Court file no. CV-16-544546

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DIANE ZETTEL, CAMERON GRANT AND CHAD HAGEL

Applicants

and

UNIVERSITY OF TORONTO MISSISSAUGA STUDENTS' UNION

Respondent

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

Court file no. 94577/16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Applicants

and

THE STUDENT ASSOCIATION AT DURHAM COLLEGE AND UOIT

Respondent

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

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 *Court of Justice Act* and rule 14.05 of the *Rules of Civil Procedure*.

APPLICANTS' JOINT MEMORANDUM OF LAW

October 18, 2017

JUSTICE CENTRE FOR
CONSTITUTIONAL FREEDOMS
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PART I – OVERVIEW

1. This case raises the fundamental question of whether individual students have legal rights enforceable against their own student union.

2. Hundreds of thousands of students are enrolled at more than 60 public universities across Canada. Without exception, each of these students is compelled to be a member of, and pay fees to, the official student union at their respective university. Mandatory dues are collected from these students by their universities and transferred to the student union.

3. Canada's student unions wield far-reaching authority over student life on campus, particularly in regard to student groups (also known as clubs). Student unions describe student groups as "an integral part of student life" which "act as a forum where students can gather for information, philanthropy, religious, cultural and social purposes".[1] In order to book meeting and event space, advertise to fellow students, access group and event funding, and receive other services and benefits, students must have their group formally recognized by their student union.[2]

4. Student unions are increasingly refusing to grant the required recognition to student groups that hold viewpoints with which the student union executives personally disagree. Student unions' actions against students with differing ideological perspectives is stifling democratic discussion and debate on campus, where diversity of opinion is supposed to flourish. The methods utilized by these student unions to deny recognition include thwarting student attempts to fulfill student

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[1] SA's *Campus Club Policy*, *Naggar et al v The Student Association at Durham and UOIT* Consolidated Application Record, ("UOIT CAR") Vol 1, Tab 2(G), p 119.

[2] See UTMSU *Club's Handbook*, *Zettel et al v University of Toronto Mississauga Students' Union* Consolidated Application Record ("UTM CAR") Vol I, Tab 2(C), pp 30-52; see also RSU policies located at *Arriola et al v Ryerson Students' Union* Consolidate Application Record ("Ryerson CAR") Vol I, Tabs 2(G), (H) and (I), pp 189-197.

group requirements,[3] imposing novel interpretations of terms in student union documents,[4] or alleging unfounded and vague claims that the proposed group is a danger to safety.[5]

5. Courts have jurisdiction to review decisions by private administrative decision-makers, sometimes referred to as "domestic tribunals", for compliance with the entity's own rules and by-laws, the principles of natural justice, and the requirements of good faith. Under these principles, courts have reviewed conflicts between student unions,[6] conflicts between student unions and students seeking to run for election,[7] and conflicts between student unions and the Canadian Federation of Students.[8]

6. A central issue common in the three cases presently consolidated before this Court is whether a student union's bias, violation of its own rules, breach of natural justice and bad faith in the denial of student group recognition is a matter of "sufficient importance" for this Court to assume jurisdiction.

7. The fact that students are unable to opt out of being paying members of student unions, or to avoid their student unions' control over student group recognition and other important corresponding benefits, is a key contextual factor for this Court to consider. Since students' association with their student union is compelled and not voluntary, it is imperative that this Court exercise its jurisdiction to ensure that students with minority beliefs and opinions are not oppressed by those with whom they are legally required to associate.

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[3] Affidavit of Diane Zettel sworn January 9, 2016 ("Zettel Affidavit"), UTM CAR Vol 1, Tab 2, paras 25-29.
[4] Affidavit of Christian Naggar sworn January 28, 2016 ("Naggar Affidavit"), UOIT CAR Vol I, Tab 2, para 18.
[5] Transcript of Cross-Examination of Obaid Ullah, January 17, 2017 ("Ullah Transcript") 31:5-36:18, Ryerson CAR Vol II, Tab 8, pp 661-662; Transcript of Cross-Examination of Jesse Cullen, March 18, 2016 ("Cullen Transcript"), 54:6-55:15, UOIT CAR Vol 3, Tab 12, p 750.
[6] See e.g. *Association of Part-Time Undergraduate Students of the University of Toronto v University of Toronto Mississauga Students Union*, [2008] OJ No 3344, 2008 CanLII 43054 (Ont SJC) [*APUS v UTMSU*], Applicants' Joint Book of Authorities ("BOA") Tab 1.
[7] See e.g. *Rakowski v Malagerio*, [2007] OJ No 369, 2007 CanLII 2214 (Ont SJC) [*Rakowski*], BOA, Tab 2.
[8] See e.g. *University of Victoria Students' Society v Canadian Federation of Students*, 2011 BCSC 122 [*UVSS v CFS*], BOA, Tab 3.

8. The practical effect of the Court's decision in these three cases will determine whether students at publicly-funded universities across Canada can engage in student life on an equal basis, or whether student unions can arbitrarily and unashamedly discriminate against students on the basis of belief, opinion and viewpoint.

PART II – FACTS[9]

9. The consolidated cases before this Court are applications instituted by students at publicly-funded universities (collectively, the "Applicants") against three student unions (collectively, the "Student Unions"): (1) the Student Association at Durham College and the University of Ontario Institute of Technology ("SA"); (2) the University of Toronto Mississauga Students' Union ("UTMSU"); and (3) the Ryerson Students' Union ("RSU").

10. In order to enrol at these public institutions (University of Ontario Institute of Technology, Durham College, University of Toronto Mississauga and Ryerson University) students are required to be members of the official student union on that campus.[10] The Student Unions receive mandatory fees that are collected from students by their respective universities.[11]

11. Through agreements with their respective universities (and, in the case of the SA, recognition under section 7 of the *Colleges Act*) the Student Unions are responsible for fostering student life and providing important services to their student members, including an exclusive power to grant recognition, funding and other rights to student groups.

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[9] Pursuant to an order of Justice Archibald, dated June 19, 2017, three separate factums (one for each of the three consolidated cases) subsequently delivered will apply the law to the facts. This initial memorandum of law addresses the Court's jurisdiction to review student union decisions concerning student group recognition, and the legal principles relevant to a review of those decisions. Consequently, the majority of the factual details of each of these three cases will be set out in the three subsequent individual factums.

[10] See e.g. *APUS v UTMSU* at paras 4-5, BOA, Tab 1.

[11] Response to Undertakings Given at Cross-Examination of Obaid Ullah, No 6, Ryerson CAR Vol II, Tab 5, p 565.

12. Student groups "play an important role in the life of the University and enrich its intellectual, social and cultural diversity".[12] Student group recognition is integral for students seeking to engage with their peers on campus in discussion of a topic or issue as it allows them public tabling, campus advertising, student union resource support and room booking privileges (without which, in some cases, students may be unable to book spaces on campus).[13] "[A]ll groups wishing to avail themselves of Union services and to participate in Union sponsored events, must first be recognized by the Union."[14] Further, it allows groups to access significant funding for their events and activities. RSU, for example, has in excess of $120,000 available exclusively for recognized student groups.[15]

13. The three Student Unions, the SA, UTMSU, and RSU refused to grant accreditation to the following student groups, respectively: (1) Speak for the Weak ("SFTW"); (2) UTM Students for Life ("SFL"); and (3) The Men's Issues Awareness Society at Ryerson ("MIAS").

14. SFTW and SFL are student groups that discuss and advocate for "the respect for the value of human life at all stages" and "support students facing crisis pregnancies, and to raise fellow students' awareness and understanding of life issues".[16]

15. MIAS aims to discuss and raise awareness on "issues that disproportionately affect men and boys, such as higher rates of suicide, homelessness, workplaces injuries and failure in school".[17]

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[12] UOIT *Policy on the Recognition of Student Organizations*, UOIT CAR Vol 1, Tab 2(L), p 151, para 1..
[13] See supra, note 2; see also Arriola Affidavit, Ryerson CAR Vol 1, Tab 2, paras 8, 27; Naggar Affidavit, UOIT CAR Vol 1, Tab 2, paras 23, 25.
[14] UTMSU *Union Clubs' Policy*, UTM CAR Vol I, Tab 2(B), p 26.
[15] Ullah Transcript 7:4-15, Ryerson CAR Vol II, Tab 8, p 655; see also Cullen Transcript pp 38:17-39:21, UOIT CAR Vol 3, Tab 12, p 746; Transcript of Cross-Examination of Francesco Otello-Deluca, Mary 15, 2016 ("Otello-Deluca Transcript") 44:11-45:20, UTM CAR Vol I, Tab 10, p 638.
[16] Zettel Affidavit, UTM CAR Vol I, Tab 2, para 6; Naggar Affidavit, UOIT CAR Vol 1, Tab 2, para 3.
[17] Affidavit of Kevin Arriola, sworn January 6, 2016 ("Arriola Affidavit"), Ryerson CAR Vol I, Tab 2, para 4.

16. As will be addressed more extensively in separate factums to follow, the Student Unions took offense to the beliefs and opinions of the Applicants, and discriminated against them on that basis, and solely on that basis.[18] Briefly described, the reasons for the Student Unions' decisions to deny the Applicants' right to form student groups were as follows:

- The SA denied SFTW its right to form a club, claiming that it would be "contrary to the SA's letters patent which maintain that abortion is a woman's right." This assertion is false, because the SA's Letters Patent do not contain any such provision. Later, the SA defended its denial on the basis of "building an environment free of systemic societal oppression and decolonization".[19]
- UTMSU initially denied SFL its right to form a club because of its alleged "political nature" and its "stance on Abortion", but subsequently UTMSU claimed the denial was because of technical "violations and discrepancies" found *ex post facto* within SFL's constitution. When SFL students met to make the required changes to their constitution, UTMSU Vice President of Campus Life invited people to that meeting who were opposed to SFL, and who, despite not being members of SFL, were permitted to vote and thereby prevent SFL from changing its constitution as required.[20]
- RSU denied MIAS its right to form a club by alleging (1) that MIAS was not taking "all the proper safety measures" to keep it from "spinning out of control"; (2) that MIAS was associated with the Canadian Association for Equality ("CAFE"); (3) that MIAS did not properly "acknowledge the systemic privilege that men have"; (4) that MIAS' constitution did not sufficiently address safety concerns, limit associations with external groups, or commit it to equality; and (5) that MIAS violated RSU policies through its alleged association with the group CAFE.[21]

17. No rule, policy or by-law grants the Student Unions authority to withhold student group recognition based on the political, philosophical or moral opinions of such groups, the shared

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[18] See Naggar Affidavit, UOIT CAR Vol 1, Tab 2, paras 13-16; Cullen Transcript, pp 40:12-41:2, UOIT CAR Vol 1, Tab 12 pp 746-47; Transcript of Cross-Examination of Reina Rexhmataj, March 17, 2016 ("Rexhmataj Transcript") 63:6-19; UOIT CAR Vol 3, Tab 11, p 692; Zettel Affidavit, UTM CAR Vol I, Tab 2, paras 8-14; Transcript of Cross-Examination of Russ Adade, March 15, 2016 ("Adade Transcript") 6:18-7:8; 64:3-67:12, UTM CAR Vol II, Tab 11, pp 680-81, 695; Otello-Deluca Transcript 24:1-24, 31:11-19, UTM CAR Vol II, Tab 10, pp 633-634; Arriola Affidavit, Ryerson CAR Vol I, Tab 2, paras 11-14, 23-24; Ullah Transcript, 32:4-35:21, 83:15-87:25, Ryerson CAR Vol 2, Tab 8, pp 661-62, 674-75.

[19] Naggar Affidavit, UOIT CAR Vol 1, Tab 2, paras 13, 18.

[20] Zettel Affidavit, UTM CAR Vol I, Tab 2, paras 8, 11, 20, 26-27; Adade Transcript 45:6-48:5, 61:18-69-7, UTM CAR Vol II, Tab 11, pp 690-91, 694-96.

[21] Arriola Affidavit, Ryerson CAR Vol I, Tab 2, para 17.

beliefs of members, or the off-campus entities with which they associate.[22] Student Unions represent a very diverse student population, including a broad range of varying political opinions and philosophical beliefs. Instead of enabling authentic diversity, Student Unions stifle it by denying recognition to student groups that fail to echo their own views. The Student Unions are practicing what they claim to be warring against – namely "systemic societal oppression"[23] exacerbated by the mandatory membership requirement for all students.

PART III – LEGAL PRINCIPLES

A. This Court has jurisdiction over these cases under private administrative law

18. Under private administrative law, Courts across Canada have taken jurisdiction to review the decisions of private and voluntary associations.

19. This jurisdiction was articulated in *Lakeside Colony of Hutterian Brethren v Hofer*, in which the Supreme Court of Canada affirmed the courts' jurisdiction to review matters concerning private bodies, based on the importance of the rights and interests at stake: "the question is not so much whether this is a property right or a contractual right, but **whether it is of sufficient importance to deserve the intervention of the court**".[24]

20. Courts have subsequently applied the "sufficient importance" standard in a generous manner. Indeed, Courts have taken jurisdiction to review the decisions of, *inter alia*, private religious organizations, cultural organizations and even yacht clubs in matters involving discipline or status of members.[25]

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[22] Naggar Affidavit, UOIT CAR Vol 1, Tab 2, para 22; Arriola Affidavit, Ryerson CAR Vol I, Tab 2, para 7.
[23] Naggar Affidavit, UOIT CAR Vol 1, Tab 2, at para 18.
[24] *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 SCR 165 [*Hofer*], p. 175 [emphasis added], BOA, Tab 4.
[25] *Pal et al v Chatterjee et al*, 2013 ONSC 1329 [*Pal*], BOA, Tab 5; *Woloshyn v. Association of United Ukrainian Canadians*, 2013 ABQB 262 [*Woloshyn*], BOA Tab 6; *McLachlan v Burrard Yacht Club*, 2008 BCCA 271 [*McLachlan*], BOA, Tab 7.

21. In *McLachlan v Burrard Yacht Club*, the BC Court of Appeal found that through revocation of membership, the petitioner "lost a right (to moor his boat at the marina) that was an important element of his social life and his family life" and took jurisdiction to reverse the revocation.[26]

22. In *Pal v Chatterjee*, the Ontario Superior Court of Justice, in reviewing the commencement of disciplinary proceedings in a private religious organization, noted that the rights to membership in the organization "are of great importance to all members. They include the rights to vote, serve on committees, attend meetings and functions, and use the facilities of the organization".[27]

23. In *Hofer,* the Supreme Court reiterated the established jurisdiction courts have to review the following substantive issues within private associations: "first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide.*"[28]

24. Since *Hofer*, courts have applied the Supreme Court's conclusions on the question of the jurisdiction to review "private" decisions. Indeed, the Ontario Superior Court of Justice has confirmed that "courts do get involved in the affairs of associations and clubs", particularly in cases "when the organization's processes and conduct lack the basic hallmarks of natural justice and fairness".[29]

25. In a similar vein, Alberta courts have also found jurisdiction to review the decisions of voluntary associations. In *Mayan v World Professional Chuckwagon Association*,[30] the court, citing *Schow v. Alberta School's Athletic Association*,[31] noted that jurisdiction would arise in cases

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[26] *McLachlan*, at para 9, BOA, Tab 7.
[27] *Pal*, at para 32, BOA, Tab 5.
[28] *Hofer*, at para 10 citing *Baird v Wells* (1890), 44 Ch. D. 661, at p 670, BOA, Tab 4.
[29] *Rakowski*, at para 30, BOA, Tab 2; *APUS v UTMSU* at para 22, BOA, Tab 1.
[30] 2011 ABQB 140 [*Mayan*], BOA, Tab 8.
[31] [2002] A.J. No.1711, BOA, Tab 9.

"where the tribunal has acted without jurisdiction, breached natural justice or made a decision that is patently unreasonable".[32]

26. In *Lee v Yeung*, the court commented on the *Hofer* case, noting:

> [C]ourts will intervene in the private activities of non-statutory bodies where the aggrieved parties have no other remedy available to them. In such cases, judicial intervention is not only appropriate but can be expected.[33]

27. Courts from Quebec have also reviewed decisions of private organizations. In *Carrier c Radio Nord-Joli inc*, the Superior Court noted that it had the power to intervene in the internal affairs of not-for-profit corporations where the following were found to exist: (1) failure to follow internal by-laws or regulations; (2) failure to comply with the rules of natural justice; (3) breach of the rights of minority members; (4) decisions made in bad faith, arbitrarily or based on irrelevant considerations.[34] This approach was later endorsed by the Quebec Court of Appeal in *Matossian c Canadian Heritage of Quebec*.[35]

28. More recently, in a case involving a decision made by the Canadian Federation of Students ("CFS"), the Quebec Superior Court reiterated that it "must intervene in the case of an unreasonable or arbitrary decision" involving the internal by-laws of a private entity.[36]

29. In similar fashion, courts have long exercised jurisdiction over trade unions. Student unions are not unlike trade unions, each designed to unite a group engaged in a common endeavour (be it a trade or education), each receiving mandatory dues from members, and each committed to representing their members' common interests, and distributing the benefits equally to all members

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[32] *Mayan*, at para 42, BOA, Tab 8.
[33] 2012 ABQB 40 [*Lee*] at para 52. BOA, Tab 10.
[34] REJB 2002-25216 (C.S.) at para 30, BOA, Tab 11.
[35] 2007 QCCA 1155 at para 25, BOA, Tab 12.
[36] *Ge c Canadian Federation of Students*, 2015 QCCS 19 at para 57 citing *Club de soccer de ville Sainte-Antoine v Association régionale de soccer des Laurentides*, 2005 CanLII 31366 (QC CS) at para 28-29, BOA, Tab 13; see also F.W. Wegenast, *The Law of Canadian Companies*, (Toronto: Burroughs and Co Ltd) at 782, BOA, Tab 14.

without discrimination. In light of these similarities, reference to courts' jurisdiction over trade unions is relevant and appropriate.

30. In *Changoor v. IBEW, Local 353*, the Superior Court of Justice stated the standard applied to trade unions as follows:

> Union tribunals are "domestic tribunals" which must conduct their proceedings fairly. This Court's jurisdiction is restricted to determining whether the Union breached its constitution, acted in bad faith, or failed to accord Mr. Changoor procedural fairness. 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.[37]

31. The jurisdiction of the Court to review the internal workings of a trade union was recognized by the Ontario Labour Relations Board in *Buttazzoni v. B.A.C., Local 2*:

> Board has said frequently that it has no inherent or statutory authority to supervise the internal workings of a trade union. That is the jurisdiction of the Superior Court of Justice.
> ...
> However I will not deal with matters of process, that is, whether the Constitution of the BACU or indeed of the IUBAC was followed, or whether the rules of natural justice were complied with. That is the task of the Superior Court of Justice, not the Board.
> ...
> Since the Superior Court of Justice has the inherent jurisdiction to review the workings of domestic tribunals, and would likely have no difficulty dealing with the true nature of this issue and coming to a much more satisfactory result, that is where the question should be decided.[38]

32. In *Rees v. United Association of Journeymen*, the Divisional Court analogized that if courts intervene in cases of private clubs, "there seems to be no rational explanation" why courts would deny jurisdiction to intervene in the case of a union.[39] The court found that the "the relations between a union and its members, no less than those between the union and the employer, is a matter of public not private concern."[40]

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[37] 2014 ONSC 4558 at para 5, BOA, Tab 15.
[38] [2004] O.L.R.B. Rep. 499, 2004 CarswellOnt 5556, at paras 7, 8, and 76, BOA, Tab 16.
[39] 43 O.R. (2d) 97 (Ont. Div. Ct.), 1983 CarswellOnt 78 at para 18, BOA, Tab 17.
[40] *Ibid.*

33. In *Grant v Ryerson Students' Union*,[41] Justice Stewart refused to intervene in a student union's decision to deny the right of pro-life students to have student group recognition. Justice Stewart stated that "[i]f an entity is private, courts have no jurisdiction to assess the conduct of that entity according to administrative law principles, nor to order administrative law remedies."[42] This assertion fails to take into account the relevant legal principles discussed above. Justice Stewart went on to spend the majority of her analysis addressing whether the decision was subject to judicial review under *public* administrative law principles, despite the fact that such a review had not been requested.[43] Without explanation or analysis, Justice Stewart dismissed the application of the relevant legal principles of private administrative law:

> 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.[44]

34. Justice Stewart confined her ruling to the particular situation before her, and did not dispute that courts may review the affairs of voluntary associations and private clubs in different circumstances. However, in so far as her decision may be argued to prevent this Court's review of the Student Unions' decisions against refusing to grant recognition to the Applicants' student groups, her bare conclusion without any reasoned analysis should be accorded little weight. Whereas, in *Grant,* Justice Stewart held that "RSU is a private entity and does not engage principles of administrative law,"[45] in *Courchene v Carleton University Students' Association*

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[41] 2016 ONSC 5519 [*Grant*], BOA, Tab 18.
[42] *Grant* at para 35, BOA, Tab 18.
[43] Applications for Judicial Review under public administrative law are made to the Divisional Court pursuant to section 6(1), *Judicial Review Procedure Act*, RSO 1990, c. Applications to review the decision of a private administrative decision maker are appropriately made to the Superior Court of Justice under Rule 14.05, BOA, Tab 19. See *APUS v UTMSU,* BOA, Tab 1; see also *Rakowski*, BOA, Tab 2.
[44] *Grant*, at para 42, BOA, Tab 18.
[45] *Grant*, at para 41, BOA, Tab 18,

(also released in 2016), Justice Ray found that the Superior Court did have jurisdiction to review a decision of the Carleton University Students Union ("CUSA").[46] Justice Ray reasoned in part:

> It is expected by the public and the students, particularly in light of the educational objects of the University, that the student-run institutions such as CUSA will conduct themselves in accord with the rules of natural justice. While deference is owed to the procedures, practices and decisions of CUSA in the conduct of its affairs, its decisions are not immune from judicial review.[47]

In reaching this decision, Justice Ray noted that the student union was an integral part of a public university that is responsible for a million-dollar budget for student services in circumstances that required considerable public funds.[48] He further noted:

> There is a substantial public interest in student services, parents' investments, students' investments, and the financial responsibilities of CUSA. This is not a private club that would expect to conduct its business in private, and without a level of accountability.[49]

35. While Justice Ray applied the public administrative law test for jurisdiction (public tribunals) rather than the test for private administrative law jurisdiction (domestic tribunals) described above,[50] his comments above are relevant in showing why the Student Unions are not immune from this Court's review.

36. Contrary to the *Grant* ruling, the case law establishes that courts have exercised jurisdiction to review the decisions of private voluntary organizations in matters concerning the rights of members, where compliance with the association's own by-laws, principles of natural justice, or good faith is called into question.

37. In the present case, the Student Unions are not truly "voluntary" or "private" such as religious groups, yacht clubs, sports teams or cultural groups. In order to earn the degree that one

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[46] *Courchene v Carleton University Students' Association*, 2016 ONSC 3500 [*Courchene*] at para 10, BOA, Tab 20.
[47] *Courchene,* at para 9, BOA, Tab 20.
[48] *Ibid* at para 10, BOA, Tab 20.
[49] *Ibid.*
[50] *See APUS v UTMSU,* BOA, Tab 1; *UVSS v CFS,* BOA, Tab 3; *Rakowski*, BOA, Tab 2.

needs to enter a profession, a student is forced to be a member of the student union and pay dues. There is nothing "voluntary" about these requirements. Further, the public interest in the actions of the Student Unions is apparent when one considers that they are entities responsible for numerous public functions on publicly-funded university campuses.[51] Thus, no Student Union in the present case is "a private club that would expect to conduct its business in private, and without a level of accountability."[52]

38. Even if they can be described as "private", the Student Unions cannot thereby avoid this Court's jurisdictional oversight.

B. Application of the "Sufficient Importance" Test for Jurisdiction

39. The rights and benefits attached to mandatory student union membership and student group status are crucial to university students. They are more important than the benefits conferred through purely private, voluntary associations, such as religious or cultural groups, or activity-based organizations such as a yacht club. The decisions of the Student Unions in these cases directly violate the right of students, who are discriminated against by their student government on the basis of their beliefs and opinions. The student Applicants in these three cases were denied their right to freely express their views, their right to utilize student space and hold discussions and presentations, and their right to freely associate with other groups and individuals. The "sufficient importance" of these rights on a public university campus must not be overlooked; they correspond with the fundamental freedoms set out in the *Canadian Charter of Rights and Freedoms*. These

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[51] See e.g. Durham College webpage on SA services, UOIT CAR, Tab 2(J), p 140. This is highlighted by the fact that Durham College, a Crown agent, along with UOIT, a government-established university, sought and received a court order dissolving the SA, in part because "the operational, governance and legal issues within the Student Association are systemic". Affidavit of Meri Kim Oliver, sworn January 17, 2017, para 8(a), UOIT CAR Vol 3, Tab 9(A); see also Tabs 9(B) and 9(C). Note: the Dissolution and Discharge Order expressly provides that new students associations established at UOIT and Durham College "shall severally assume any interest in, and be responsible for any liabilities under, and shall abide by any final determination in respect of, any Outstanding Claims", including expressly the case against the SA presently before this Court. UOIT CAR Vol 3, Tab 9(C), pp 616, 620.

[52] *Courchene,* at para 10, BOA, Tab 20.

factors weigh on top of the basic rights that all members of private, voluntary associations have to ensure that their association respects its own bylaws, policies and rules, conducts its affairs in accordance with natural justice and acts in good faith.

40. Before this Court are three groups of students representing themselves and other students whose beliefs and opinions were effectively silenced to a large extent by their respective student unions. The student Applicants in these cases were blocked from participating in an integral part of student life through the denial of the right to form recognized student groups. As will be further elaborated in subsequent written submissions addressing the facts in each of these situations, these students endured discriminatory treatment from their respective Student Unions, including the violation of student union policies and rules, the breach of the principles of natural justice and the bad faith of the Student Unions. That three such cases would come before courts in Ontario alone shows that such behaviours are not isolated incidents at student unions, but rather a pressing concern that requires judicial oversight.

41. From the record before this Court, it is clear that pro-life views are currently targeted by student unions for discriminatory treatment. However, other groups are also subject to similar discriminatory treatment. After successfully barring pro-life students from accessing student group benefits and resources as described in *Grant*, RSU's emboldened executives then discriminated against a mixed-gendered group of students seeking to discuss men's issues. The consolidated cases before this Court are "sufficiently important" to warrant this Court's review. Further discrimination against fee-paying students will continue to expand if this Court does not exercise its jurisdiction to intervene.

42. Permitting Student Unions to continue with this discriminatory conduct against minority opinion will promote the ideological ghettoization of Canada's public university campuses.

Public university campuses are meant to be forums where the diversity of the public's beliefs can be debated and discussed. The actions and decisions of the student unions in these cases clearly prevent the fulfilment of this important element of a public university.

43. This Court has both the power and responsibility to review the decisions of the Student Unions. Students who adhere to minority beliefs and opinions are not in a position to elect a majority of the representatives to the student union executive. Such students have no recourse other than to the courts of justice, when oppressed by their student union.

44. This Court's review of these cases will affirm that university campuses are not legal voids where the unlawful decisions of select individuals in power can escape judicial scrutiny. As the ABQB noted in *Lee*, in cases where "aggrieved parties have no other remedies available to them [...] judicial intervention is not only appropriate but can be expected".[53]

C. Free Exchange of Ideas and Freedom of Association at a University

45. The university is universally recognized as an institution founded upon the principles of academic freedom, the free exchange of ideas, and honest and vigorous debate. As summarized by the University of Toronto on its website:

> Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.[54]

Similarly, Ryerson University's "Statement on Freedom of Speech" declares:

> Ryerson embraces unequivocally the free exchange of ideas and the ideal of intellectual engagement within a culture of mutual respect. It is a powerful ideal that encompasses every dimension of the University. Everyone who is part of the University, as well as guests and visitors, has a role to play in this shared enterprise. This responsibility extends to both proponents and detractors of any idea or point of view. Recognizing and respecting diversity of people, thought and expression are essential and an integral part of the ideal.

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[53] *Lee*, at para 52, BOA, Tab 10.
[54] University of Toronto "Purpose of the University" webpage, UTM CAR Vol II, Tab 8(B), p 603.

> In order to achieve and sustain Ryerson's ideal, members of its community must have freedom of thought and expression, freedom from harassment or discrimination and the freedom to consider, inquire, and write or comment about any topic without concern for widely held or prescribed opinions. This right to freedom of thought and expression inevitably includes the right to criticize aspects of society in general and the University itself.[55]

46. Student unions, including those before this Court, expressly affirm in their own policies the central importance of freedom of thought, belief, expression and association on campus. UTMSU, for example, expressly commits not discriminating against its student members on the basis of their personal or political beliefs as follows:

> As stated in the Letters Patent the Mission Statement of the Union is:
> 1. To safeguard the individual rights of the student, regardless of race, colour, creed, sex, nationality, place of origin, or personal or political beliefs;[56]

Similarly, the Ryerson Students' Union declares its commitment to support the fundamental freedoms listed in section 2 of the *Charter*:

> The Ryerson Students' Union Supports:
> ii. Freedom of conscious [sic] and religion;
> iii. Freedom of thought, belief, opinion and expression, including freedom of the press and other mediums of communication;
> iv. Freedom of peaceful assembly; and
> v. Freedom of association.

47. Thus, the freedoms of expression and association must be considered in these cases, regardless of the application of the *Charter* on university campuses.[57]

i. Philosophy of freedom of expression and association

48. Freedom of expression is a basic individual right and a fundamental value of our legal system, a value with both "instrumental and intrinsic justifications".[58]

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[55] Ryerson University "Statement on Free Speech", May 4, 2010, Ryerson CAR Vol I, Tab 2(E), p 185.
[56] UTMSU *Constitution and Bylaws*, "Mission Statement", UTM CAR Vol I, Tab 2(D), p 56.
[57] The *Charter's* application to universities is a subject that continues to be debated. See Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5:1 *Can J Hum Rts* 59; Dwight Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45:1 *RDUS* 133, BOA Tab 22.
[58] *R v Keegstra*, [1990] 3 SCR 697 [*Keegstra*] (McLachlin J dissenting) at para 194, BOA, Tab 23.

49. In *Edmonton Journal* v. *Alberta (Attorney General)*, commenting on the value of freedom of expression, Cory J. noted that "[i]t is difficult to imagine a guaranteed right more important to a democratic society".[59]

50. Freedom of expression precedes and transcends the *Charter*. As noted in *RWDSU v Dolphin Delivery Ltd*: "Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and *educational institutions* of western society".[60]

51. Freedom of expression is not reserved to protecting against governmental tyranny and censorship. As McLachlin J noted in her *Keegstra* dissent, the Supreme Court "affirmed the fundamental value of freedom of speech not only in our political system, but also in *society generally*".[61]

52. Similarly, as noted by Yale Law School Professor Owen Fiss, John Stuart Mill was primarily concerned with social, not governmental, censorship as he feared that "social sanctions could restrain liberty as much as those imposed by law".[62]

53. For Mill, social censorship is dangerous because public opinion can be "intolerant of any marked demonstration of individuality" and is inclined to impose "general rules of conduct, and endeavour to make every one conform to the approved standard".[63]

54. Professor Fiss also notes that "individual self-development" lies at the heart of Mill's defence of free speech from social censorship:

> Mill saw freedom of speech as a means of examining the validity of established conventions, and thus he needed to guard against the kind of sanctions that were most likely

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[59] [1989] 2 SCR 1326, at p 1336, BOA, Tab 24.
[60] [1986] 2 SCR 573 [*Dolphin Delivery*] at para 12 [emphasis added], BOA, Tab 25.
[61] *Keegstra* at para 204, BOA, Tab 23, citing in *Boucher v The King, Boucher v. The King*, [1951] SCR 265.
[62] Owen Fiss, "A Freedom both Personal and Political," in John Stuart Mill, *On Liberty*, David Bromwich and George Kateb (eds), (New Haven: Yale University Press, 2003) [Fiss] at 184-185, BOA Tab 26.
[63] John Stuart Mill, *On Liberty*, David Bromwich and George Kateb (eds), (New Haven: Yale University Press, 2003) at 133-134, BOA Tab 27.

> to be enlisted in the protection of those conventions. A theory of free expression that condemned state censorship while permitting social censorship would do little to provide the individual with the freedom needed to examine prevailing ethical doctrines and religious creeds, or more generally, to determine how best to live his life.[64]

55. The Court has frequently cited and endorsed Mill's legal philosophy as it pertains to freedom of expression. In *Dolphin Delivery*, the Supreme Court, commenting on "the importance of freedom of expression [...] as a necessary feature of modern democracy", noted that "[n]othing in the vast literature on this subject reduces the importance of Mill's words".[65]

56. Freedom of association is similarly recognized as a fundamental freedom in Canada.[66] Freedom of association is recognized to protect (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[67]

57. The Supreme Court recently described the purpose of freedom of association as follows:

> The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.[68]

Quoting Chief Justice Dickson, the Court affirmed:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be

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[64] Fiss, at 186, BOA Tab 26.
[65] *Dolphin* Delivery, at para 14, BOA, Tab 25.
[66] See *Charter*, section 2, "Fundamental Freedoms".
[67] *Mounted Police Association of Ontario v Canada (Attorney General),* 2015 SCC 1 [*Mounted Police*] at para 66, BOA, Tab 28,
[68] *Ibid* at para 58, BOA, Tab 28,

> vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. . . . [69]

ii. Freedom of expression and administrative law

58. In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court affirmed that under administrative law, decision-makers will often be under the obligation to consider *Charter* values or principles.[70] This was reiterated in *Pridgen v University of Calgary,* when O'Ferrall J.A. noted that in addition to the *Charter*, the common law provided protection of civil liberties, such as freedom of expression, through administrative law remedies.[71]

59. Similarly, in *Wilson v University of Calgary*, which concerned the discipline of students for putting up a display about abortion, the ABQB found that the University's decision was unreasonable for failing to properly consider the nature of a university and relevant *Charter* values:

> The University holds itself out to be an institution which facilitates scholarly inquiry. Members of the University community expect to be able to engage in the exchange of ideas and open discourse. Mr. Hickie's reasons fail to demonstrate that he took into account the nature and purpose of a university as a forum for the expression of differing views. Nor do they demonstrate that any prior attempt to balance *Charter* values by interfering "no more than necessary" was reasonably undertaken. Neither Ms. Houghton's nor the Appeal Boards' decisions demonstrate that due regard has been given to the importance of the expressive rights and Mr. Hickie's conclusion to the contrary is unreasonable.[72]

iii. Freedom of expression under international law

60. Under international law, Canada is bound by the international human rights instruments it has ratified, including the *International Covenant on Civil and Political Rights* ("ICCPR").

61. Article 19 of the ICCPR stipulates that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds ... subject to certain restrictions, but these shall only be such as are provided by law ...."

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[69] *Mounted Police* at para 35, BOA, Tab 28,
[70] [1999] 2 SCR 817 at p 56, BOA, Tab 29.
[71] 2012 ABCA 139 [*Pridgen*] at page 180, BOA, Tab 30.
[72] 2014 ABCA 190 [*Wilson*] at para 163, BOA, Tab 31.

62. In its *General Comment No. 34*, at para 7, the *Human Rights Committee* ("HRC"), as the Chief Interpretive Body of the ICCPR, commented that the freedom of expression obligation in the ICCPR "is binding on every State party as a whole" which "may also be incurred [...] under some circumstances in respect of acts of semi-State entities."[73] It continues:

> The [freedom of expression] obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.[74]

63. In *Gauthier v Canada*, the HRC found that Canada violated its Article 19 obligation to provide access to information under the ICCPR because of the decision of a private organisation, the Canadian Press Gallery, as it denied the author full-time membership. The HRC noted that Canada "has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament".[75] Importantly, the HRC also noted Canada's failure under the ICCPR to provide judicial recourse for rights violations, as no right of review existed for the decision of the private organisation before the Courts or Parliament.[76]

64. The Supreme Court has affirmed that there is a presumption that Canadian law is in compliance with Canada's obligations under international law.[77]

65. As this Court reviews the decisions of the Student Unions against the student groups based on their views (or perceived views), certainly the Student Unions own commitments to the fundamental freedoms of thought, belief, opinion and expression, freedom of assembly, and

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[73] UN Human Rights Committee (HRC), *General Comment No. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 at para 7 [footnotes omitted], BOA, Tab 33.
[74] *Ibid.*
[75] *Robert W Gauthier v Canada*, Communication No 633/1995, UN Doc CCPR/C/65/D/633/1995 (5 May 1999) at para 13.5, BOA, Tab 34.
[76] *Ibid* at para 13.7, BOA, Tab 34.
[77] *R v Hape*, 2007 SCC 26 at paras 53-56, BOA, Tab 35.

freedom of association, to encouraging a diversity of viewpoints and to not discriminating against students on the basis of personal or political belief are centrally relevant. In applying the common law applicable to the decisions of these Student Unions, this Court should be mindful of the duty to develop the common law consistent with Canada's fundamental values expressed in the *Charter* and in accordance with Canada's international obligations.[78] Finally, this Court should consider the importance to public university campuses of the free exchange of ideas in the context of these consolidated cases.

D. This Court's jurisdiction permits review for compliance with student union policies and rules, the principles of natural justice and requirements of good faith.

i. Student unions must comply with their own bylaws, policies and rules

66. Private associations and clubs owe their members a duty to respect their own by-laws, policies and rules. Failure to do so can result in judicial intervention and the setting aside of an *ultra vires* decision.

67. In the *Mayan* case cited earlier, the ABQB noted that the Association's decision to suspend the Applicant was *ultra vires*, as its bylaws stipulated that only the Board had jurisdiction to suspend members, whereas Officers could simply impose fines or penalties, which was interpreted by the Court as not including suspensions. Moreover, the Court noted that in case of doubt as to the interpretation of the bylaws, "the doctrine of *contra proferentem* would require that it be resolved against the Association."[79] Finally, the Court noted that the Board's decision compelling the Applicant to complete anger management courses was *ultra vires* as it had no authority under its bylaws to do so.[80]

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[78] See *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, BOA, Tab 36; *Grant v Torstar Corp*, 2009 SCC 61, BOA, Tab 37.
[79] *Mayan*, at paras 49-51, BOA, Tab 8.
[80] *Ibid* at para 50, BOA, Tab 8.

68. In *Courchene v Carleton University Students' Association*, the Ontario Superior Court of Justice reversed the decision of the Constitutional Board and reinstated the Applicant as Vice-President of the Students' Association. The Court found that the decision to disqualify the Applicant as Vice-President had been taken based on a subsequently-enacted provision which was not part of the "Voting Day Policy" at the time of election.

69. In *University of Victoria Students' Society v Canadian Federation of Students*, the BCSC invalidated a decision made by the CFS. Here, the CFS decided that no referendum could take place regarding continued CFS membership at the University of Victoria due to insufficient signatures. The Court found that this decision was based on a practice that was not sufficiently established nor written in the relevant bylaws, as votes of certain students were not counted if their signatures later appeared in a subsequent contradictory petition. The Court found that this second petition was an irrelevant consideration, as it was not contemplated in the bylaws at the relevant time.[81]

70. Similarly, in *Ge c Canadian Federation of Students*, the Quebec Superior Court found that the decision of a CFS Officer, prohibiting students from engaging in expressive activity surrounding a referendum on CFS membership, was unlawful as it was an act *ultra vires* the CFS bylaws.

71. Finally, in *Kwantlen University College Student Association v Canadian Federation of Students—British Columbia Component*,[82] the BCCA also ruled that CFS-British Columbia Component ("CFS-BC") acted *ultra vires* its bylaws. Here, the CFS-BC tried to prevent a Kwantlen University College Student Association representative from taking his position on the Executive Committee of the CFS-BC. The Court of Appeal concluded that the decision to exclude

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[81] *Ibid* at para 58, BOA, Tab 8.
[82] 2011 BCCA 133 [*KUCSA v CFS-BC*], BOA, Tab 38.

the representative was outside the jurisdiction of the CFS-BC, as this was not a power that it held under its bylaws.

72. Thus, in reviewing the decision of a student union, a court must investigate whether the student union's actions are specifically authorized by its bylaws, policies or rules. The Student Unions' actions must be in accordance with their own bylaws, policies and rules in order to be upheld. Where there is doubt concerning the appropriate application of the student union's own documents, it should be resolved against the student union. Where student union decisions are premised on irrelevant considerations, those decisions are *ultra vires*. Further, student unions should not be presumed to have the jurisdiction to engage in bad faith or unlawful actions.

ii. Student unions must comply with the principles of natural justice

73. The specific principles of natural justice that are applicable during the review of decisions made by private voluntary associations depend on several factors. As the BCSC noted in *Farren v Pacific Coast Amateur Hockey Association*, Courts must examine "(1) the nature of the organization and (2) the seriousness of the consequences of the decision" when determining the content of natural justice. [83]

74. The Court in *Farren* also cited *Garcia v Kelowna Minor Hockey Association*, where the BCSC found that regarding a decision by the minor hockey association to suspend a parent, the dictates of natural justice required obligations "on the decision-maker to (1) approach the hearing in good faith and with an open mind, (2) provide notice of the hearing to the impacted party(s), and (3) give the impacted party(s) an opportunity to be heard in his/her own defence".[84]

75. The decisions at issue before this Court are clearly decisions of significance. The Student Unions' own rules require strict procedural protection for student group status, including written

[83] 2013 BCSC 498, at para 19, citing *Barrie v Royal Colwood Golf Club*, 2001 BCSC 1181 at para 59, BOA, Tab 39.
[84] 2009 BCSC 200 at para 20, BOA, Tab 40.

warnings, detailed advance notice specifying the policies allegedly violated, the presentation of evidence, the opportunity for the student group to defend itself, a written decision, and a right of appeal.[85] Such processes incorporated into the Student Unions procedures show that these decisions were not to be made based on the unfettered discretion of the Student Unions' executives. Rather, these decisions were to be made based on the established written policies of the Student Unions, and in accordance with a meaningful threshold of natural justice.

1. Notice

76. The right to receive notice is the fundamental foundation of procedural fairness, without which its other elements are illusory. In *Hofer*, the Supreme Court affirmed that details as to the cause of the hearing are required and that "it is insufficient merely to give notice that the conduct of a member is to be considered at a meeting".[86]

77. In addition to the specific allegations, the obligation to provide notice also requires details as to the potential sanctions or consequences. In *Hofer*, the Supreme Court found that the obligation to provide notice was not respected, as the notice to members of the Colony that their conduct was being considered at a meeting did not mention their potential expulsion.

78. Similarly, in *Mayan*, the Court found that the notice given to the Applicant prior to his suspension from the association was insufficient. The Court reasoned that the notice gave no warning that suspension was a possible outcome, and did not specify the details and seriousness of the allegations made against him.[87]

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[85] See *RSU Student Group Policies* "Appeal of Termination", Ryerson CAR Vol 1, Tab 2(C), p 178; UTMSU *Clubs' Handbook* "Warning System", UTM CAR Vol I, Tab (C), p 42; SA *Campus Clubs Procedure* "Club Sanctions", UOIT CAR Vol 1, Tab 2(H), pp 128-30.
[86] *Hofer*, at p 224, BOA, Tab 4.
[87] *Mayan*, at paras 58-64, BOA, Tab 8.

79. Mere notice from a student union of a meeting is thus insufficient. Details concerning the nature of allegations against the student group are required, along with information concerning the consequences of the decision to be reached at the meeting.

2. Right to be heard, bias and prejudgement

80. At a basic level, the right to be heard includes an "opportunity to respond to the allegations".[88] In *Farren*, the Court reversed the decision of the hockey association concerning the eligibility of the Applicant's children to play in its league because it had been made at a Hearing that the Applicant could not attend.

81. The right to be heard also includes an obligation on decision-makers to have an open mind free from "a reasonable apprehension of bias".[89]

82. In *Old St. Boniface Residents Association Inc v Winnipeg (City)*, the Supreme Court noted that bias could be found in cases where "there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile".[90]

83. A relevant application of the "closed-mind" or "bias" test was in the previously cited *McLachlan v Burrard Yacht Club* case. The BC Court of Appeal found that the Petitioner was denied procedural fairness, as the decision to terminate his membership was prejudged before the Hearing by the Board:

> Although Mr. McLachlan was not entitled to be heard by persons unknowledgeable of the dispute, he was entitled, in my view, to appear before a Board that was not then on the record as concluding, without hearing from him, that he had in fact done as was alleged.[91]

Here, the letter sent to the Petitioner from the Board, inviting him to the Hearing and stating that he had violated the club by-laws constituted prejudgment.

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[88] *Hofer*, at p. 196, BOA, Tab 4.
[89] *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 636, BOA, Tab 41.
[90] [1990] 3 SCR 1170, 1197, BOA, Tab 42.
[91] *McLachlan*, at para 41, BOA, Tab 7.

84. The Students Unions' duty to afford the student Applicants an adequate opportunity to respond to the allegations against them and their student groups is clearly provided in the student union rules. Student group recognition is to be determined on an impartial basis, using identifiable criteria that apply to all student applicants. For a student union to provide that opportunity only as a formality, having prejudged the decision and closed its mind is a breach of natural justice.

iii. Student unions must act in good faith

85. Courts have also been willing to review decisions of voluntary associations that have been made *mala fide* or in bad faith. Courts use the terms "bad faith", "unauthorized purpose" and "irrelevant considerations" interchangeably to identify essentially the same defect in a decision: an improper intention.[92]

86. In *Pal*, the Ontario Superior Court of Justice described bad faith in the following way: "[o]ne of the hallmarks of bad faith is where a process is put in place, ostensibly for a legitimate purpose, but really for another oblique, illegitimate or collateral purpose".[93]

87. In *Pal*, the Court found that the Respondents acted in bad faith by initiating a process to expulse the Applicants as members of the religious association. The Court found that this was done in bad faith, as the real reason this Expulsion Hearing was initiated was to indirectly remove the Applicants as Trustees. The Court inferred this conclusion as the Expulsion Hearing was only initiated against the Applicants and not any of the other members who had signed the Petition that upset the respondents, and because of the very stringent requirements for Trustee termination.[94]

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[92] CED (online), *Administrative Law*, "The Abuse of Improper Intention: Unauthorized or Ulterior Purpose, Bad Faith or Irrelevant Considerations", III.4.(d).(i).B) at §162, BOA, Tab 43.
[93] *Pal*, at para 46, BOA, Tab 5.
[94] *Ibid* at para 47, BOA, Tab 5.

88. Another prominent example of a case involving bad faith is *Roncarelli v Duplessis*.[95] In that case, the Court held that Roncarelli was unlawfully denied a liquor permit, as irrelevant considerations had influenced the decision. Indeed, the Court noted that although the Liquor Commission had the right to refuse to grant liquor permits, it could only do so in regards to relevant considerations. In other words, the fact that Roncarelli was paying bail for Jehovah's Witnesses who had been arrested for disseminating religious literature was not a relevant consideration in his request for a renewed liquor permit.[96]

89. Similarly, in *Smith & Rhuland Ltd v Nova Scotia*,[97] the Supreme Court found that the decision of a Labour Relations Board to refuse union certification was unlawful, as it was based on the fact that the secretary-treasurer was a communist. In doing so, the Court noted that the Board "exceeded the limits of its discretion" as the Board was not "empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribed a labour organization".[98] In this respect, the political views of the secretary-treasurer was an irrelevant consideration for certification.

90. The Saskatchewan Court of Queen's Bench applied the principles of natural justice and duty of good faith to a decision of the University of Saskatchewan Students' Union ("USSU") ratifying a vote to join the Canadian Federation of Students.[99] It asked whether the student union executive council had acted "in a fashion that meets the legitimate expectations of a fair-minded observer?"[100] The Court ruled that the student union breached its obligation to act in good faith

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[95] [1959] SCR 121 [*Roncarelli*], BOA, Tab 44.
[96] *Ibid* at pp 140-143 (Rand J), BOA, Tab 44.
[97] [1953] 2 SCR 95, BOA, Tab 45.
[98] *Ibid* at p 100, BOA, Tab 45.
[99] *Mowat v University of Saskatchewan Students' Union,* 2006 SKQB 462, aff'd 2007 SKCA 90, BOA, Tab 46.
[100] *Ibid* at para 60, BOA, Tab 46.

and in accordance with the rules of natural justice, finding that the student union executive council "simply ignored its own rules and imposed its own preordained outcome."[101]

91. Thus, as demonstrated by the cases above, the Student Unions are not permitted to invoke facially neutral rules and procedures in a targeted way in order to achieve their predetermined decision against student groups with which they disagree. Student unions are not permitted to grant student group recognition status based on popularity, or an executive's personal ideologies, both of which are irrelevant – and thus unlawful – considerations.

E. This Court Has Authority to Grant the Applicants' Appropriate Remedies

92. In cases involving review of private decisions made by voluntary associations, "private law remedies" are available such as a declaration, injunction, or setting aside the offending decision.[102]

93. Courts have not shied away from providing redress to Applicants who have been victims of unlawful decisions made by voluntary associations. In *Farren v Pacific Coast Amateur Hockey Association*, the BCSC ordered the association to conduct another appeal at a time when the Applicant would be able to attend in order to remedy the procedural fairness defect.

94. In *Mayan v World Professional Chuckwagon Association*, the Court went further, setting aside the decision of the Hearing Panel and reinstating the Applicant's membership, leaving open the possibility of a future Hearing conducted fairly and *intra vires*. Similarly, *McLachlan v Burrard Yacht Club*, the revoked membership of the Applicant was reinstated for breaches of natural justice in the decision on revocation.

95. Two cases involving student unions also provided similar remedies to the aggrieved applicants. In *Courchene v Carleton University Students' Association*, the Ontario Superior Court

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[101] *Ibid* at paras 62-63, BOA, Tab 46.

[102] *Knox v Conservative Party of Canada*, 2007 ABCA 295 at paras 16-20, BOA, Tab 47; *Woloshyn*, at para 13, BOA, Tab 6.

of Justice reversed the decision made by the Constitutional Board, and reinstated the Students' Association's Vice-President, who had been unlawfully disqualified contrary to the relevant Bylaws. Similarly, in *Ge c Canadian Federation of Student*, the Court suspended the referendum rules adopted by a CFS officer which were *ultra vires*.

96. In *Pal et al v Chatterjee et al*, the Ontario Superior Court of Justice also addressed some of the substantive issues in dispute within the voluntary association in providing remedies. In finding bad faith on the part of the defendants, who had initiated a process to revoke the Applicants membership for improper reasons, the Court ordered the Respondents to take steps to rescind the procedures, and prohibited the respondents from taking any future steps to terminate the membership of the applicants.

97. Courts have also granted orders in the nature of *mandamus* in cases involving membership.[103] Of particular interest, in *Murray v Veterinary Medical Association (Saskatchewan)*, the court ordered reinstatement of the applicant's membership upon finding that (i) the relevant bylaws which permitted a member of the veterinary association to be struck from the register were *ultra vires* and (ii) the decision to remove the Applicant's membership was taken in violation of the principles of natural justice.[104]

98. In the context of a decision concerning academic standing, the Saskatchewan *Court of Queen's Bench* endorsed the possibility of the writ of *mandamus* in a university setting:

> However, the prerogative writs of *certiorari* and *mandamus* are available to a student who has been denied natural justice in respect of his examinations. The university has been entrusted with the higher education of a large number of the citizens of the province. This is a public responsibility that should be subject to some judicial control.[105]

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[103] *Law Society of British Columbia v MacKrow*, 68 DLR (2d) 179, 1968 CanLII 577 (BC CA), BOA, Tab 48; *Latimer v Association of Licensed Practical Nurses*, 42 Man. R. (2d) 287, 1986 CarswellMan 26 (Man. Q.B.), BOA, Tab 49; *Murray v Veterinary Medical Association (Saskatchewan)*, 2006 SKQB 316 [*Murray*], BOA, Tab 50; *Seafarer's International Union of North America (Canadian District) v Stern*, [1961] SCR 682, BOA, Tab 51.

[104] *Murray, ibid* at paras 31, 40, BOA, Tab 50.

[105] *Houston v University of Saskatchewan (Joint Senate-Council Board of Student Appeals)*, [1994] S.J. No. 10 (Sask. Q.B.) at para 17, BOA, Tab 52.

99. This Court is thus empowered with appropriate flexibility to provide adequate redress to the Applicants, in the face of the Student Unions' discriminatory treatment and decisions.

100. It is respectfully submitted that the appropriate remedies to be granted against the respective Student Unions will include:

a. Declarations invalidating the decisions against the student groups as requested in the Notice of Applications,

b. Orders prohibiting the Student Unions from discriminating against student groups on the basis of their views and associations,

c. Orders directing the Student Unions to grant student group recognition to the student groups, and

d. In the alternative, orders requiring the Students Unions to reconsider the Applicants applications for student group recognition in accordance with their own provisions and rules, the principles of natural justice and good faith, and any further directions from this Honourable Court.

PART IV - CONCLUSION

101. Student life on Canada's public university campuses is significantly determined by student unions, which control important student resources such as student spaces, funds and services, often accessed exclusively through student group recognition. Student unions are not typical private bodies – student membership is compulsory, and students are required by universities to fund student unions, even if they do not want to do so. It is unsurprising that abuses occur, given the authority of student unions without requisite safeguards. The Student Unions before this Court have demonstrated a willingness to subject the students under their authority to differential, even discriminatory and oppressive, treatment, and to do so on ideological grounds for the purpose of

preventing expression of social views with which they disagree. Courts should not turn a blind eye to the excesses and abuses of these Student Unions. Rather, Courts have both the authority and the responsibility to ensure that the Student Unions comply with their own bylaws and rules, the basic principles of natural justice, and the duty of good faith, for the benefit of students, who have no other recourse but to the courts.

102. Subsequent briefs will be filed applying the legal principles discussed herein to the facts of each of the cases. As will be seen, each of the Student Unions' decisions were animated by the Student Unions' animus toward the Applicants' views. Further, these Student Unions' decisions violated, in a variety of ways, the Student Unions' own bylaws, policies, and rules; the principles of natural justice; and the requirement to not act in bad faith.

103. Established legal principles warrant this Court's exercise of jurisdiction to review these Student Unions' decisions. Failure to exercise that jurisdiction will embolden Canada's student unions to discriminate against students with minority views on university campuses with impunity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 18, 2017

Justice Centre for Constitutional Freedoms

LIST OF AUTHORITIES

1. *Association of Part-Time Undergraduate Students of the University of Toronto v University of Toronto Mississauga Students Union*, [2008] OJ No 3344 (Ont. S.C.J.).
2. *Rakowski v Malagerio,* [2007] OJ No 369 (Ont. S.J.C.).
3. *University of Victoria Students' Society v Canadian Federation of Students,* 2011 BCSC 122.
4. *Lakeside Colony of Hutterian Brethren v Hofer,* [1992] 3 SCR 165.
5. *Pal et al v Chatterjee et al,* 2013 ONSC 1329.
6. *Woloshyn v Association of United Ukrainian Canadians,* 2013 ABQB 262.
7. *McLachlan v Burrard Yacht Club,* 2008 BCCA 271.
8. *Mayan v World Professional Chuckwagon Association,* 2011 ABQB 140.
9. *Schow v Alberta School's Athletic Association,* [2002] A.J. No. 1711 (Alta. Q.B.).
10. *Lee v Yeung,* 2012 ABQB 40.
11. *Carrier c Radio Nord-Joli Inc.*, REJB 2002-25216 (Que. C.S.).
12. *Matossian c Canadian Heritage of Quebec,* 2007 QCCA 115.
13. *Ge c Canadian Federation of Students*, 2015 QCCS 19.
14. F.W. Wegenast, *The Law of Canadian Companies,* (Toronto: Burroughs and Co Ltd. 1931).
15. *Changoor v IBEW, Local 353,* 2014 ONSC 4558.
16. *Buttazzoni v B.A.C., Local 2,* [2004] O.L.R.B. Rep. 499, 2004 Carswell Ont 5556.
17. *Rees v United Association of Journeymen,* 43 O.R. (2d) 97 (Ont. Div. Ct.).
18. *Grant v Ryerson Students' Union,* 2016 ONSC 5519.
19. *Judicial Review Procedure Act,* RSO 1990.
20. *Couchene v Carleton University Students' Association,* 2016 ONSC 3500.
21. Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5:1 *Can J Hum Rts* 59

22. Dwight Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45:1 *RDUS* 133.

23. *R v Keegstra,* [1990] 3 SCR 697.

24. *Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326.

25. *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580,* [1986] 2 SCR 573.

26. Owen Fiss, "A Freedom both Personal and Political," in John Stuart Mill, *On Liberty*, David Bromwich and George Kateb (eds), (New Haven: Yale University Press, 2003).

27. John Stuart Mill, *On Liberty*, David Bromwich and George Kateb (eds), (New Haven: Yale University Press, 2003).

28. *Mounted Police Association of Ontario v Canada (Attorney General),* 2015 SCC 1.

29. *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817.

30. *Pridgen v University of Calgary,* 2012 ABCA 139.

31. *Wilson v University of Calgary,* 2014 ABQB 190.

32. *International Covenant on Civil and Political Rights*, December 16. 1966, 999 U.N.T.S. 171.

33. UN Human Rights Committee (HRC), *General Comment No. 34, Article 19, Freedoms of opinion and expression,* 12 September 2011, CCPR/C/GC/34.

34. *Robert W Gauthier v Canada,* Communication No 633/1995, UN Doc CCPR/C/65/D/633/1995 (5 May 1999).

35. *R v Hape,* 2007 SCC 26.

36. *Hill v Church of Scientology of Toronto,* [1995] 2 SCR 1130.

37. *Grant v Torstar Corp,* 2009 SCC 61.

38. *Kwantlen University College Student Association v Candian Federation of Students – British Columbia Component,* 2011 BCCA 133.

39. *Farren v Pacific Coast Amateur Hockey Association,* 2013 BCSC 498.

40. *Garcia v Kelowna Minor Hockey Association,* 2009 BCSC 200.

41. *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 SCR 623.

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

43. CED (online), *Administrative Law*, "The Abuse of Improper Intention: Unauthorized or Ulterior Purpose, Bad Faith or Irrelevant Considerations", III. 4 (d).(i).B.

44. *Roncarelli v Duplessis,* [1959] SCR 121.

45. *Smith & Rhuland Ltd. v Nova Scotia,* [1953] 2 SCR 95.

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

47. *Knox v Conservative Party of Canada,* 2007 ABCA 295.

48. *Law Society of British Columbia v MacKrow,* 68 DLR (2d) 179, 1968 CanLII 577 (BC CA).

49. *Latimer v Association of Licensed Practical Nurses,* 42 Man. R. (2d) 287, 1986 CarswellMan 26 (Man. Q.B.).

50. *Murray v Veterinary Medical Association (Saskatchewan),* 2006 SKQB 316.

51. *Seafarer's International Union of North America (Canadian District) v Stern,* [1961] SCR 682.

52. *Houston v University of Saskatchewan (Joint Senate-Council Board of Student Appeals),* [1994] S.J. No. 10 (Sask. Q.B.).

KEVIN ARRIOLA et al.

and RYERSON STUDENTS' UNION et al

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ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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