sup>48</sup> *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728 [*Hart*], BOA, Tab 16.

<sup>49</sup> *Lakeside Colony*, at para 80, BOA, Tab 10.

<sup>50</sup> *Changoor Ont SCJ*, para 25, BOA, Tab 13, upheld in *Changoor Div Ct*, at para 9, BOA, Tab 14.

voluntary associations, it is almost inevitable that the decision makers will have at least an “indirect interest” in the decision being made.<sup>51</sup>

40. In *Lakeside Colony*, the decision to remove Mr. Hofer and his sons from the colony was initially made by the voting members of the colony in a meeting of the Lakeside Colony when Mr. Hofer refused to repent for his misbehaviour. The decision was later brought up and reaffirmed in a meeting with a senior elder. The decision was further discussed and affirmed in three separate meetings of Ministers and three additional meetings of the Lakeside Colony members. At each meeting the decision to remove Mr. Hofer from the colony was affirmed. The Supreme Court of Canada made no ruling on whether the tribunal was biased in this case, and instead ruled the decision to be unfair based on the lack of sufficient notice given in the first colony meeting.

41. Notably, the Supreme Court of Canada in *Lakeside Colony* recognized the legitimacy of the appeal process outlined by the Hutterite customs and traditions as the highest source of authority for establishing the internal rules and procedure of the Hutterite Colony. The other written sources of rules were “merely imperfect attempts to capture these [customs and traditions].”<sup>52</sup> The Supreme Court relied on the informal internal appeal processes expressed through Hutterite customs and traditions and specifically found that to rely exclusively on written documents would be unwise.<sup>53</sup>

**(iii) *Decisions Must be Made Bona Fide without Bad Faith***

42. A domestic tribunal must exercise its power *bona fide* without fraud, oppression, or improper motives.<sup>54</sup> Bad faith connotes arbitrary or unfair conduct usually marked by unfairness,

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<sup>51</sup> *Lakeside Colony*, at para 85, BOA, Tab 10.

<sup>52</sup> *Lakeside Colony*, at para 62, BOA, Tab 10.

<sup>53</sup> *Lakeside Colony*, at para 62, BOA, Tab 10.

<sup>54</sup> *Rakowski*, at para 56, BOA, Tab 6.



partiality, secretiveness, unreasonableness, improper motives, oppression, fraud, or the absence of procedural fairness.<sup>55</sup>

43. In *Rakowski*, the Students' Federation enacted a policy to address an internal lack of loyalty in light of diverse or discordant political views on the Ontario government's possible tuition fee increase. This policy stated that Directors of the Federation could not be members or hold positions in any other student association or student advocacy group throughout their term as Director.<sup>56</sup> Mr. Rakowski, a member of a student association called the National Education Association of Disabled Students ("NEADS"), wanted to run for Director, but was prevented from running because of his membership in NEADS. The Court found that although there were interpersonal and emotive factors at work in the implementation of the new policy (perhaps not surprising in a private corporation), the Court found that the policy was not enacted in bad faith.<sup>57</sup>

44. In *Association of Part-Time Undergraduate Students of the University of Toronto*, the Court found unfairness in the referendum process and in the steps taken leading up to it. In this case one student union unilaterally made decisions affecting the other student union without any direct communication with the affected student union. The Court found this to breach natural justice; however, the Court was not prepared to find that the student unions acted in bad faith.<sup>58</sup>

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<sup>55</sup> *Rakowski*, at para 56, BOA, Tab 6.

<sup>56</sup> *Rakowski* at para 3, BOA, Tab 6.

<sup>57</sup> *Rakowski* at para 57, BOA, Tab 6.

<sup>58</sup> *Association of Part-Time Undergraduate Students*, at para 24, BOA, Tab 15.

**D. THE COURT’S NARROW JURISDICTION DOES NOT EXTEND TO REVIEWING FACTUAL FINDINGS**

45. The narrow, supervisory jurisdiction of the court does not extend to determining whether a domestic tribunal’s decision was right or wrong in substance.<sup>59</sup>

46. In *Courchene*, the Court noted that “it is not the function of judicial review to re-hear the evidence and decide how the matters ought to have been decided.”<sup>60</sup> The Court held that the Board was free to make the findings of fact that the students had entered a classroom without permission, even though the contrary was evidenced in a statement. The Court stated that it was within the student union’s policy-making authority to make such findings of fact.<sup>61</sup> The Court did not review whether or not the Board’s finding of fact were right or wrong because it is outside the Court’s jurisdiction to review the decisions of domestic tribunals.

47. Similarly, in *Hart*, the Court held that it would not review the merits of an internal decision, and would only determine whether the decision was carried out in accordance with the organization’s rules and the requirements of natural justice.<sup>62</sup> The Court declined to review the decision of the Diocese to remove a priest from his position in the church because Father Hart failed to exhaust the internal review process established by the church’s own rules.<sup>63</sup>

48. In *Lakeside Colony*, the Supreme Court of Canada limited its review of the decision to expel members of the colony to whether the expulsion was carried out in accordance with the applicable rules and principles of natural justice.<sup>64</sup> The Court did not review the merits of the

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<sup>59</sup> *Rakowski*, at para 35, BOA, Tab 6; *Mayan v World Professional Chuckwagon Association*, 2010 ABQB 140 at para 25, BOA, Tab 17.

<sup>60</sup> *Courchene* at para 20, BOA, Tab 12.

<sup>61</sup> *Courchene*, at para 20.

<sup>62</sup> see *Hart*, BOA, Tab 16.

<sup>63</sup> *Hart*, at para 24.

<sup>64</sup> *Lakeside Colony*, at para 10, BOA, Tab 10.

colony's decision to expel certain members, or review its findings of fact. Instead, the Supreme Court strictly limited its review and only considered whether the colony followed its rules in expelling the member.

#### **E. THE CHARTER DOES NOT APPLY TO STUDENT UNIONS**

49. The Supreme Court of Canada has recently confirmed the well-established principle that there are two ways to determine whether the *Charter* applies to an entity's activities: first, by enquiring into the nature of the entity and questioning whether the entity itself is "government"; and second, by enquiring into the nature of the particular activity in question and asking whether that activity itself is governmental in nature.<sup>65</sup>

50. In *McKinney v University of Guelph*, the Supreme Court of Canada made clear that even universities are not "organs of the government."<sup>66</sup> The Court recognized that the government has no legal power to control universities, even though universities, like other private organizations, are subject to government regulations and in large measure depend on government funds.<sup>67</sup> This same logic applies *a fortiori* to student unions within a university.

51. In *Grant v Ryerson Students' Union*, Justice Stewart stated that "as a general principle which still prevails, the *Charter* does not apply to a private corporation's internal decisions affecting its members."<sup>68</sup> A student union is not controlled by any government ministry,

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<sup>65</sup> *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31, para 16, BOA, Tab 18; see also *Eldridge v British Columbia*, [1997] 3 SCR 624 (SCC) para 44, BOA, Tab 19.

<sup>66</sup> *McKinney v University of Guelph*, [1990] 3 S.C.R. 229 (SCC) at para 40 [*McKinney*], BOA, Tab 20; See also *Lobo v Carleton University*, 2012 ONSC 254, at para 14 [*Lobo Ont. SCJ*], BOA, Tab 21.

<sup>67</sup> *McKinney*, at para 41, BOA, Tab 20.

<sup>68</sup> *Grant*, at para 49, BOA, Tab 4.

department or agency in developing its rules, and as such are private entities whose actions are not governed by the *Charter*.<sup>69</sup>

52. In *Lobo v Carleton University*, the Court confirmed that Carleton University was not a government actor, nor was it implementing a government policy or program when it booked space for non-academic extra-curricular use.<sup>70</sup>

53. Payment of mandatory fees does not automatically render a student union a public body, just as payment of union dues does not automatically render a union a public body. Indeed, this Court in *Rakowski* held that the decision of the Humber Students' Federation was a private decision, even though all students were required to pay fees to the Federation.<sup>71</sup>

54. Enacting a policy with which minority union members disagree does not make that policy unconstitutional. In *Lavigne v OPESU*, a member of the staff bargaining unit represented by the respondent Union, OPESU, brought an action against the Union because he opposed the use of his dues to support certain causes.<sup>72</sup> The payment of dues to the OPESU was mandatory. The Supreme Court of Canada decided that the issue of how a union's dues or fees are spent is not a government action, and therefore does not invite *Charter* scrutiny.<sup>73</sup>

## **F. INTERNATIONAL LAW IS NOT APPLICABLE**

55. The Respondents recognize that Government of Canada is bound by various international human rights instruments, including the *International Covenant on Civil and Political Rights*. The same cannot be said of the Respondents as private corporations. Just as the *Charter* does not apply

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<sup>69</sup> *Grant*, at paras 40, 41, and 50.

<sup>70</sup> *Lobo* Ont. SCJ, upheld in *Lobo v Carleton University*, 2012 ONCA 498, at para 4, BOA, Tab 22.

<sup>71</sup> *Rakowski*, at paras 10, 29, 39, BOA, Tab 6.

<sup>72</sup> *Lavigne v OPSEU*, [1991] 2 SCR 211, BOA, Tab 23.

<sup>73</sup> *Lavigne*, at para 67.

to the Respondents' decisions, international instruments do not apply to the Respondents' decisions. The Respondents are not government actors.

## **G. REMEDIES**

56. The Applicants exhausted all levels of appeal. Unhappy with the Student Unions' decisions, they now ask this Court to step in and act as a supervisor to the Student Unions' private, internal workings. With respect, this is not the role of the Court. As stated by the Court in *Lee*: "...this court cannot be made a court of appeal from decisions of such tribunals."<sup>74</sup>

57. Moreover, the Applicants were not affected in a way that the Court wishes to remedy. The Applicants did not lose any property, nor were their civil rights affected. The Applicants can continue to form groups, meet on campus and hold events. The Applicants' membership with the Student Unions was never in jeopardy.

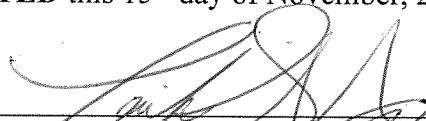


58. The Applicants are not without remedies. The decisions at issue were made by members of the Student Unions, who are elected by and from that membership. It is that elected representative body that passes by-laws and policies. As members of the Student Unions, the Applicants can run for office and become decision makers themselves. They can campaign for other members who share their beliefs. They can lobby the current Student Unions' executive to pass new policies or by-laws. They can even put motions on the agenda for the semi-annual and annual general meetings. The Applicants' remedy is political in nature.

59. Should this Honourable Court be inclined to intervene with the Student Unions' decisions, the Student Unions submit that the appropriate remedy is to remit the decision to the Student Unions for reconsideration, with directions if appropriate.

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<sup>74</sup> *Lee*, at p 341, BOA, Tab 7.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of November, 2017.

  
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Jennifer P. Saville  
  
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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.

KEVIN ARRIOLA et al.  
Applicants

-and- RYERSON STUDENTS' UNION et al.  
Respondents

Court File Nos. CV-16-550599  
CV-16-544546  
CV-17-575212

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDING COMMENCED AT TORONTO

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**RESPONDENTS' JOINT MEMORANDUM OF LAW**

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