CITATION: Canadian Federation of Students v. Ontario, 2019 ONSC 6658
COURT FILE NO.: DC 279/19
DATE: 20191121

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, D.L. Corbett and Favreau JJ.

B E T W E E N:	)	
	)	
THE CANADIAN FEDERATION OF STUDENTS and THE YORK FEDERATION OF STUDENTS	)	*Mark Wright, Louis Century, Geetha Philipupillou and Ella Bedard,* for the Applicants
Applicants	)	
- and -	)	
ONTARIO (MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)	)	*Antonin I. Pribitec and Kisha Chatterjee,* for the Respondent
Respondent	)	
– and –	)	
UNIVERSITY OF TORONTO GRADUATE STUDENTS UNION and B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS	)	*Ewa Krajewska and Teagan Markin Mannu,* for U. of T. Grad. Students Union *David Elmaleh and Aaron Rosenberg,* for B'Nai Brith
Intervenors	)	**Heard at Toronto:** October 11, 2019

REASONS FOR DECISION

The Court:

1. Introduction

[1] On December 12, 2018, the Ontario Cabinet directed the Minister of Training, Colleges and Universities to direct colleges and universities to "allow" students to opt-out of "fees related to student associations" and other "ancillary fees". The Minister implemented this direction on March 29, 2019 by issuing the "Student Choice Initiative" in "policy directives" for colleges and "guidelines" for universities in Ontario (collectively, the "impugned directives").

[2] The Applicants, two student associations, seek judicial review to quash the impugned directives. They argue that:

a. the impugned directives are inconsistent with the statutory schemes regulating colleges and universities in Ontario;

b. the impugned directives were made for an improper purpose and in bad faith; and

c. the Minister's failure to notify or consult student associations prior to announcing and issuing the impugned directives breached a duty of procedural fairness owed to the applicants and other student associations.

[3] Ontario argues that the matters raised in the application are not justiciable as the impugned directives are either "core policy decisions" based on social, economic and political considerations, or are exercises of the Crown prerogative power over public spending. Such decisions, Ontario argues, are not reviewable by the court absent bad faith or irrationality, neither of which are established in this case.

[4] The University of Toronto Graduate Students Union intervenes to argue in support of the Applicants. B'Nai Brith intervenes to argue in support of Ontario's position on the basis that it respects the freedom of choice of students who do not support their student associations.

2. Summary and Disposition

(a) Justiciability

[5] Ontario says that this application is not justiciable for two reasons:

(a) the impugned directives reflect a "core policy choice" not subject to review before the courts; and

(b) the impugned directives are exercises of the Crown's prerogative power over spending.

Neither argument justifies exempting the impugned directives from judicial review for legality. To hold otherwise would undercut the supremacy of the legislature and open the door for government by executive decree, a proposition repugnant to the core principles of parliamentary democracy.

[6] Although other issues have been raised in this application, we find that this case turns on whether the impugned directives are consistent with the laws that prescribe governance for colleges and universities. That is a question of legality and is clearly justiciable: indeed, it lies at the very heart of the court's public law mandate.

(b) Legality

[7] University and college student associations are private not-for profit corporations. Ontario does not fund these associations directly or indirectly. Ontario does not control these associations directly or indirectly. There is no statutory authority authorizing Cabinet or the Minister to interfere in the internal affairs of these student associations.

[8] Universities are private, autonomous, self-governing institutions. They are "publicly assisted" but not publicly owned or operated. For more than 100 years, Ontario has had a legislated policy of non-interference in university affairs, reflected in private legislative Acts conferring on university governing councils and senates the authority and responsibility to manage university affairs. There is no statutory authority authorizing Cabinet or the Minister to interfere in the internal affairs of universities generally, or in the relations between universities and student associations specifically.

[9] Membership in university student associations is mandatory. That is, universities require students to be members of their student associations. There is no statutory authority authorizing Cabinet or the Minister to interfere with this requirement.

[10] Students are required to pay association membership fees, in amounts authorized by the students through democratic processes, including student referenda. There is no statutory authority for Cabinet or the Minister to interfere with democratic decisions taken by students respecting their student association membership fees.

[11] Universities have arrangements with student associations respecting student association fees. Generally, universities collect and remit these fees to student associations in exchange for those associations observing agreed democratic practices for increasing fees, and budgeting and accounting for the money. There is no statutory authority for Cabinet or the Minister to interfere with these arrangements between universities and student associations.

[12] The autonomy of universities, as private institutions, is fundamental to the academic freedom that is their hallmark. Inclusion of students in university governance is part of the autonomous internal workings of universities: students are important members of the academic community, with interests that require and are accorded representation in a structure that has evolved since the Second World War. The impugned directives are not authorized by law and are inconsistent with the autonomy granted universities, bedrock principles on which Ontario universities have been governed for more than 100 years.

[13] Colleges, on the other hand, are not private institutions. They are public institutions, subject to the direction of the government. The governing legislation accords the Minister, and by extension, the Cabinet, authority to direct colleges to manage their affairs in accordance with Ontario's requirements. However, the legislation speaks directly to student associations: it precludes interference with student associations in any way that would restrict those associations from carrying out their "normal activities".

[14] As with university student associations, college student associations are private not-for profit corporations. There is no statutory authority authorizing Cabinet or the Minister to interfere

in the internal affairs of these student associations. And while it is open to Cabinet and the Minister to issue directions to colleges, they may not give directions that require interference with student associations in any way that would restrict those associations from carrying out their "normal activities". The impugned directives require colleges to interfere in the normal activities in the most fundamental and obvious of ways: by reducing or eliminating the funding used by student associations to carry on their "normal activities".

[15] Ontario argues that its prerogative spending power provides authority for the impugned directives. The Crown prerogative power on spending must be exercised in a manner consistent with the statutory framework for university and college governance. So, although Ontario is authorized to make grants to colleges and universities, and may attach conditions and requirements to those grants as an exercise of the prerogative power over spending, the impugned directives are not lawful requirements because they are inconsistent with the statutes enacted by the legislature in respect to governance of universities and colleges.

[16] The intervenor B'Nai Brith defends the impugned directives on the basis of the freedom of individual students to decide not to support their student associations. This may be a policy argument in favour of the impugned directives but it does not provide a legal basis for them. The wisdom of the impugned directives is not before us, and political arguments, such as the one advanced by B'Nai Brith, cannot be used to overcome the legal argument advanced by the Applicants.

[17] Therefore, for the reasons that follow, we find that the impugned directives are contrary to law, we grant the application, and we grant an order in the nature of *certiorari* quashing the impugned directives.

3. Structure of this Decision

[18] We begin by describing background facts, including:

a. the Applicants and their activities;

b. governance of colleges and universities and student associations;

c. provincial funding of colleges and universities; and

d. the "Student Choice Initiative" and its effects on student associations.

[19] We then analyse the legal issues as follows:

(a) Is this application justiciable? We find that it is.

(b) Are the impugned directives consistent with the laws related to governance of universities and colleges? We find that they are not.

(c) Are the impugned directives nonetheless authorized by law as an exercise of the Crown spending prerogative? We find that they are not because the prerogative power may not be exercised contrary to laws enacted by the legislature.

(d) We address briefly issues raised before us which we need not decide, including (a) B'Nai Brith's "freedom" argument, and (b) the Applicants' "bad faith, improper purpose and procedural unfairness" arguments.

(e) We give brief reasons respecting two issues related to admissibility of evidence:

a. A statement made by the Premier in a fundraising letter; and

b. The evidence of Dr Glen Jones tendered by the Applicants.

[20] We then conclude by granting *certiorari*, with costs, but denying the other relief requested by the Applicants.

Facts and Context

4. The Applicants

(a) The York Federation of Students

[21] The York Federation of Students ("YFS") represents 45,000 undergraduate students at York University. Like other student governments in Ontario, including the intervenor University of Toronto Graduate Students Union, YFS is an independent corporation. It is governed by its own Constitution and By-laws. Its affairs are managed by a Board of Directors elected every academic year. All its members have the right to run for elected office, vote and participate in decision-making.

[22] YFS is student-funded. It receives no public funding. Its membership fee funds its activities and is approved democratically in accordance with its By-laws, including through student referenda. For 2018-2019, its membership fee was $1.78 per credit or $53.40 per year for a full-time student. Membership fees make up the majority of YFS revenue, totalling over $2,000,000.00 annually. Any adjustments to the membership fees have been approved democratically by student referenda held in accordance with the YFS By-laws.

[23] Membership fees are charged and collected by York as a condition of a student's enrolment and remitted to YFS in accordance with Presidential Regulation Number 4 – Regulations Regarding Student Government Organizations ("Regulation 4").

[24] In the introductory portion of Regulation 4 the following statement appears:

> For many years, indeed almost from the earliest days of the university, the question of how student government and activities at York should be configured and financed has been a source of concern and controversy.

The Regulation goes on to state that it represents the President's solution to this controversy, a solution that grew out of consultation between the administration and the students.

[25] In the section that sets out the Regulation's governing principles, the first principle is:

> 1. York University believes that independent student governments and student organizations promote learning, growth and responsibility amongst those who conduct these activities and serve the interests of their fellow students. Conversely it believes that the quality and diversity of life on campus can be enriched by the activities of student governments and organizations. It therefore formally recognizes and supports such duly constituted governments and organizations.

[26] Paragraph 2 of Regulation 4 provides that:

> Every student must be represented by, and pay a fee to, a central student government.

[27] In addition to student government membership fees, York students have also approved, via student referenda, per-credit levies for other organizations and activities on campus, including (among other things) a community and legal aid services program ($0.15/credit), a student newspaper ($0.13/credit), membership in the Ontario Federation of Students/ Canadian Federation of Students ($0.24/credit), a sexual survivors support line ($0.07/credit), a centre for women and trans people ($0.10/credit) and a centre supporting and sponsoring refugee students ($0.03/credit), the Canadian Centre for Civic Media & Arts Development ($0.15/credit), Regenesis Environmental and Community Initiatives at York ($0.15/credit), Ontario Public Interest Research Group ($0.10/credit) and a college levy ($0.95/credit).

[28] Like the YFS fees, York collects and remits these fees on behalf of these organizations at the time of student registration as a condition of enrolment. As per the original student referendum establishing it, the YFS membership fee is mandatory, as are the CFS-Ontario membership fees.

[29] YFS members are automatically enrolled in the YFS health and dental plans to ensure that all members have access to affordable supplementary insurance, but members who already have alternate health insurance may opt out of the health and dental plans, in which case they receive a refund of the amount of these fees.

[30] As per the original referenda establishing them, YFS members can opt out of the following levies: the Ontario Public Interest Research Group, the Sexual Survivors Support Line, the Centre for Women and Trans People and the World University Service of Canada. That is, students themselves have decided, democratically, which student fees should be "opt-out" and which should be mandatory.

[31] YFS employs 50 to 60 students to deliver and run its programs. It represents student interests through seats on the university Senate, Student Centre Board of Directors and Department and Faculty Councils. It advocates for the interests of York students to the York administration and with governments and other organizations to promote accessibility and affordability of higher

education for all students. It directly funds and administers programs such as health and dental insurance, a wellness centre, free legal advice on academic and non-academic matters, affordable printing and photocopying services, cost-saving services such as TTC passes and discounted school supplies, an off-campus housing tool and access to food and supplies through a food support centre. YFS organizes events and programs on campus such as student orientation weeks. It provides resources and support to a number of autonomous community service groups such as the Aboriginal Students Association of York. It provides a variety of services, including funding, to over 300 student clubs and associations that meet the requirements of its ratification procedure.

(b) The Canadian Federation of Students

[32] The Canadian Federation of Students ("CFS") is a national student organization with a core mandate to promote accessible and affordable post-secondary education. Formed in 1981, it is student-funded. It advocates for students at the institutional, provincial and federal levels.

[33] CFS is incorporated, self-governing and receives no public funding. Pursuant to its Constitution and By-laws, membership is determined by campus referendum. If approved by referendum, a local student government (such as YFS) becomes a member of CFS, remits membership fees and participates in CFS' governance. CFS membership fees are collected and remitted by universities and colleges in the same manner as local student association fees. Under the CFS Constitution and By-laws, local student unions are legally bound to remit the fees to CFS. More than half of the CFS member student associations are in Ontario.

(c) Total Student Association Fees and Overall Tuition and Ancillary fees

[34] . A"full-time" student normally takes 30 "credits" per academic year. Annual tuition for a full-time student is $7,743. Ancillary fees collected by and spent by the university are $21.95 per credit, or $658.50. Total fees approved by student referenda are $9.56 per credit, or $286.80. Of this amount, $5.71 per credit ($171.30) is spent on Student Centres (the buildings) and is "essential". This leaves an annual total of $115.50 in student-approved fees. Of this, about half of the student-approved fees are for student associations: $2.02/credit for the annual joint cost of the YFS and CFS fees (a total annual cost of $60.60 for a full-time student). Total tuition and university and student ancillary fees are $8,687.30; the student association fees – the only fees deemed by Cabinet to be "non-essential", are $60.60 of this total.

5. Governance of Colleges and Universities[1]

(a) University Autonomy

[35] The earliest universities in the colonies that were to become Canada arose in the late 18th and early 19th centuries. They were creatures of colonial administration, governed by boards or committees largely composed of members of colonial legislatures or by religious authorities. These early institutions were small and focused on training religious officials and the sons of the wealthy.

[36] By the early 20th century, concerns came to the fore about the relationship between the University of Toronto and Ontario. The government was criticized for using the university for patronage purposes and dragging the university into partisan politics, trends that would not assist the university to develop into a leading academic institution by international standards. In this context, Ontario established a Royal Commission, the Flavelle Commission, to study university governance at elite institutions in the United Kingdom and the United States. It reported back in 1906.

[37] The Flavelle Commission's conclusions were clear:

> We have examined the governmental systems of other State universities upon this continent and found a surprising unanimity of view upon the propriety of divorcing them from direct superintendence of political powers.

[38] The Commission recommended institutional autonomy as a response to past political interference in university affairs:

> Despite the zealous efforts of statesmen and educationalists the University became on many occasions in the past the sport of acrimonious party disputes. Its interests were

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[1] The facts set out in this section are drawn from the evidence of Dr Glen Jones, Professor and Dean of the Ontario Institute for Studies in Education, and a leading Canadian scholar on university governance and higher education policy in Canada. The admissibility of this evidence – which was challenged by Ontario – is addressed at the end of these reasons. The sources for the history summarized in this section are Dr Jones' affidavit, and articles authored or co-authored by Dr Jones, attached to his affidavit, including "Student Pressure: A National Survey of Canadian Student Organizations, *Ontario Journal of Higher Education – 1995*, 93-106; "Governments, governance, and Canadian universities" in J. Smart (ed.), *Higher Education: Handbook of Theory and Research* (Vol. 11, 337-371); Governing Boards in Canadian Universities", *Review of Higher Education*, 20(3), 277-295; "University Governance in Canadian Higher Education", *Tertiary Education and Management*, 7(2), 135-148; "The Structure of University Governance in Canada: A Policy Network Approach", in A. Amaral, G.A. Jones and B Karseth eds., *Higher Education: National Perspectives on Institutional Governance*, 212-234; *"Shifting Roles and Approaches: Government Co-ordination of Post-Secondary Education in Canada, 1995-2006"* in M. Tight, K.H. Mok, J. Huisman and C.C. Morphew (eds.), *The Routledge International Handbook of Higher Education*, 312-325; "Student Organizations in Canada and Quebec's 'Maple Spring'", *Studies on Higher Education*, 39(3), 412-425; "An Introduction to Higher Education in Canada", in J.M. Joshi and Saeed Paivandi (eds.), *Higher Education Across Nations* (vol. 1,), 1-38; "Provincial Oversight and University Autonomy in Canada: Findings of a Comparative Study of Canadian University Governance", *Canadian Journal of Higher Education*, 48(3), 65-81.

> inextricably confused in the popular mind with party politics, although with these it had, in reality, little concern.

[39] The Commission stated the rationale for its proposed governance model as follows:

> The Commission, which reviewed the issue of governance at the University of Toronto, argued that the process by which universities make decisions should be autonomous from the political whims of government. The public interest in this internal decision making process should be delegated to a corporate board composed of government-appointed citizens, and this board should assume responsibility for administrative policy.

[40] The new governance arrangement that emerged protected the university from political interference. Rather than view the publicly supported university as an arm of the state, the Commission argued that the university should be an autonomous, self-governing entity where provincial government interests would be delegated to a governing board appointed in part by the government. The governing board would assume overall responsibility for administrative affairs of the institution, including the appointment of the president and other senior staff, and financial matters. A separate body, the senate, would be responsible for academic matters. This division of responsibility between governing board and senate is described in the literature as "bicameralism".

[41] The Commission prepared a draft *University of Toronto Act* incorporating the principles of institutional autonomy and bicameralism. The Ontario legislature enacted the draft into law. The new *University of Toronto Act* became a governance model for universities across the country. The structure of the *Act* has been the template for every other university in Ontario (other than Queen's University and Royal Military College [the former of which was uniquely established earlier by Royal Charter[2] and the latter of which was created earlier by the Government of Canada[3]]).

[42] Each Ontario university is created by a unique statute.[4] Each statute confers on a Board of Governors (or similar body) the responsibility for governing the affairs of the university, and on a Senate the responsibility for establishing the educational policies and making recommendations to the Board "with respect to any matter of academic concern to the University."[5]

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[2] Victoria Regina, *Royal Charter of Queen's College at Kingston*, 16 October 1841 (5 Vic.), as am. up to and including SC 2011, c.27.

[3] *An Act to establish a Military College in one of the Garrison Towns in Canada*, SC 1874, c.36.

[4] *The University of Toronto Act 1971*, SO 1971, c.56; *The University of Guelph Act, 1964*, SO 1964, c.120; *Ryerson University Act, 1977*, SO 1977, c.47; *Wilfred Laurier University Act*, SO 1973, c.86; *The McMaster University Act*, 1976, SO 1976, c. 98; *Ontario College of Art and Design University Act*, SO 2002, c.8, Sch. E; *University of Ontario Institute of Technology Act*, SO 2002, c.8, Sch. O, *Algoma University Act*, SO 2008, c.13; *Nipissing University Act*, SO 1992, c.Pr52; *University of Ottawa Act*, SO 1965, c. 137; *Laurentian University of Sudbury Act*, SO 1960, c.151; *The Brock University Act*, SO 1964, c. 127; *Carleton University Act*, SO 1952, c.117; *Lakehead University Act*, SO 1965, c.54; *Trent University Act*, SO 1962-63, c.192; *University of Waterloo Act*, SO 1972, c.200; *University of Western Ontario Act*, SO 1982, c.163; *York University Act*, SO 1965, c.143; *The University of Windsor Act*, SO 1962-63, c.194.

[5] See for, example, *Nipissing University Act*, SO 1992, c.Pr52, s.22(a).

[43] Under their unique statutes, each university has the authority to govern its own affairs. Ontario has granted wide-ranging powers to the governing board and senate of each university covering every aspect of university governance and operations.[6] This authority includes the authority to collect tuition fees and to "collect other fees and charges, as approved by the Board, on behalf of any entity, organization or element of the University."[7]

[44] This structure, marked by institutional autonomy from political control and bicameral governance through a Board and Senate, continues today. Universities are private, not-for-profit corporations that receive government funding. They are not part of government.

[45] Dr Jones, in his evidence, states as follows:

> Institutional autonomy represents a fundamental principle of university governance in Ontario dating back to the early 20th century. The separation of university governance and operations from partisan political control is a core feature of university governance and has played a central role in allowing universities to fulfill their mission.

(b) Democratization of Universities

[46] Universities changed dramatically between the end of the Second World War and the early 1970s. Enrollment increased substantially after the War: many thousands of returning soldiers had to be re-integrated into everyday life in Canada, while at the same time wartime procurement programs came to an end. One way to soften the entry of so many working-age young people into the work force was to send more of them to colleges and universities – both to train them for new careers and to keep them occupied and out of the labour market for a few years.

[47] Increased enrollments did not shrink back to pre-war levels in later years. Getting a university education became increasingly common. By the 1960s the "massification" of higher education was well underway in Canada.

[48] In this context, both faculty and students demanded greater participation in university governance, and in 1966 the Duff-Bergdahl Report[8] recommended that these demands be addressed by adding faculty and student representatives to governing bodies within the university. The result did not displace the core governance principles of autonomy and bicameralism. Rather, participation by faculty and students was introduced and increased at all levels of university governance within the existing structure as a result of democratization initiatives following the Duff-Bergdahl Report of 1966.

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[6] Dr Jones attaches the relevant provisions of each University Act at Exhibit "N" of his affidavit.

[7] See, for example, *Nipissing University Act*, SO 1992, c.Pr52, s.16(g).

[8] This Report was co-commissioned by the Canadian Association of University teachers (CAUT) and the National Conference of Canadian Universities and Colleges. Its senior Commissioners were an American academic, Robert O. Berdahl, and a British university administrator, Sir James Duff, who had recently retired as the Vice-Chancellor of Durham University.

(c) Structure and Nature of Student Associations

[49] University students are automatic members of at least one student association. These organizations are private not-for-profit corporations with their own independent governance structures, which are democratic: elections are held each year for executive positions for the following academic year. Student associations are not created or funded by Ontario or by universities. They belong to and are funded by students.

[50] Student associations are funded by charging fees to their members. These fees are set democratically and fee increases are subject to approval in student referenda.

[51] Current student associations have taken shape in response to four major changes since the Second World War:

a. Prior to the War, universities were seen as standing *in loco parentis* towards their students. After the War, a large influx of returning soldiers entered universities, which changed the relationship between universities and their students. These students were older and more mature than traditional students and came from more diverse socio-economic backgrounds. The relationship between universities and students did not revert back to pre-War paternalism in later years.

b. Mandatory student association fees were in place across Canada by the 1960s, collected by universities and remitted to student associations. These fees provided student associations with stable funding to develop and deliver programs and services to students. Practices evolved differently at different institutions, but the general framework common at most universities is now as follows. Universities respect the independence of student associations but do set conditions in agreeing to collect and remit those fees. Those conditions include external audit of student association finances and democratic mechanisms (usually student referenda) to increase fees or introduce new fees.

c. The democratization of universities in the 1960s and 1970s gave student associations an important role in internal university affairs. With representation came a need for communication with students about their needs and preferences, which in turn led to transformation of student newspapers from social and artistic publications to fora for discussion of issues of interest to students and communication from student leaders.

d. In pre-War times, university affordability generally did not present as an issue of broad importance. Once government moved to provide university and college education for a large portion of the school-age population, accessibility became increasingly important, starting with programs to help returning soldiers pay the cost of their education. Today, generally, university student associations focus their efforts on advocacy within their own universities and with local governments. Provincial and national student associations, such as the Applicant Canadian Federation of Students, take a lead in advocating on behalf of students with

provincial and federal governments, primarily in respect of accessibility issues (the overall cost of education and student aid programs).

[52] Reporting on research he conducted in 1993, Dr Jones summarized as follows:

> ... beginning with the reforms of university governance in the late 1960s, student organizations have come to play a formal and legitimized role within the decision-making structures of the university. There are now student members on almost all university committees and student leaders are often part of the policy networks that play a central role in shaping university-wide policies. In short, student associations are now part of the formal decision-making structures of the university.... [T]heir financial and human resources... provide these organizations with the capacity to extend the time and energy necessary to play an ongoing, active role within institutional decision-making structures....[9]

[53] Dr Jones, in his evidence, states as follows:

> Student associations are independent corporations that provide advocacy and a wide range of services on behalf of their membership. These services are dependent on mandatory membership fees which, since at least the 1960s, have been collected and remitted by universities on behalf of student associations in Ontario. Institution-level student associations have chosen, through a referendum process, to become members of provincial and/or national student organizations, as a mechanism for representing their interests to provincial and federal governments. These umbrella organizations are similarly dependent on the collection of mandatory fees by university administrations.

6. Provincial Funding of Universities

[54] The two major sources of income for Ontario universities are government grants and tuition. Provincial grants account for about one-third of overall operating revenue, currently totalling around $5 billion annually. As part of its funding framework, Ontario has set limits on the tuition that universities may charge and has provided for a reduction of grants if tuition caps are exceeded.

[55] In addition to tuition, students at universities and colleges pay compulsory ancillary fees for non-academic services. These fees fall into two categories: (i) fees related to services that are provided by the university or college such as athletic centres. These fees form part of institutional revenues; (ii) fees approved by students in democratic processes that fund student groups including student governments, student newspapers, legal aid clinics, and student clubs and activities. These do not contribute to institutional revenues.

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[9] "Student Pressure: A National Survey of Canadian Student Organizations", *Ontario Journal of Higher Education – 1995* 93 at 100-101.

[56] For over 30 years Ontario has prohibited tuition-related ancillary fees and imposed conditions on institutional "non-tuition related ancillary fees", including requiring institutions to consult with student governments before increasing such fees. If an institution charges ancillary fees that violate the Minister's policies, the Minister can correspondingly reduce the institution's operating grant. Until the impugned directives, "existing and future fees established by student governments, including those resulting from referenda sponsored by them" were exempt from the Minister's policies on ancillary fees for both colleges and universities.

[57] Dr Jones, in his affidavit, states as follows:

> By overriding longstanding relationships between universities and third-party student associations for the collection of student association fees, the [impugned directives] represent an unprecedented intervention into the sphere of autonomy of universities.... To my knowledge, independent student associations have never before been the subject of policy-making by the [Minister].... [T]he government has always excluded student association fees from [the government's] requirements out of an understanding that these fees belong to and are determined by independent student associations, and do not form part of university revenues.

7. The "Student Choice Initiative"

[58] On December 12, 2018, Cabinet approved a direction for the Minister to implement three initiatives:

(a) Changes to the Ontario Student Assistance Program to make the program more financially sustainable while continuing to support access for students with financial need to post secondary education;

(b) Reduce tuition at publicly funded colleges and universities by 10% from the current level and to freeze tuition for 2020-21 (and beyond pending a review); and

(c) Require institutions to allow students to opt-out of ancillary fees related to student associations, products and special services. It is this aspect of the Cabinet direction that is referred to as the "Student Choice Initiative" ("SCI").

On January 17, 2019 the Minister announced these initiatives publicly.

[59] The SCI introduced a new condition with respect to ancillary fees to take effect for the 2019-20 academic year. Ancillary fees would now be categorized as "essential" and "non-essential". Essential fees may be made mandatory, non-essential fees must be optional (i.e. opt-out) at the choice of individual students. In addition, institutions are expected to itemize the individual purposes for which fees are charged. Bundling fees together is not permitted.

[60] As per the Cabinet directive, membership fees for student associations (including YFS and CFS) are deemed to be "non-essential".

[61] After the press release, the Minister started consulting with universities and other affected groups about the specifics of the new initiatives. On March 19, 2019, draft versions of the directives were circulated, with a 48-hour window for review. As a result of feedback, the final directives were amended to reclassify three categories of ancillary fees as "essential" – fees related to certain transit passes, fees related to varsity athletic teams and certain technology fees.

[62] On March 29, 2019, the final directives were released by the Minister. One is called the "Tuition and Ancillary Fees Minister's Binding Policy Directive" concerning Colleges of Applied Arts and Technology. ("College BPD") The other is the "Tuition Fee Framework and Ancillary Fee Guidelines" for publicly assisted universities ("University Guidelines"). The College BPD and the University Guidelines are very similar and are the impugned directives at issue in this proceeding.

[63] Under the impugned directives the following categories of services are deemed essential: athletics, career services, student buildings, health and counselling, academic support, student ID cards, transcripts, financial aid offices, and campus safety. Health and dental plan fees may be charged on a compulsory basis, with a provision for opt-out if a student provides proof of pre-existing coverage. Compulsory ancillary fees may also be charged for certain student transit passes and some technology fees. All other fees are deemed "non-essential".

[64] In the directives the Minister set out the following enforcement mechanisms:

> (a) *Universities*: Universities are required to reimburse students if any fee is collected contrary to the directive and if the student cannot be reimbursed "the Ministry will have the option of reducing the institution's operating grant."
>
> (b) *Colleges*: Non-compliance could result in the Minister exercising her powers under the *OCAAT Act*, which includes being able to directly interfere in the affairs of the college or "could result in a deduction from the college's allocation under the Core Operating Grant."[10]

(a) Purpose of the SCI

[65] According to Ontario, the SCI was approved by Cabinet as part of a three-pronged initiative to improve affordability and access to publicly-assisted universities and colleges. According to research conducted by Ministry staff, ancillary fees at colleges and universities can range from several hundred dollars to more than $2000.00 per academic year.

[66] Ontario further submits that the SCI policy is aimed at enhancing transparency regarding the fees that students are expected to pay, giving students greater choice regarding the services and

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[10] *Ontario Colleges of Applied Arts and Technology Act, 2002,* S.O. 2002, c.8 Sch F.

activities they wish to support, and promoting consistency and simplicity across post-secondary institutions in the manner in which students can opt-out of ancillary fees.

[67] The Applicants submit that the purpose of the SCI can be found in the Cabinet directive, which specifically directs that student association fees must be non-essential. According to the Applicants, this position is consistent with the Premier's stated reasons for targeting student associations through the SCI, revealed in the following portions of a fundraising letter sent by the Premier to his supporters:

> I think we all know what kind of crazy Marxist nonsense student unions get up to. So, we fixed that. Student union fees are now opt-in.

[68] Nowhere in the record is it explained why student association fees are "non-essential" while athletics (which are much more expensive) are considered "essential". Indeed, aside from the statement made by the Premier in the fundraising letter, no explanation is provided by Ontario as to why Cabinet concluded that, of all the components of ancillary fees charged to college and university students, only one – student association fees – was deemed by Cabinet to be non-essential.

(b) Effect of the SCI

[69] While the record before us was prepared before complete data was available for the current academic year, based on the previous academic year for undergraduate students in the Faculty of Liberal Arts and Professional Studies at York University, the university prepared a breakdown such that 38% of the YFS fee was deemed essential. The remaining 62% is now subject to an opt-out provision pursuant to the University Guidelines. The total ancillary fees collected by York for the fall/winter term from such a student in 2018-2019 was $31.51 per credit. Of these fees, approximately $10.00 related to fees approved by student referenda. Membership fees for YFS and CFS comprised about $2.00 of this $10.00. On the basis of these calculations, the annual cost of student association fees was about $60 for these students.

[70] According to the Applicants, due to uncertainty of opt-out rates each semester, student associations will be unable to effectively plan or budget or predict whether they will have the funds needed to carry on programs or retain staff. For YFS, 62% of its levy was deemed non-essential for the current academic year, meaning that $1.25 million of its $2 million revenue is now optional. First year students have the opportunity to opt out before gaining any exposure to YFS programs. As a result of the SCI, among other things:

(i) YFS will be forced to breach certain of its legal obligations, including its obligation to remit fees to CFS and its obligations to other vendors and suppliers;

(ii) Each semester and year, YFS will have to expend part of its resources to persuade students of the value of opting in to YFS programs, while also attempting to sustain its existing programs under reduced budgets;

(iii) YFS will have to lay off full-time staff, including a lawyer who assisted students with tenant rights and with navigating the Ontario Student Assistance Plan among other things. It will also have to reduce its part-time staff, cut administrative costs and limit events.

(iv) YFS will have to eliminate stipends for its elected executive, which may impact the ability of low-income students to serve on these executives;

(v) YFS will lose access to the benefits and services provided by CFS, including its bulk-purchasing program and its co-ordinated advocacy at the provincial and federal levels.

(vi) Student associations will become unable to continue to provide student association-run services classified as "essential" because of a reduction in their overall capacity.

(vii) The prohibition against "bundling" will impact negatively on student associations' flexibility and autonomy. The impugned directives require student associations to break down their fees into individual purposes, which results in an inflexible year-long budget with no opportunity to revisit it as the year progresses. Moreover, because the Minister has directed colleges and universities to enforce the impugned directives, York has been required to interfere in the affairs of YFS by providing a set fee breakdown, rather than letting YFS determine those breakdowns through its own democratic processes.

[71] CFS estimates that it could lose up to 73% of its revenue. It too will be unable to effectively budget for programs and staff because its opt-out rates will be unknown until well into the fall of each year and could vary from year to year.

[72] The uncertainty caused by the SCI could also have a real impact on student groups and activities funded through levies such as student newspapers and student legal clinics. The legal clinics depend on stable and secure funding to plan, allocate and deliver legal services to vulnerable clients.

[73] Ontario submits that the harm alleged to be caused by the SCI is speculative and unsubstantiated. If students choose to opt-out of a non-essential fee, student associations may have to function with smaller budgets, reprioritize their pursuits and focus on what is most valuable to their membership to retain student membership. Further, they may be able to continue to provide the same level of service in some areas (such as political advocacy) by diverting resources from other services. However, any adjustment in the scope of a student association's activities would be the result of students opting out, not because of the directives at issue. Nothing in the SCI requires students to opt out of any particular service.

Analysis: Justiciability, Legality and Other Arguments

8. Justiciability

[74] Ontario argues that the directives are not justiciable on the basis of two arguments. First, Ontario argues that the impugned directives are based on "core policy decisions" made by Cabinet, and that they are therefore beyond the scope of the court's jurisdiction to review. Second, Ontario argues that the impugned directives were made pursuant to the Crown's prerogative spending power, and that the court has no jurisdiction to interfere with government spending decisions.

[75] We do not accept these arguments. While we accept that the court has no authority to assess the wisdom or effectiveness of the impugned directives, the court nevertheless has a role in ensuring that the Minister has the legal authority to require universities and colleges to comply with the directives.

(a) Core policy decision argument

[76] Ontario submits that in asking this court to quash the impugned directives, the Applicants are effectively asking us to quash the SCI, which was a "core policy decision" made by Cabinet to introduce a policy aimed at improving transparency, affordability and access to post-secondary education. By allowing students to opt-out of student association fees (and other "non-essential fees") the SCI reduces financial barriers to accessing the post-secondary education that the government supports through its grants. Thus, Ontario argues that the SCI is based entirely on economic, social and political considerations. And, Ontario argues, absent bad faith or irrationality, core policy decisions of Cabinet are not justiciable.

[77] In making its argument that the decisions at issue are not justiciable because they are "core policy decisions" Ontario relies on the Supreme Court of Canada's decision in *R. v. Imperial Tobacco Canada Ltd.*, where the court defined "core policy decisions" as "[t]he weighing of social, economic and political considerations to arrive at a course or principle of action" which "is the proper role of government, not the courts."[11] In that case the court confirmed the distinction between "core policy" and "operational decisions", a distinction that Ontario relies on to buttress its submission concerning justiciability.

[78] *Imperial Tobacco* deals with the government's liability in tort. It addressed "[t]he question of what constitutes a policy decision that is generally protected from negligence liability" (para. 72). The decision is a response to a concern raised in the second stage of the *Anns/Cooper* test regarding the impact that potential negligence liability would have in restricting government policy-making and innovation. Its *ratio* is explicitly tied to negligence liability: "I conclude that 'core policy' government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."[12]

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[11] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, paras. 74 and 87.
[12] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para. 90.

[79] In *Abbey v. Ontario (Community and Social Services)*, this court declined to apply the *Imperial Tobacco* test in the context of whether damages may be available for the harm suffered as the result of the enactment or application of the law (the "*Mackin* rule"). In doing so it made the following comment:

> The applicant seeks to import private law negligence considerations into the matter of quasi-constitutional remedial principles that implicate public law considerations. The applicant relies on the analysis of immunity in the tort liability context (specifically the distinction between "core policy" and operational decisions) with no reference to the jurisprudential context.[13]

This comment is equally applicable to the case at bar. While the policy considerations may overlap, they are not the same.

[80] A challenge to the justiciability of a decision involves a review of the subject matter of the decision to determine whether it is appropriate for judicial consideration.

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic government... In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.[14]

[81] In this case the Applicants seek to have us determine the lawfulness of the impugned directives, that is, whether they conflict with the statutory schemes governing the executive's authority when it comes to the regulation of colleges, universities and student associations. This question has a "sufficient legal component to warrant the intervention of the judicial branch." Indeed, it lies at the very core of the court's role in a constitutional democracy characterized by the Rule of Law: executive action may be reviewed judicially for legality, and that is what this application is about.

(b) Prerogative spending power argument

[82] Ontario also submits that the impugned directives involve the government's exercise of a prerogative power. A prerogative power is a power recognized at common law (as opposed to a statute) and exercised by the Crown. The question of the justiciability of a question involving the exercise of a prerogative power was recently addressed by the United Kingdom Supreme Court in *R. (on the application of Miller) (Appellant) v. The Prime Minister (Respondent)* ("*Miller*").[15]

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[13] *Abbey v. Ontario (Community and Social Services)*, 2018 ONSC 1899, para. 51.
[14] *Reference Re Canada Assistance Plan (Canada)*, [1991] 2 SCR 545 (SCC), p.545, citations omitted.
[15] *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent); Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41.

[83] In *Miller* the court was asked to review a decision involving the exercise of the prerogative power to prorogue Parliament. The government argued that the issue was not justiciable because the court cannot decide political questions. In rejecting this argument, the court stated:

> Secondly, although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, arises from a matter of political controversy, has never been sufficient reason for the court to refuse to consider it. As the Divisional Court observed at para. 47 of its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.[16]

[84] The court then addresses the issue of whether the issues raised before them were justiciable. In doing so they identified the issues that arise when it comes to the exercise of a prerogative power. "The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The first of these issues undoubtedly lies within the jurisdiction of the courts and is justiciable... The second of these issues, on the other hand may raise questions of justiciability."[17]

[85] The court then discusses some basic principles of parliamentary democracy, one of which is that the prerogative powers of the Crown are "subject to the overriding powers of the democratically elected legislature as the sovereign body." Judicial review for legality of executive action is not so much about the power and authority of the courts so much as it is about the power and authority of the law: "[t]ime and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from the threats posed to it by the use of prerogative powers."[18]

[86] The justiciability of decisions based on the exercise of prerogative powers has also been confirmed by courts in Canada. For example, in *Black v. Chrétien* the Court of Appeal held that "the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source".[19]

[87] In this case, there is no issue that the prerogative power relied upon by Ontario – the power to spend – does exist. The question is whether the SCI and the directives fall within the limits of the Crown's prerogative spending power. This issue is justiciable.

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[16] *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent); Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41, para. 31.
[17] *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent); Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41, para. 35.
[18] *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent); Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41, para. 41.
[19] *Black v. Chrétien*, [2001] OJ No. 1853 (CA), para. 47.

9. Do the impugned directives fall within the Crown's prerogative spending power ?

[88] There is no doubt that the Crown's prerogative spending power gives the Crown wide latitude to decide whether and how it will spend public funds. How the Crown chooses to allocate scarce resources is a policy decision beyond the Court's reach.[20]

[89] Several cases have recognized that the Crown's prerogative spending power includes the power to impose conditions on the use of funds. For example, in *Pharmaceuticals Manufacturers' Association of Canada*, the British Columbia Court of Appeal held that the government in that province had the power to control the costs of publicly funded drugs by designating certain drugs as "reference drugs" for the purpose of reimbursing the cost of other drugs:

> ...the Crown has the capacities and powers of a natural person and a natural person has the capacity to establish programs for public benefit and to define or restrict the distribution of such benefits.[21]

[90] Ontario argues that the purpose of the SCI and directives is tied to the public funding of universities and colleges because it is consistent with the government objective of making post-secondary education accessible; allowing students to opt out of student association fees potentially lowers the cost of their education. Ontario suggests that this is no different than the Crown making its funding for universities conditional on tuition fee freezes.

[91] One of the obvious flaws in this argument is that, based on the evidence before us, the amounts at issue for each student are very small relative to the overall cost of an education. In addition, the distinction between essential and non-essential fees seems arbitrary if the actual objective behind the SCI and directives is to lower the financial burden on students: athletic fees, which are roughly ten times greater than student association fees, are deemed "essential" but student association fees are not: no principled basis for this distinction was offered in the record before us or in argument.

[92] Therefore, this case could raise a legitimate issue regarding the scope of the Crown's prerogative spending power: can attached conditions be irrelevant or immaterial to the purpose for which the funding is provided? Can conditions go so far as to interfere with the financing and activities of third parties, such as the student associations in this case, that receive no funding from Ontario? However, this issue was not squarely raised by the Applicants or addressed by Ontario, and there appears to be little case law on the scope of the Crown's prerogative spending power. We do note that there are no cases like this one where a court has addressed the issue of whether

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[20] *R. v. Criminal Injuries Compensation Board, ex parte Lain*, [1967] 3 WLR 348; *Pharmaceutical Manufacturers' Association of Canada v. British Columbia* (1997), 38 BCLR (3d) 175 (C.A.); *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 OR (3d) 716 (Div. Ct.); *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651; and *Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064.

[21] *Pharmaceutical Manufacturers' Association of Canada v. British Columbia* (1997), 38 BCLR (3d) 175 (C.A.), para. 27.

the Crown has the authority to use its spending power in a manner that affects the self-funding and activities of a third party.

[93] In any event, for the purposes of this decision, we need not decide the limits, if any, to the scope of conditions the Crown can impose on its allocation of spending, because there are recognized limits on the exercise of Crown prerogatives that are determinative in this case.

[94] The Crown cannot exercise its prerogative powers in a manner contrary to legislation or in circumstances where legislation has displaced the Crown's prerogative power explicitly or by necessary implication. This principle was clearly articulated by Lord Dunedin in *Attorney-General v. De Keyser's Royal Hotel*:

> It is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?"

[95] In *Miller*, the United Kingdom Supreme Court explained that this principle is based on Parliamentary sovereignty:

> Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty. To give only a few examples, in the Case of Proclamations the court protected Parliamentary sovereignty directly, by holding that prerogative powers could not be used to alter the law of the land. Three centuries later, in the case of Attorney General v De Keyser's Royal Hotel Ltd, [1920] AC 508, the court prevented the Government of the day from seeking by indirect means to bypass Parliament, in circumventing a statute through the use of the prerogative. More recently, in the Fire Brigades Union case, the court again prevented the Government from rendering a statute nugatory through recourse to the prerogative, and was not deflected by the fact that the Government had failed to bring the statute into effect. As Lord Browne-Wilkinson observed in that case at p 552, "the constitutional history of this country is the history of the prerogative powers of the Crown being made subject

> to the overriding powers of the democratically elected legislature as the sovereign body".[22]

[96] In Canada, the courts have also recognized that legislation takes precedence over the exercise of Crown prerogatives. As held in *Black*, "[d]espite its broad reach, the Crown prerogative can be limited or displaced by statute... Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by statute...."[23]

[97] The issue is therefore whether the SCI and directives are inconsistent with legislation or whether legislation has "occupied the field" addressed by the SCI and directives. As set out below, in our view, the College BPD and University Guidelines are inconsistent with the legislation governing colleges and universities.[24]

10. Is the College BPD a lawful exercise of the Minister's authority ?

[98] Colleges in Ontario are established by regulation under the *Ontario Colleges of Applied Arts and Technology Act, 2002* ("*OCAAT Act*").[25] Pursuant to s. 4(1) of that *Act*, the Minister is given the power to "issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs." Section 4(1) is the source of the Minister's authority to issue the College BPD.

[99] However, section 7 of the *OCAAT Act* states:

> Nothing in this Act restricts a student governing body of a college elected by the students of the college from carrying out its normal activities and no college shall prevent a student governing body from doing so.

[100] According to Ontario, section 7 only provides that a college must not restrict a student governing body from carrying out its "normal activities". The provision is aimed at preserving the independence of student governments, which may be adverse in interest to the college administration. Ontario argues that nothing in section 7 prevents the Minister from making binding policy directives that apply to institutions and that may impact student associations.

[101] There are two problems with Ontario's position. First, the wording of the section is clear. It states that nothing in the *OCAAT Act* is to restrict a student governing body from carrying out its "normal activities". The word "nothing" on its face encompasses s.4 of the *Act* that gives the

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[22] *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent); Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41, para. 41.
[23] *Black v. Chrétien*, [2001] OJ No. 1853 (CA), para. 27.
[24] We note that the exercise of prerogative powers is also subject to the common law and the Constitution. These points were not argued before us, but we should not be taken to suggest that the exercise of prerogative powers is restricted only by statute.
[25] *Ontario Colleges of Applied Arts and Technology Act, 2002,* S.O. 2002, c.8 Sch F.

Minister the power to make directives. In other words, the wording of the *Act* is such that the Minister's power under s. 4 is restricted by s. 7.

[102] Second, the College BPD requires colleges to enforce the directive. Thus, the Minister is ordering colleges to take steps that will restrict student governing bodies from carrying out their normal activities, something that s. 7 expressly prohibits. It would defeat the clear intent of the legislation if a Minister, using her powers under s. 4, could direct a college to take steps in violation of s. 7.

[103] Ontario denies that the College BPD restricts a student governing body from carrying out its normal activities. This position is belied by the evidence. In a public Q & A document, the Minister specifically stated: "Going forward, student governing bodies may need to adjust their scope and activities based on the demand of their institutions." Further, during the cross-examination of the witness produced by the Minister, Ivonne Mellozzi, the following exchange occurred:

> Q. ...So you'd agree with me that the anticipation is that not all students will choose to pay student association fees?
>
> A. Yes.
>
> Q. And depending on the level of support at a given institution that may well affect the student governing body's ability to engage in the scope of activities they've historically engaged in?
>
> A. Yes.

[104] Ontario has effectively conceded in the evidence that the effect of the College BPD will be to restrict student associations from carrying out their normal activities. Apart from anything else, their normal activities with respect to the collection and disbursement of their fees have been substantially altered.

[105] Ontario's concession in the evidence in this regard is consistent with its previous policy of exempting "existing and future fees established by student governments, including those resulting from referenda sponsored by them" from its longstanding policies on ancillary fees.

[106] Thus, we find that in enacting the College BPD the Minister acted beyond the scope of her legislative authority. This finding is not altered by the fact that the Minister's actions emanated from a Cabinet directive. Cabinet must also act in a manner consistent with the statutory scheme set by the legislature.

11. Are the University Guidelines a lawful exercise of the Minister's authority ?

[107] Unlike with colleges, there are no specific statutory provisions that deal with the Minister's authority regarding universities and university student associations. However, in our view, the

independent governance structure of universities precludes the Minister from implementing the University Guidelines.

[108] All universities in Ontario are constituted by legislation (collectively referred to as the "University Acts"). The University Acts set out the governance structure for each university in Ontario, which, as described above, generally consists of a Board of Governors and a Senate. Together, the Board and the Senate are meant to govern all the internal affairs of the university.

[109] For example, section 4 of the *York University Act* provides that the "objects and purposes of the University are ... the advancement of learning and the dissemination of knowledge ... and ... the intellectual, spiritual, social, moral and physical development of its members and the betterment of society".

[110] The *Act* then delegates very broad powers to the Board of Governors and the Senate to achieve the "objects and purposes" of the University.

[111] With respect to the Board of Governors, the *Act* sets out a long list of specific responsibilities with the following preamble:

> 10. Except, as to such matters by this Act specifically assigned to the Senate the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University....,

[112] With respect to the Senate, section 12 of the *Act* states that the Senate "is responsible for the academic responsibility of the University", and then sets out a list of specific related responsibilities.

[113] Section 13(2) gives the President of the University, who is appointed by the Board in consultation with the Senate, many administrative powers, including the power "to formulate and implement regulations governing the conduct of students and student activities".

[114] Nowhere in the University Acts is any authority given to the Minister in particular, or the executive in general, to participate, to make directives or regulations or to interfere in any way in the governance of universities.

[115] In *McKinney v. University of Guelph*, the Supreme Court of Canada confirmed that the legislation constituting universities in Ontario is designed to foster the autonomy of those institutions:

> 40 It is evident from what has been recounted that the universities' fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government. There are many other entities that receive government funding to accomplish policy objectives governments seek to promote. The fact is that each of the

universities has its own governing body. Only a minority of its members (or in the case of York, none) are appointed by the Lieutenant-Governor in Council, and their duty is not to act at the direction of the government but in the interests of the university (see, for example, s. 2(3) of *The University of Toronto Act*, 1971). The remaining members are officers of the Faculty, the students, the administrative staff and the alumni.

41 The government thus has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources. What Beetz J. said of the *University of Regina in Harelkin v. University of Regina, supra,* in the passage at pp. 594-95, quoted above, applies equally here. I simply reiterate his general conclusion: "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy." In short, I fully share the following conclusion of the Court of Appeal (1987), 63 O.R. (2d) 1, at pp. 24-25:

> The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.[26]

[116] While *McKinney* dealt with the issue of whether the *Charter* applies to universities, the Supreme Court's statements about the autonomy of universities applies to this Court's assessment of the intention of the University Acts. The powers delegated to the governing bodies under the University Acts have the effect of granting universities autonomy over their governance and internal affairs, including the conduct of student activities.

[117] In our view, the University Acts "occupy the field" when it comes to university governance, including student activities. Requiring that universities allow students to opt out of student association fees and other "non-essential" services is inconsistent with the universities' autonomous governance.

[118] The University Guidelines represent a significant incursion into the ability of universities to govern their affairs autonomously. The directive requires universities to allow students to opt out of "non-essential" student services, which include student association fees. This has the effect of intruding into the role universities have given to student associations in the governance of universities. For example, in the case of York University, the University Guidelines are in direct conflict with President's Regulation No. 4. As referred to above, the regulation was implemented by York University as a part of a policy to promote independent student government. The policy

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[26] *McKinney v. University of Guelph*, [1990] 3 SCR 229, paras. 40-41.

includes a requirement that every student is to be represented by government and must pay a fee to the central student government.

[119] Ontario argues that the University Guidelines do not conflict with the universities' autonomous governance. Student associations can continue to exist and provide services. The only change is that students attending a university cannot be required to contribute fees for non-essential services. We do not agree. While the Applicants did not have extensive evidence about the effects of the University Guidelines, there is some evidence, as referred to above, that the opt-outs will have significant detrimental effects on student associations and their ability to provide services to students and to participate in university governance. In addition, and more significantly, this argument ignores the governance choice made by the university. The issue is not whether the University Guidelines will have the effect of interfering with student government, but rather whether the imposition of the opt-out, including the classification of some programs as essential and other as non-essential, is itself a form of interference with university autonomy. Given the legislative scheme, in our view the University Guidelines are inconsistent with the intention to give universities autonomy over their governance.

[120] Finally, we note the context provided by the history of governance of universities and colleges. Universities enjoy far more independence from government than do colleges. It would be a strange result indeed to find that the impugned directives are contrary to law for colleges, as they clearly are, but that they are lawful for universities.

[121] For all of these reasons, we find that the University Guidelines are beyond the scope of the Crown's prerogative power over spending because they are contrary to the statutory autonomy conferred on universities by statute.

12. The "Liberty Argument"

[122] The intervenor B'Nai Brith supported Ontario's position, but advanced a different basis for argument. It submitted that the impugned directives enhance autonomy and choice for individual students who may not agree with or wish to support their student associations. There are several problems with this argument:

a. First and foremost, the argument focuses on the wisdom of the impugned directives rather than their legality. In this application, the court is concerned with the legality of the impugned directives, not whether there is a principled basis for supposing their desirability.

b. Second, there was no record to support these arguments. B'Nai Brith included evidence in its factum that was not in the record before this court, something which no party or intervenor is permitted to do. Further, as an intervenor, on the basis on which intervention was granted in this case, B'Nai Brith was required to take the record as it found it. If B'Nai Brith wished to expand the record to make arguments not available on the record presented by the parties, then it was required to seek permission to do so when it sought leave to intervene in the case.

c. Third, there are countervailing arguments to the "liberty argument" which were not addressed by the parties because the case had not been framed on this basis. The "liberty argument" arguably collides with the right to take collective action (which may be included in the freedom of association). The parties did not present a record or argument on these issues, because this was not the way in which the application was framed. During oral argument, for the purpose of illustrating that there are countervailing arguments, the point was made that individual liberty would be enhanced by permitting union members to opt out of union dues, or permitting individuals to opt out of their taxes if they do not agree with the government (whether local, provincial or federal), but that this additional "liberty" could come at the cost of effective representation, taxation and governance.

d. Finally, when seen as a conflict over fundamental governance issues and the right to take collective action, the absence of legislative authority for the impugned directives becomes even starker, and raises the prospect of a serious *Charter* challenge to the impugned directives. These issues need not arise in this case since there is no lawful authority for the directives. If the directives had been authorized by legislation, then these *Charter* issues could come to the fore.

[123] On the case, as presented by the parties, the "liberty argument" does not arise for this court. A Cabinet decree will not be lawful if it is inconsistent with the law, whatever merit or lack of merit there may be to the policy choice underlying the decree.

13. Other Arguments

[124] In view of our conclusion that the impugned directives are contrary to law, there is no need for us to address the Applicants' arguments about improper purpose, bad faith and procedural fairness.

Admissibility of Evidence

[125] Ontario objected to two aspects of the evidence filed by the Applicants:

a. the quotation from an email sent by Premier Ford in a fundraising letter; and

b. the expert opinion evidence of Dr Glen Jones.

14. Admissibility of the Premier's Statement

[126] Ontario strongly objected to the admissibility of the Premier's fundraising letter (quoted above). The letter emanated from the head of the Executive, which was the source of the impugned directives. No other evidence was placed before this court as to why Cabinet decided that student association fees, alone among all ancillary fees, are "non-essential".

[127] This context may be readily distinguishable from the kinds of statements that were in issue in the leading authority on this point.[27] However, the Premier's statement is not relevant to the question we have decided: that the impugned directives are contrary to law. Since we do not decide the issues of improper purpose or bad faith, the Premier's statement is not material to our decision, and we need not rule on its admissibility.

15. Admissibility of Expert Opinion of Dr Glen Jones

[128] Dr Jones is a professor at the Ontario Institute for Studies in Education, where he is currently the Dean. He is a leading expert in the governance of post-secondary institutions in Canada. Dr Jones is a qualified expert, and his area of expertise – university governance and higher education policy in Canada – are recognized areas of academic study in Canada, as is established clearly in Dr Jones' evidence and curriculum vitae.

[129] Ontario argues that Dr Jones' opinion ought not be received into evidence because it does not satisfy the "necessity test" in *R.* v. *Mohan*.[28] Ontario does not argue that Dr Jones is not an appropriately qualified expert, or that his evidence is not relevant. Rather, it argues that the evidence provided by Dr Jones "simply repeats the evidence of... lay affiants", "offers legal opinions and interpretations" or "addresses issues such as the historical autonomy of institutions that are not germane to this application." In the alternative Ontario argues that Dr Jones' evidence should not be afforded any weight "beyond what the Court may give to the evidence of the 'lay affiants'".

[130] There are aspects of Dr Jones' evidence that offer legal opinions. Obviously the court will not admit into evidence expert evidence on domestic law: that is the task of the court, not of expert witnesses. However, Dr Jones is entitled to describe his understanding of the law in order to place his evidence within the context of that understanding.

[131] The "necessity" test in *Mohan* and *Abbey* requires that expert evidence be on matters beyond the knowledge of the trier of fact, and be in respect to matters necessary to decide the case. The sections of these reasons describing the history of university governance in Canada, including the history and role of student associations, are not topics of which the court may take judicial notice, and that history may not be discerned simply by reading the University Acts. This is relevant contextual information which the court may consider, and Dr Jones' evidence is necessary to provide that context. We admit the evidence of Dr Jones as expert evidence.

Conclusion and Order

[132] The application is granted. As requested in para. 1(a) of the notice of application, an order in the nature of *certiorari* shall issue quashing the impugned directives.

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[27] *Reference re Upper Churchill Water Rights Reservation Act*, [1984] 1 SCR 297.
[28] *R.* v. *Mohan*, [1994] 2 SCR 9. See also *R.* v. *Abbey*, 2009 ONCA 624, 93 OR (3d) 330.

[133] The applicants also seek declaratory relief. There is no need for a declaration in this case: the remedy of *certiorari* encompasses the legal findings made by this court.

[134] The parties agreed upon costs: there shall be no costs for or against the intervenors, and Ontario shall pay the Applicants' costs in the amount of $15,000 inclusive.

Sachs J.

D.L. Corbett J.

Favreau J.

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COURT FILE NO.: DC 279/19
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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, D.L. Corbett and Favreau JJ.

BETWEEN:

THE CANADIAN FEDERATION OF STUDENTS and THE YORK FEDERATION OF STUDENTS

Applicants

- and –

ONTARIO (MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Respondent

- and –

UNIVERSITY OF TORONTO GRADUATE STUDENTS UNION and B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS

Intervenors

REASONS FOR DECISION

Sachs J.
D.L. Corbett J.
Favreau J.

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