

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CHRISTIAN NAGGAR, EMILIE HIBBS,)
JOSHUA HAVILAND, CHRISTIAN) *Marty Moore* for the Applicants
BROWN, KATHLEEN HEPWORTH,)
ALEXANDRA BROWN and KASSIA)
ALMEIDA)
Applicants)

– and –

THE STUDENT ASSOCIATION AT)
DURHAM COLLEGE AND UOIT) *Andrea Sanche* for the Respondent
Respondent)
HEARD: January 24, 2018

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

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This judgment is one of three in three Applications that were argued together. The judgments are being released simultaneously. The judgments are: *Arriola v. Ryerson Students' Union*, 2018 ONSC 1246; *Naggar v. The Student Association at Durham College and UOIT*, 2018 ONSC 1247; and *Zettel v. University of Toronto Mississauga Students' Union*, 2018 ONSC 1240.

[2] The facts of the three cases are similar but not identical. The common factual features of the three cases are that the Applicants in each case are students at a publicly-funded university. The Applicants are conscripted (non-voluntary) members of the respective university's student

unions or associations, which are non-profit corporations independent and autonomous from the university. In each of the three cases, the Applicants organized student groups (campus clubs) and applied to have those groups officially recognized by their student unions or associations. In each case, the Applicants were refused. In each of the three cases the Applicants apply for judicial review of their student unions' decisions and seek orders quashing the decisions of the student unions or associations.

[3] The law and the legal analysis to be applied to the facts of the three cases is identical. In the circumstances of the three cases, with some exceptions, the law that applies is the private law of groups. Under this law, a court has only a limited jurisdiction to review the conduct and decisions of an association, and the court will only do so if a significant private law right or interest is involved. The court has its jurisdiction associated with the enforcement of contracts and a limited judicial review jurisdiction over the decisions of the association. The court does not review the merits of the association's conduct or decision but reviews whether the association made its decision in accordance with the association's own rules and with the principles of natural justice, and without *mala fides*. The court may decline to exercise its judicial review jurisdiction when the internal dispute resolution mechanisms of the association have not been exhausted.

[4] In this application, Christian Naggar, Emilie Hibbs, Joshua Haviland, Christian Brown, Kathleen Hepworth, Alexandra Brown, and Kassia Almeida sue the Student Association at Durham College and UOIT (the "SA").

[5] Mr. Naggar, Ms. Hibbs, Mr. Haviland, Mr. Brown, Ms. Hepworth, Ms. Brown, and Ms. Almeida organized a Student Group known as "Speak for the Weak," and they applied for their Student Group to be officially recognized as a Campus Club. The SA refused the application.

[6] In this application, Mr. Naggar, Ms. Hibbs, Mr. Haviland, Mr. Brown, Ms. Hepworth, Ms. Brown, and Ms. Almeida seek declarations that the SA's decision not to ratify Speak for the Weak as a Campus Club was: *ultra vires*; in violation of the SA's bylaws and policies; in violation of the principles of natural justice and of due process; was made in bad faith; was based on irrelevant considerations; and failed to respect their freedom of expression and association, and consequently the decision is void. Further, they seek an order ratifying Speak for the Weak as a Campus Club or alternatively remitting their application for reconsideration with directions prohibiting the SA from limiting a student's access to the services and other resources of the SA on account of a student's or a Student Group's opinions and beliefs.

[7] For the reasons that follow, this application is dismissed.

B. Facts

1. The Student Association at Durham and UOIT ("SA")

[8] Durham College was established pursuant to the *Ontario Colleges of Applied Arts and*

Technology Act, 2002 and Ontario Regulation 34/03.¹ Durham College has two main campuses: one in Oshawa and a second in Whitby. The University of Ontario Institute of Technology (“UOIT” or the “University”) was established pursuant to the *University of Ontario Institute of Technology Act, 2002*.² In 2003, UOIT opened its doors at Durham College’s Oshawa campus. They share the campus but are independent institutions.

[9] The SA was the official student union representing and serving the interests of more than 20,000 full-time students at Durham College and UOIT. All registered full-time students of the College and the University were members of the SA. All registered part-time students who paid the applicable membership fee were associate members. The SA was autonomous and not under the control of the College or the University although there were contractual arrangements between the SA and the College and the University.

[10] 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 because the College, which collected the student fees for the SA, believed the fees were being unfairly allocated for the benefit of UOIT students and not proportionately for the College’s students. On October 13, 2017, the SA was wound up and dissolved. It has been replaced by separate student associations for the College and the University. For the purposes of this application, I am treating the two new student associations as the respective successors of the former Student Association at the College and the University.³

[11] The SA was incorporated in 1993 by Letters Patent pursuant to the Ontario *Corporations Act*.⁴ It is a non-profit independent, democratic organization governed by a six-member Executive and a 20-member Board of Directors, with the elected directors-at-large divided equally between the two institutions. Both the Executive and the Board of Directors are elected annually by the students they represent.

[12] The Objects of the SA, set out in its letters patent, are:

- (a) to organize students on a democratic, co-operative basis for advancing students' interests and advancing the interests of the students' community;
- (b) to provide a common framework within which students can communicate, exchange information and share experience, skills and ideas;
- (c) to bring students together to discuss and co-operatively achieve necessary educational, administrative and legislative change whenever decision making affects students;
- (d) to facilitate co-operation among students in organizing services which supplement the learning experience, provide for human needs and develop a sense of community among students and with other members or society:

¹ *Ontario Colleges of Applied Arts and Technology Act, 2002*, S.O. 2002, Ch. 8, Schedule F and Ontario Regulation 34/03.

² *University of Ontario Institute of Technology Act, 2002*, S.O. 2002, Ch. 8, Schedule O.

³ Pursuant to court order, the new student associations have been ordered to assume on behalf of the SA “any interest in, and be responsible for any liabilities under, and shall abide by any final determination in respect of, any Outstanding Claims”, including this application. See Dissolution and Discharge Order, October 13, 2017.

⁴ *Corporations Act*, R.S.O. 1990, c. C.38.

(e) to articulate the desires of students to fulfill the duties and be accorded the rights of citizens in Ontario, in Canada, and in the international community;

(f) to achieve the goal of a system of post-secondary education which is accessible to all, which is of high quality, and which is nationally planned; which recognizes the legitimacy of student representation and the vitality of students' rights; and whose role in society is clearly recognized and appreciated;

(g) to work toward building an environment free of systemic societal oppression and decolonization; and,

(h) to do all other things that are incidental or conducive to these purposes.

[13] The College and the University respectively have a general policy of respecting the autonomy of the SA. Durham College's *College Policy* states:

Introduction

Voluntary student organizations are an important part of the Durham College community and contribute significantly to the diversity of the college's intellectual, social, educational, and cultural co-curricular opportunities. While *bona fide* student groups have significant autonomy, their actions do reflect on the college. Their right to pursue social, cultural and other interests and to organize and hold various activities for the benefit of their members is balanced by understanding that recognition of a campus organization is a privilege. The college expects that activities of student organizations will be carried out in a responsible, democratic, and co-operative manner that is based on the observance of college policies and procedures and on the acceptance of certain obligations.

...

4. Policy statements

4.1 Durham College reserves the right to determine which organizations will be recognized by Durham College.

4.2 Student organizations that adhere to this policy will be considered by the college to be an RSO [Recognized Student Organization] in good standing. The college has the ultimate authority in administering the privileges associated with being an RSO.

4.3 Under the terms of this policy the college will not attempt to censor, control or interfere with any RSO on the basis of its philosophy, beliefs, interests or opinions expressed unless and until these activities violate this policy.

4.4 Recognition of student organizations by the SA or by the college implies neither endorsement of a particular group's beliefs or philosophy, nor the assumption of legal liability for the RSO's activities.

4.5 Durham College recognizes the SA as a PSO [Primary Student Organization] that is the official representative of students. All full time students are members of the SA and share in the duties and responsibilities of student government.

4.5.1

4.6 The college acknowledges SA recognized clubs and societies as legitimately constituted representative organizations of students. No organization has the right to exist or to continue to exist as a Durham College Recognized Student Organization without the express recognition granted by the SA.

4.7 The college does not recognize any organization that:

(a) Operates under a non-public constitution or;

(b) Fails to comply with:

- The Recognition of Student Organizations policy
- The Ontario *Human Rights Code*
- The *Canadian Charter of Rights and Freedoms of Canada*
- Federal and provincial statutes
- College policies and procedures

[14] In its *Student Rights and Responsibilities* policy, Durham College states:

2. Student rights include, but are not limited to, the right to:

...

(b) Be free from discrimination.

...

(f) Freedom of expression, individually or in groups, as provided by law.

...

(h) Form, join and/or participate in any lawful group or organization for intellectual, social, economic, spiritual, political, cultural or recreational purposes.

[15] The University's *Policy on the Recognition of Student Organizations* states:

PURPOSE

1. At UOIT, student organizations play an important role in the life of the University and enrich its intellectual, social and cultural diversity. Recognized Student Organizations are able to pursue social, cultural and other interests, and to organize and hold various activities for the benefit of their members. At the same time, the University expects that these activities will be carried out in a responsible, democratic, and cooperative manner that is based on the observance of certain procedures and the acceptance of certain obligations. The UOIT Policy on the Recognition of Student Organizations sets out the principles according to which student organizations are recognized by the University.

....

POLICY

All student organizations wishing to use the University name and logo, access University facilities and equipment and/or hold Events as part of their activities must be recognized by the University. The University will recognize Student Associations and Student Groups in accordance with the principles set out in this Policy, and any amendments thereto.

5. General

5.1. Membership in any Recognized Student Organization must be open to all students in compliance with the Ontario *Human Rights Code*. While discriminatory membership practices are not allowed, it is recognized that certain groups may be homogeneous in nature without being discriminatory.

....

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

5.4. Recognition by the University of a student organization does not imply endorsement of a

particular organization's beliefs or philosophies, nor the assumption of legal liability for the respective Recognized Student Organization's activities.

5.5. Recognized Student Organizations are expected to act in compliance with UOIT policies and all applicable municipal, provincial and federal laws.

[16] UOIT requires the SA to have a policy for the recognition of Student Groups and the governance and operations of those Groups.

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

[18] The SA's Board of Directors is 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. The Executive has the power to review any matter relating to the property, revenue, business, and affairs of the SA.

[19] The SA's Supplementary Letters Patent, dated December 21, 2007, are the SA's constituting documents and its objects are repeated in its General By-Law as a Statement of Principles.

[20] The SA set out its policy in respect of discrimination and equality on its website, in the following statement:

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.

2. Campus Clubs – Policy and Procedure

[21] Both Durham College and UOIT consider Campus Clubs to be a very important part of university and college life. Durham College's policy *Recognition of Student Organizations* states:

Voluntary student organization are an important part of the Durham College community and contribute significantly to the diversity of the college's intellectual, social, educational, and

cultural co-curricular opportunities.

UOIT's *Policy on the Recognition of Student Organizations* states:

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

[22] Students at the College and the University may get together to form a Student Group. The members of a Student Group may apply to the SA to obtain recognition or ratification of their group or club as a "Campus Club." The SA's Campus Clubs Policy states that the recognition of a Campus Club is a privilege and not a right of membership. Recognition of a Campus Club is in the discretion of the SA. There are approximately 150 Campus Clubs at the College and the University.

[23] Both Student Groups and Campus Clubs recruit members and hold meetings and events on campus. Both Student Groups and Campus Clubs use social media, distribute pamphlets, post posters, and advertise their activities on campus.

[24] Campus Clubs, but not Student Groups: receive \$750 in base funding from the SA; are listed on the SA website; can use SA meeting rooms; can use the SA's audio-visual and other equipment; and may seek advice and assistance from SA Officers and full-time staff as a liaison with the College or the University with respect to the College's or the University's extra-curricular activities.

[25] To be recognized as a Campus Club, there is an online application process, which is set out in the *Campus Clubs Procedure*. A proposed Campus Club must comply with both the SA's *Club Policy* and with the *Campus Clubs Procedure*. The *Club Policy* stipulates that "Campus Clubs must adhere to all SA, Durham College, and UOIT Codes of Conduct and rules". The SA's *Club Policy* states:

INTRODUCTION

The Student Association at Durham College & UOIT (SA) facilitates the creation and support of Campus Clubs to fulfill its mission of student service, advocacy and support. Campus Clubs act as a forum where students can gather for information, philanthropy, religious, cultural and social purposes. The SA recognizes and supports the formation of Campus Clubs as an integral part of student life.

....

PURPOSE

This policy outlines the structure within which students can form, operate and develop Campus Clubs through the SA. It also defines the obligations Campus Clubs have to the SA and its members. Should any part of this policy be in contravention or contradiction of the SA General By-Laws, those governance documents shall prevail.

All club activities must be compliant with the policies stated herein. In the event of a conflict between the SA Campus Club Policy and individual club constitutions, the SA policy will take precedence.

POLICY STATEMENTS

- (a) Campus Clubs must adhere to all SA, Durham College, and UOIT Code of Conduct and rules;
- (b) Campus Clubs must be ratified and in good standing to be eligible for resources and funding;

(c) Campus Clubs and SA resources must be utilized in a manner that ensures all funded activities are sensible, ethical and legal;

(d) An active Campus Club’s eligibility for SA resources and funding is a privilege and not a right.

(e) The SA recognizes that any student who pays fees to the SA at Durham College and UOIT can be a member of any Campus Club.

(f) Campus Clubs act as a means to achieve student member involvement with the SA. Campus Club Executives are responsible for serving as liaisons between Campus Clubs members and the SA.

(g) As representatives of the SA, Campus Clubs are expected to act in good faith when interacting with: their membership, SA staff and services, Durham College and UOIT administration, faculty, services, professional organizations, outside organizations, and all students.

(h) Campus Clubs are entitled to request access to certain campus and SA services, as per the Campus Clubs Procedure.

....

NON-COMPLIANCE IMPLICATIONS

Violation of the Campus Clubs policies and procedures may result in reputational, financial, and/or situational consequences to the club, Campus Clubs, and the SA.

[26] The SA’s *Campus Club Procedure* provides 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.” The *Campus Clubs Procedure* states:

INTRODUCTION

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

PROCEDURE

This procedure establishes a structure within which students can form, operate and develop Campus Clubs through the SA. These are the guiding procedures used for decisions handed down by the Club and Society Coordinator (CS Coordinator), the SA Risk Team, and the SA Funding Committee. The SA reserves the right to change or amend any information stated in this procedure without prior notice. The SA delegated decision-making power in respect of the ratification of Campus Clubs to the Clubs and Society Coordinator of the Club and Society Office, but ratification decisions ultimately rest with the Executive. Upon receipt of an application, the Club and Society Office review the application to ensure that it meets the SA’s requirements. The Coordinator is required to provide the applicants with a response within 10 business days. If the Coordinator and Club and Society Office has any concerns about an application, the matter is referred to the Executive.

....

NEW CLUB APPLICATIONS

Students wishing to form a new club must submit a copy of a Club Ratification Package to the CS Coordinator by January 31 of each academic year.

Club Ratification Packages must include:

....

RATIFICATION REQUIREMENTS

The 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. Clubs must not share a purpose with any existing club, society, or SA service. Fees may not be charged for membership in a club.

If desired, a Campus Club may adopt a constitution. If they choose to do so, they may adopt the standard Campus Clubs Constitution (available online), or draft their own constitution, to define internal operational practices of the club as well as certain roles and responsibilities within the club. If a club wishes to adopt a constitution, the constitution must be included with a Ratification Package and approved by the CS Coordinator. If a constitution is associated with a club, a copy must be available to all members of the club. If a provision of the constitution contradicts this procedure or other SA policy or procedure, that provision in the constitution is invalid.

3. Speak for the Weak's Application

[27] In the summer of 2015, Mr. Naggar, Ms. Hibbs, Mr. Haviland, Mr. Brown, Ms. Hepworth, Ms. Brown, and Ms. Almeida, respectively students of the College or the University, formed a Student Group known as Speak for the Weak.

[28] In the summer of 2015, Mr. Naggar spoke to Clarissa Canaria of the National Campus Life Network, an organization that assists in establishing pro-life clubs. He also asked and received from the SA a draft constitution for a Campus Club. He reviewed the policy and procedures of the SA.

[29] On August 19, 2015, on behalf of the Applicants, Mr. Naggar applied to the SA, seeking ratification of Speak for the Weak as a Campus Club.

[30] On August 20, 2015, the Club and Society Coordinator (CS Coordinator), Chantal James, forwarded the Speak for the Weak application to the SA Executive. She noted that Speak for the Weak was a pro-life organization but took a neutral position with respect to the application. At the same time, she forwarded another group's application to the Executive.

[31] On August 24, 2015, at an *ad hoc* meeting, the Executive met and reviewed the Speak for the Weak application. Reina Rexhmataj, Vice-President Equity, queried whether the mandate and events violated the SA's anti-oppression principle. The Executive discussed the March for Life Rally, which the Speak for the Weak group planned to support. The rally was being organized by the Campaign for Life Coalition, and it was the view of the Executive that the Coalition's ideology, which opposes same-sex marriage and opposes a so-called "gay agenda" was contrary to the SA's Statement of Principles and SA's support of the LGBTQ community. The Executive decided that it would not approve the Speak for the Weak application unless its concerns were addressed. It decided to meet with the applicants to discuss the application.

[32] On the instructions of the Executive, Amy Blais, the Administrative Assistant for the Clubs and Societies Office, emailed Mr. Naggar and advised him that the SA Executive wanted to meet with the applicants in-person to discuss their application.

[33] Mr. Naggar responded that his group were available to meet on September 3, 2015 and a meeting was arranged.

[34] On September 3, 2015, there was a meeting between representatives of Speak for the Weak and the SA Executive. At the meeting, Jesse Cullen, the President of the SA, explained

that the Speak for the Weak's position on abortion conflicted with SA's objective of creating an environment free from systemic societal oppression. He indicated that the SA provided services both to women who wanted to continue their pregnancies and to women seeking abortions and that some of the services provided by Speak for the Weak were already provided by the SA, including counselling and support for students facing unplanned pregnancies. Mr. Naggar testified that Mr. Cullen stated that the Executive had already decided to not ratify Speak for the Weak's application because doing so would be contrary to the SA's letter patent that maintain that abortion is a woman's right.

[35] Following the September 3, 2015 meeting, the applicants asked for meeting minutes, which had not been taken. Mr. Cullen prepared a letter to the applicants, repeating the decision reached at the meeting. The letter stated:

This letter is to confirm that the Speak for the Weak application for ratification has been denied, as submitted on Wednesday August 19th, 2015. By reiterating the Founding Principles of the Student Association and further analyzing our stance, we hope to address any concerns you may have in regard to our decision. This has been a collective resolution made by the 2015/2016 Executive Team.

In the by-laws of the Student Association, specifically the statement of principles, it states: "We, the students of Durham College and the University of Ontario Institute of Technology (UOIT), recognizing the need to speak with one voice in asserting our legitimate needs and concerns, wish to express our support for one campus-wide student association whose basic aims will be as follows: ... To 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.

This statement places responsibility unto our members to ensure that human rights are not infringed and establish an anti-oppressive framework to make the SA a more equitable and accessible place for everyone. As the democratically elected leaders, it is our responsibility to uphold the mandate of the SA to embrace the freedom of women and uphold a woman's legal right to reproductive freedom. Ultimately, we support a woman's right and freedom to choose her own path.

In your application, it states that one of the events includes traveling to Ottawa for the National March for Life organized by the Campaign Life Coalition. This organization openly opposes same-sex marriages and discredits the LGBTQ+ community contradicting our equity mandate as we strive to challenge all forms of oppression based on race, gender, sexuality, class, religion, immigration status, country of origin, age and physical ability.

We are aware that public opinion may differ, however, medical service of abortion is public and legal in Canada and the SA supports that right. This decision does not ban students from organizing on campus, or limit freedom of speech, it prioritizes the distribution of the memberships' funds to equity seeking groups.

....

The SA Executive Team.

[36] When Mr. Cullen was cross-examined, he stated that his concern arose because of the affiliation between the organizer of the March for Life Rally, the Campaign Life Coalition, and the "Institute for Marriage in the Family," which he said was actively opposing the rights of the LGBTQ community.

[37] 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, it would commence legal proceedings.

[38] The SA's lawyer responded advising that the SA would consider his written submissions and would respond by November 20, 2015.

[39] On November 13, 2015 the entire Board met to discuss the Executive's decision to refuse to ratify Speak for the Weak as a Campus Club. The Board unanimously upheld the Executive's decision.

[40] On November 23, 2015, Mr. Moore was advised of the Board's decision.

[41] On January 28, 2016, Mr. Naggar, Ms. Hibbs, Mr. Haviland, Mr. Brown, Ms. Hepworth, Ms. Brown, and Ms. Almeida commenced this application.

[42] Both before and after the application was considered by the SA, the Speak for the Weak group organized meetings and membership recruitment on campus.

C. Discussion

1. The Position of the Parties

[43] Mr. Naggar, Ms. Hibbs, Mr. Haviland, Mr. Brown, Ms. Hepworth, Ms. Brown, and Ms. Almeida submit that they have been denied official Campus Club status, which is an integral part of student life, because the SA Executive disagrees with the students' beliefs and opinions. They submit that the SA decision is subject to judicial review and that the SA's decision to refuse their application was contrary to the SA's own rules and regulations and to the principles of natural justice and with *mala fides*.

[44] The Applicants submit that they are fee-paying members of the SA and have a contractual right to expect the SA to comply with its own binding rules and policies, when making decisions about club recognition. Further, the Applicants submit that they have a right to freedom of expression and freedom of association on campus, a right the SA may not violate. They submit that the SA's decision violates their rights, which are of sufficient importance to warrant the court's judicial review.

[45] The Applicants submit that they have been seriously harmed by the decision because they are unable to utilize the opportunities and resources of Club status such as using space for events, promoting of events, funding for events and activities, insurance, equipment and more. Most significantly, they submit they have been harmed because the SA's decision directly violated their right to freedom of expression as provided by law, contravened the *Canadian Charter of Rights and Freedom*,⁵ targeted their beliefs and opinions, engaged in viewpoint discrimination, and undermined and attacked the intellectual, social and cultural diversity Campus Clubs are intended to bring to the campus.

[46] The SA submits that the public law of judicial review does not apply to its activities and under the private law that governs associations the court does not have jurisdiction to intervene in its decision to reject the Applicants' application for recognition of Speak for the Weak as a campus club. The SA submits that it is not a government or government agent subject to the

⁵ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c 11.

Charter of Rights and Freedoms and in any event it did not violate the Applicants' freedom of speech or right to associate. It submits that if under the private law that governs associations the court has the jurisdiction to review its decision to reject the application to recognize the Speak for the Weak application, the SA did not violate its rules and regulations, did not deny the Applicants natural justice and made a good faith decision that it was entitled to make which included its right to decide what groups it would support consistent with its own principles and policies.

2. The Law of Groups

[47] Unless they are sufficiently infused with a public element, the activities and decisions of associations be they incorporated or unincorporated voluntary associations, including charities, social clubs, fraternities, sororities, yacht, golf, tennis, curling clubs, etc., athletic organizations, schools, religious societies, trade unions, professional guilds, political parties, or NGOs (non-governmental organizations), are governed by private not public law.⁶

[48] Where the decisions or activities of an association are challenged in court, to determine whether the matter is within the purview of public law, the court should examine a variety of factors in the particular circumstances of the case, including: the character of the matter for which review is sought; the nature of the decision-maker and its responsibilities; the extent to which a decision is founded in and shaped by law as opposed to private discretion; the association's relationship to statutory schemes or governments or public authorities; the extent to which the association is an agent of government or is directed, controlled or significantly influenced by a public entity; the suitability of public law remedies; the existence of a compulsory power; and whether the activities or decisions of the association has a significant public dimension.⁷

[49] In *Setia v. Appleby College*,⁸ a private school regulated by the *Education Act*, expelled a student for smoking marijuana contrary to the school's Code of Conduct that his parents, in signing a contract with the school, acknowledged would govern his school enrollment. Reversing the Divisional Court, the Court of Appeal held that expulsion decision was governed by private not public law. In *West Toronto United Football Club v. Ontario Soccer Assn.*,⁹ the Ontario Soccer Association, which governed the playing of competitive soccer in Ontario and which had control over 500,000 players was held to have very public responsibilities and a very large public dimension such that it was amenable to public law scrutiny.

[50] The *Canadian Charter of Rights and Freedoms* applies to an association's activities if the

⁶ *Air Canada v. Toronto Port Authority*, 2011 FCA 347; *Setia v. Appleby College*, 2013 ONCA 753.

⁷ *Air Canada v. Toronto Port Authority*, 2011 FCA 347; *Setia v. Appleby College*, 2013 ONCA 753; *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881; *Association for the Protection of Amherst Island v. Ontario (Director of Environmental Approvals)*, 2014 ONSC 4574; *Courchene v. Carleton University Students' Association*, 2016 ONSC 3500; *Grant v. Ryerson Students' Union*, 2016 ONSC 5519.

⁸ 2013 ONCA 753.

⁹ 2014 ONSC 5881.

association is government or if the association's activity is governmental action.¹⁰ In *McKinney v. University of Guelph*,¹¹ the Supreme Court of Canada stated universities are not organs of the government, even though they are subject to government regulation and depend on government funds. In *Grant v. Ryerson Students' Union*,¹² Justice Stewart held that a student association as a non-profit corporation was not subject to the *Charter*.

[51] Where the affairs of an association are governed by private law, a court has only a limited jurisdiction to review the conduct and decisions of associations, and the court will only do so if a significant private law right or interest is involved.¹³ If a significant private law right or interest is involved; for example if a member of the association has been expelled or lost his or her membership status, been deprived of his or her membership privileges, or his or her ability to pursue vocations and avocations associated with the association, the court does not review the merits of the association's conduct or decision but reviews whether the purported expulsion or loss of membership or of membership privileges was carried out according to the applicable rules of the association and with the principles of natural justice, and without *mala fides*.¹⁴

[52] The court may get involved in the affairs of an association when the matter is of sufficient importance to deserve the intervention of the court and where the remedy sought is susceptible of enforcement by the court.¹⁵ The court retains a limited jurisdiction to review the procedural integrity of the association's action even if the constitution or rules of the association purport to oust any jurisdiction in the court.¹⁶ The court may decline its jurisdiction and treat the court proceeding as premature where it is shown that internal procedures and remedies of the association have not been exhausted.¹⁷

¹⁰ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Eldridge v. British Columbia*, [1997] 3 SCR 624; *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31.

¹¹ [1990] 3 S.C.R. 229. See also *Lobo v. Carleton University*, 2012 ONSC 254.

¹² 2016 ONSC 5519.

¹³ *Street v. B.C. School Sports*, 2005 BCSC 958; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (C.A.).

¹⁴ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at paras. 10 -11; *Berry v. Pulley*, 2002 SCC 40; *Changoor v. IBEW, Local 353*, 2014 ONSC 4558 (S.C.J.), aff'd 2015 ONSC 2472 (Div. Ct.); *Pal v. Chatterjee*, 2013 ONSC 1329; *Farren v. Pacific Coast Amateur Hockey Association* 2013 BCSC 498; *Lee v. Yeung*, 2012 ABQB 40; *University of Victoria Students' Society v. Canadian Federation of Students*, 2011 BCSC 122; *Garcia v. Kelowna Minor Hockey Association*, 2009 BCSC 200; *Association of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students Union*, [2008] O.J. No. 3344 (S.C.J.); *Barrie v. Royal Colwood Golf Club*, 2001 BCSC 1181; *Falk v. Calgary Real Estate Board Co-operative Ltd.*, 2000 ABQB 297; *Clark v. Gilbert*, [1996] O.J. No. 4415 (S.C.J.); *Peerless (Guardian ad litem of) v. B.C. School Sports* (1998), 157 D.L.R. (4th) 345 (B.C.C.A.); *Vancouver Hockey Club Ltd. v. 8 Hockey Ventures Inc.* (1987), 18 B.C.L.R. (2d) 372 (S.C.); *Warkenkin v. Sault Ste. Marie Board of Education* (1985), 49 C.P.C. 31 (Ont. Dist. Ct.); *Baird v. Wells* (1890), 44 Ch. D. 661 at p. 670.

¹⁵ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at para. 9; *Woloshyn v. Association of United Ukrainian Canadians*, 2013 ABQB 262.

¹⁶ *Street v. B. C. School Sports*, 2005 BCSC 958.

¹⁷ *Ukrainian Greek Orthodox of Canada v. Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Lee v. Yeung*, 2012 ABQB 40; *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728, aff'g 2010 ONSC 4709; *Alberta Soccer Assn. v. Charpentier*, 2010 ABQB 715; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (C.A.).

[53] The court has the jurisdiction to enforce the contractual rights between an association and its members and the contractual rights of the members between or among themselves.¹⁸ The court has the jurisdiction to interpret the contracts that define the rights of the members in respect of the association's operations.¹⁹ The relationship between national associations and their incorporated local units is contractual and the members of the local association are taken to have accepted the national constitution as a contract binding on them and all the members both of the local and national organization.²⁰ A provision in a local unit's constitution that the national constitution governs in cases of inconsistency means that a provision in the local unit's constitution would be invalid if inconsistent with the national constitution.²¹

[54] To determine whether the association has acted in accordance with its rules, the principles of natural justice and without *mala fides*, the court must understand the institutional framework of the association and the sources of its rules, which depending on the association may have a variety of sources including contract, statute, and custom and tradition.²²

[55] The content of the principles of natural justice are flexible and depend on the particular circumstances of the association, but the minimum requirements are: (a) adequate notice of what is to be determined and the consequences;²³ (b) an opportunity to make representations; and (c) an unbiased tribunal.²⁴ The scope of the requirements of natural justice depend on the subject-matter that is being dealt with, the particular legislative or administrative context, the circumstances of the case, the nature of the inquiry, and the rules under which the tribunal is acting, and the ultimate question is whether the procedures adopted were fair in all the circumstances.²⁵

[56] The rules which require a tribunal to maintain an open mind and to be free of bias, actual or perceived, are part of the *audi alteram partem* principle which applies to decision-makers.²⁶ In the context of associations, an unbiased tribunal in accordance with the principles of natural

¹⁸ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329 (C.A.).

¹⁹ *Kwantlen University College Student Assn. v. Canadian Federation of Students*, 2011 BCCA 133, aff'g 2010 BCSC 1951.

²⁰ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at paras. 45-46; *Polish Veterans Second Corps v. Army, Navy & Air Force Veterans in Canada* (1978), 20 O.R. (2d) 321 at p. 341 (C.A.); *Canadian Union of Public Employees v. Deveau* (1977), 19 N.S.R. (2d) 24.

²¹ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at paras. 45-46.

²² *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165.

²³ *Cohen v. Hazen Avenue Synagogue* (1920), 47 N.B.R. 400 (S.C.); *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523 (C.A.).

²⁴ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at paras. 80-86; *McLachlan v. Burrard Yacht Club*, 2008 BCCA 271.

²⁵ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at pp. 630-31; *Syndicat des employés de production du Qué. et de l'Acadie v. Can. (Can. Human Rights Comm.)*, [1989] 2 S.C.R. 879 at pp. 895-96; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 at p. 110 (C.A.); *Polish National Union of Canada v. Branch 1 the Polish National Union of Canada*, 2014 ONSC 3134.

²⁶ *Old St. Boniface Residents Association Inc v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

justice is one that has not prejudged the matter and is opened-minded to being persuaded.²⁷ In *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*,²⁸ the Supreme Court of Canada was called on to consider the application of the rules of natural justice or fairness where members of an organization, in that case elected municipal councillors, would be expected to have a view (but not a direct or indirect personal interest), in making a decision about a matter within the organization's mandate, in that case a zoning application. In deciding that a councillor did not have to recuse himself from participating in the hearing of the zoning application on the grounds that he had prejudged the matter, Justice Sopinka stated at para. 94:

In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of council who are capable of being persuaded. The legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of council, while they may very well give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[57] Although the public law remedies of *certiorari*, *mandamus*, and prohibition are not available for the judicial review of the activities of an association, courts use the private law remedies of injunctions and declarations instead.²⁹ If a member of an association is expelled by the association in breach of contract, the court will grant a declaration that the association's action is *ultra vires* and it will grant an injunction if necessary to protect the contractual, employment, or proprietary rights of the member.³⁰

[58] To conclude this discussion of the law of groups, the above survey of the case law about the law of groups reveals that courts tend to employ an analytical framework that progresses through a series of five issues.

[59] First, the court determines whether the association that is before the court has a public stature or importance that exposes it to scrutiny in accordance with the principles of public administrative law, in which case the court judicially reviews the decision of the association in accordance with the principles of public law. Depending on the nature of the association, public law may include the application of the *Canadian Charter of Rights and Freedoms*.

[60] Second, if the court concludes that public law does not apply, the court determines whether the group is the type of group in which the members of the group would not have

²⁷ *McLachlan v. Burrard Yacht Club*, 2008 BCCA 271; *Old St. Boniface Residents Association Inc v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

²⁸ [1990] 3 S.C.R. 1170.

²⁹ *Lee v. Yeung*, 2012 ABQB 40; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, leave to appeal to the S.C.C. ref'd [2007] SCCA No. 567; *Kaplan v. Canadian Institute of Actuaries*, [1994] A.J. No. 868 (Q.B.).

³⁰ *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at paras. 9-11.

envisioned that the members had a contractual relationship one to another, in which case, the court will decline to exercise its jurisdiction. For examples, the members of an informal book club, an informal social club, or a family tree club would not envision that their promises were legally enforceable because they would have no intention to contract. In other words, the second question for the court to decide is whether any private law applies to the association before the court.

[61] Third, if the court concludes that private law applies, then the court determines whether there is some reason for the court to decline or postpone the exercise of its jurisdiction. For example, the court may decline to exercise its private law (or its public law) jurisdiction where the dispute resolution mechanisms of the association have not been exhausted.

[62] Fourth, if the court concludes that private law applies and there is no reason to decline to exercise the court's jurisdiction, the court determines whether the members of the group have breached the contract among the group and the members of the group.

[63] Fifth, if the court concludes that private law applies and there is no reason to decline to exercise the court's jurisdiction, the court determines whether there has been any violation of the principles of natural justice.

3. Analysis

[64] The rhetoric in this case, by both sides, was somewhat overheated, but the SA was more persuasive and convinced me that the dispute between the parties did not raise any issues of public importance and that it certainly did not involve any interference with Mr. Naggar's, Ms. Hibbs', Mr. Haviland's, Mr. Brown's, Ms. Hepworth's, Ms. Brown's, and Ms. Almeida's freedom of association or freedom of expression or any breach of any rights they might have as members of the SA.

[65] The SA did not censor, control, or interfere with Speak for the Weak on the basis of its philosophy, beliefs, and opinions. As a Student Group, Speak for the Weak is apparently thriving on campus without the official status of a Campus Club and bereft of the \$750 of base funding. If the *Canadian Charter of Rights and Freedoms* applied to this case, and it does not, in no way have the Applicants' rights to associate and to express and to proselytize their views been infringed.

[66] Granted that universities are important public institutions and granted that student associations are important institutions in their own right operating in the public space of a university, neither are organs of government and the *Canadian Charter of Rights and Freedoms* does not apply in the immediate case.

[67] I agree with the SA that there is no basis to apply public law to the activities of the SA in recognizing or not recognizing Student Groups as Campus Clubs, but I disagree with the SA that this is a case in which neither public or private law applies. In my opinion, the private law of groups applies and there is no reason for the court to decline its limited jurisdiction to judicially review the conduct of the SA.

[68] Applying the private law of groups, I see no breach of contract between the Applicants and the Respondents. The SA did not breach its own rules and regulations.

[69] As associations, the SA and Speak for the Weak are both entitled to have ideologies, beliefs and policies that they can promote and prioritize when they make decisions.

[70] Mr. Naggar, Ms. Hibbs, Mr. Haviland, Mr. Brown, Ms. Hepworth, Ms. Brown, and Ms. Almeida were denied no entitlements associated with their membership in the SA. They understood or ought to have understood that under the SA's Campus Clubs Policy the recognition of a Campus Club is a privilege and not a right of membership and that the recognition of a Campus Club is in the discretion of the SA.

[71] The acts of the SA were not in violation of its letters patent, *Club Policy*, or *Campus Club Procedure*. Contrary to the submissions of the Applicants there were no secret policies or criteria for deciding their application. The *Campus Club Procedure* stated that club's purpose for being must not contain any endorsement or support for activities or events that break SA policies, and the SA was entitled to have, to interpret, and apply its own policies.

[72] There was no violation of the principles of natural justice. As noted above, the content of the principles of natural justice and scope of the requirements of natural justice are flexible and depend on the particular circumstances of the association and also the subject-matter that is being dealt with, and the ultimate question is whether the procedures adopted were fair in all the circumstances.

[73] In the circumstances of the immediate case, where recognition of a Student Group as a Campus Club was a privilege in the discretion of the SA and where the SA had published the requirements of an application, the scope of the requirements of natural justice would be very modest and in my opinion those requirements were satisfied in the immediate case.

[74] The Applicants seem to measure the scope of the principles of natural justice applicable to their application for the privilege of recognition as a Campus Club as requiring a degree of procedure and decision-making comparable to what might be imposed on an association when it expels or suspends a member. However, very much less was required in the immediate case and the Applicants were treated fairly.

[75] The Applicants had notice that an application for Campus Club recognition had to comply with the SA's policies and that it was a discretionary decision of the SA to grant or refuse recognition. The Executive did not pre-judge the application. Rather, the Executive and the Board of Directors reviewed the decision, came to a reasoned decision and provided the Applicants with several opportunities to persuade the SA to change its mind. The SA was entitled to consider whether Speak for the Weak's mandate and proposed events conflicted with the SA's principles, including its objects and policies, and it raised its concerns with the Applicants. They took the opportunity of meeting with the SA but did not convince the SA to change its mind.

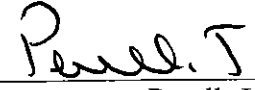
[76] I see no breach of contract or violation of the principles of natural justice.

D. Conclusion

[77] For the above reasons, the application is dismissed.

[78] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with SA's submissions within 20 days from the release of these Reasons for

Decision followed by the Applicants' submissions within a further 20 days.

A handwritten signature in cursive script, appearing to read "Perell, J.", written above a horizontal line.

Perell, J.

Released: February 26, 2018

CITATION: Naggar v. The Student Association at Durham College and UOIT, 2018 ONSC 1247
COURT FILE NO.: CV-17-575212
DATE: 20180226

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

REASONS FOR DECISION

PERELL J.

Released: February 26, 2018