

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO (MINISTER OF COLLEGES AND UNIVERSITIES)

Appellant

and

THE CANADIAN FEDERATION OF STUDENTS and
THE YORK FEDERATION OF STUDENTS

Respondents

**MOTION RECORD OF THE PROPOSED INTERVENERS,
CANADIAN JOURNALISTS FOR FREE EXPRESSION, CENTRE FOR FREE
EXPRESSION, CANADIAN ASSOCIATION OF JOURNALISTS, PEN CANADA,
WORLD PRESS FREEDOM CANADA AND CANADIAN ASSOCIATION OF
UNIVERSITY TEACHERS
(MOTION FOR LEAVE TO INTERVENE)**

December 7, 2020

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TAB 1

Court File No. C68262

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO (MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Appellant
(Respondent)

- and -

THE CANADIAN FEDERATION OF STUDENTS and THE YORK
FEDERATION OF STUDENTSApplicants
(Respondents)**NOTICE OF MOTION OF THE PROPOSED INTERVENERS,
CANADIAN JOURNALISTS FOR FREE EXPRESSION, THE CENTRE FOR FREE
EXPRESSIONS, THE CANADIAN ASSOCIATION OF JOURNALISTS, PEN CANADA,
WORLD PRESS FREEDOM CANADA AND THE CANADIAN ASSOCIATION OF
UNIVERSITY TEACHERS****Pursuant to Rules 13.03(2), 37.01 and 61.16 of the *Rules of Civil Procedure***

The Proposed Interveners, Canadian Journalists for Free Expression, the Centre for Free Expression, the Canadian Association of Journalists, Pen Canada, World Press Freedom Canada, and the Canadian Association of University Teachers (the “**Coalition**”), will make a Motion to this Honourable Court on a date and time to be set by the Court at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.**THE MOTION IS FOR**

- (a) An order granting the Coalition leave to intervene in the appeal bearing Court File No. C68262, including the right to make written submissions not to exceed 15 pages

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and oral submissions at the hearing of this Appeal of such length as this Honourable Court may deem appropriate;

- (b) An order that the Coalition will not seek, nor will it be subject to, any award of costs, including the costs of the motion for leave to intervene; and
- (c) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE

Nature of the Appeal

- (a) This appeal raises issues of broad public importance that transcend the interests of the immediate parties, including the values that underlie s. 2(b) of the *Canadian Charter of Rights and Freedoms* and their role in interpreting ambiguous legislation that affects the freedom of expression of campus student groups across the Province of Ontario;
- (b) Given the questions raised on this appeal that affect students' freedom of expression, this proceeding would benefit from the expertise and perspective of the Coalition interveners. Each member of the intervening Coalition is well suited to assist the Court on this appeal;

The Coalition Members are Uniquely Qualified to Provide Assistance to this Honourable Court

- (c) The Canadian Journalists for Free Expression (the "CJFE") is a non-profit organization that defends the rights of journalists and contributes to the development of media freedom, both in Canada and throughout the world. CJFE

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recognizes these rights are not confined to journalists, and it strongly supports and defends the broader objectives of free expression in Canada and abroad;

- (d) The Centre for Free Expressions (the “**CFE**”) educates, researches, advocates, collaborates and provides information to uphold free expression in Canada. The CFE has significant experience in court interventions on freedom of expression issues;
- (e) The Canadian Association of Journalists (the “**CAJ**”) is Canada’s largest national professional organization for journalists from all media, representing over 700 members across the country, whose primary roles are to provide high-quality professional development for its members and public-interest advocacy. The CAJ has extensive experience in court interventions on freedom of expression issues;
- (f) PEN Canada is the Canadian member of PEN International, which is an organization of writers and readers that works with others to defend freedom of expression as a basic human right, at home and abroad. PEN Canada has significant experience in court interventions on freedom of expression issues;
- (g) World Press Freedom Canada (“**WPFC**”) is an Ottawa-based volunteer group comprised of journalists, former journalists and other supporters. It advocates on issues of press freedom in Canada and abroad. WPFC has provided briefs to parliamentary committees on access to information law and other media freedom issues, and regularly holds information sessions for journalists, policymakers and media consumers;

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- (h) The Canadian Association of University Teachers (the “CAUT”) is the national federation of post-secondary academic staff associations and unions. CAUT represents over 70,000 teaching staff, librarians, researchers, and academic professionals across Canada. Since its inception in 1951, CAUT has advocated for high quality accessible post-secondary education that permits academic staff and students to serve the public interest by promoting, through free expression, the preservation, dissemination and advancement of knowledge;

The Coalition’s Interest and Expertise in this Appeal

- (i) The Coalition has a direct and significant interest in the issues raised in this appeal;
- (j) The issues raised in this appeal, especially regarding the role s. 2(b) of the *Charter* as a legislative aid to interpret the legislation in issue between the parties, falls directly within the various mandates of each of the Coalition members;

The Coalition’s Proposed Submissions

- (k) The Coalition is uniquely situated to provide this Honourable Court with a distinct perspective and submissions that will be useful and different from those of the other parties;
- (l) If granted leave to intervene, the Coalition’s submissions will argue that s. 2(b) of the *Charter*, and the *Charter* values that are recognized as underlying and informing that provision, provide an obvious and appropriate interpretive lens through which to assess the issues of statutory interpretation and legal jurisdiction that have been raised by the parties before the Divisional Court, and that are at issue in this appeal;

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- (m) More specifically, the Coalition will argue that the Student Choice Initiative policy changes that are in issue must be informed and guided by s. 2(b) of the *Charter* and the values which underlie it;
- (n) The issues that the Coalition proposes to address have been, or will be, put into play by the parties;
- (o) The Coalition brings an important perspective distinct from the immediate parties;
- (p) If the Coalition is denied leave to intervene, these submissions will not otherwise be made;

The Coalition's Involvement will not cause any Prejudice to the Parties

- (q) Granting leave to intervene to the Coalition will not prejudice any of the parties or otherwise prejudice their interests;
- (r) If granted leave to intervene, the Coalition:
 - (i) will take the record as it finds it and will not seek to supplement the record;
 - (ii) will abide by any schedule set by this Honourable Court;
 - (iii) will not seek costs associated with its intervention, and asks that no costs be awarded against it;
 - (iv) will not unduly expand the issues;
 - (v) will not unreasonably delay or lengthen the hearing of this appeal; and

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- (vi) will work with the parties and any other interveners in order to avoid duplicative submissions and ensure an efficient presentation of each intervener's position to the court;
- (s) Rules 1.04, 13.01, 13.02, and 37.10 of the *Rules of Civil Procedure*, RRO 1990, O Reg 194; and
- (t) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Affidavit of Peter Jacobsen, affirmed November 30, 2020; and
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

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November 30, 2020

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The Centre for Free Expressions
The Canadian Association of Journalists
PEN Canada
World Press Freedom Canada
The Canadian Association of University
Teachers

**THE CANADIAN FEDERATION OF
STUDENTS et al**
Respondents

**and ONTARIO (MINISTER OF TRAINING, COLLEGES
AND UNIVERSITIES)**
Appellant

Court of Appeal File No. C68262

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**NOTICE OF MOTION OF THE PROPOSED
INTERVENERS**

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The Centre for Free Expressions
The Canadian Association of Journalists
PEN Canada
World Press Freedom Canada
The Canadian Association of University Teachers

TAB 2

Court File No. C68262

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO (MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)

Appellant
(Respondent)

- and -

THE CANADIAN FEDERATION OF STUDENTS and THE YORK
FEDERATION OF STUDENTSApplicants
(Respondents)**AFFIDAVIT OF PETER JACOBSEN**(Affirmed on November 30, 2020 in support of motion for leave to intervene pursuant
to Rule 13.02 of the *Rules of Civil Procedure*)

I, **PETER JACOBSEN**, of the City of Toronto in the Province of Ontario, do solemnly swear as follows.:

1. I am a member of the Board of Directors of Canadian Journalists for Free Expression ("CJFE"), which is one of the organizations seeking leave to intervene in this matter. As such, I have personal knowledge of the matters to which I depose in this Affidavit, or I have received the information from others, which I verily believe to be true.
2. I am a partner at WeirFoulds LLP, a law firm with its head office in Toronto, and was called to the bar of Ontario in 1978. My practice includes a focus in the area of media and defamation law.

3. I swear this affidavit on behalf of CJFE, and on behalf of the following organizations who wish to join with CJFE, in bringing this motion to intervene in this Appeal as a Coalition:

- (a) The Centre for Free Expressions (“CFE”);
- (b) The Canadian Association of Journalists (“CAJ”);
- (c) PEN Canada;
- (d) World Press Freedom Canada, formerly named The Canadian Committee for World Press Freedom (“WPFC”); and
- (e) The Canadian Association of University Teachers / L’Association canadienne des professeures et professeurs d’Université (“CAUT/ACPPU”).

4. This group of organizations has come together for the purpose of seeking leave to intervene in this Appeal, because they share common interests in and perspective on its subject matter, and because they wish to advance a common position to assist this Honourable Court.

5. In a nutshell, the Coalition will ask this Court to use the fundamental freedom of expression on s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and the values which underlie that *Charter* provision, as an interpretive aid in resolving the issues – and particularly the issues of statutory interpretation and the proper scope of the Crown prerogative and spending power – which were raised by the parties before the Divisional Court and which are before this Court on the Appeal.

The Coalition Members

6. The proposed Coalition includes organizations whose mandates give them direct interests in the subject matter of this Appeal. Each Coalition member has intervened in significant cases in this Court and in Supreme Court of Canada in the past decade, particularly involving free expression but also other issues related to this Appeal. The Coalition members' expertise and experience uniquely qualifies them to assist the Court in this appeal, as follows.

CJFE

7. CJFE is a non-profit, Canadian non-governmental organization, founded in 1981. The core purpose of CJFE as an organization is to defend the rights of journalists and to contribute to the development of media freedom, both in Canada throughout the world. CJFE recognizes these rights are not confined to journalists, and it strongly supports and defends the broader objectives of free expression in Canada and abroad.

8. CJFE is governed by a Board of Directors comprised of leaders in the field of media law, journalism and business. CJFE's "mission statement", as adopted by the Board of Directors on August 20, 2008, states:

We boldly champion the free expression rights of journalists and media workers around the world. In Canada, we monitor, defend and promote free expression and access to information. We encourage and support individuals and groups to be vigilant in the protection of their own and others' free expression rights. We are active participants and builders of the global free expression community.

9. CJFE is supported by Canadian journalists, lawyers, media personalities, and others who share CJFE's mission and objectives in advocating for free expression in Canada and around the world. It has approximately 100 voting members, and numerous other individual and

organizational supporters who participate regularly, on a volunteer basis or as financial supporters of CJFE's work.

10. CJFE has significant experience in court interventions on freedom of expression issues, as can be seen from the list of recent interventions by Coalition members in this Court and in the Supreme Court of Canada that is now shown to me and attached as **Exhibit "A"** to this Affidavit. CJFE has also intervened in other cases before tribunals and at the trial court level that relate to its mandate.

11. Outside the courtroom, CJFE closely follows legislative and policy reforms before Parliament, the Ontario legislature, and other bodies across Canada that involve media law, freedom of expression and journalists' rights, and often participates in discussions with an aim to shaping such laws, government policies and administrative practices. For example, CJFE testified before the Standing Senate Committee on Legal and Constitutional Affairs regarding the federal *Journalistic Sources Protection Act* prior to its enactment in 2017, and also lobbied the Ontario government for anti-SLAPP legislation and was an important voice leading up to the passing of what is now s. 137.1 of the *Courts of Justice Act* (Ontario). CJFE has also provided testimony and submissions on issues such as improving our access to information system, increasing government openness, maintaining net neutrality, curtailing overbroad digital surveillance, and implementing meaningful whistleblower protections. CJFE is a founding member of the International Freedom of Expression Exchange (IFEX) Network, created in 1992 to monitor, promote and defend freedom of expression worldwide, and actively participates in IFEX's activities. CJFE has also submitted briefs to various Global Affairs Canada consultations and to other bodies involved in media freedom internationally.

12. CJFE's significant interests in protecting free expression and the ability of journalists to gather and report news on matters of public interest, as a means to hold public institutions to account, are directly engaged by the issues raised by this Appeal.

CFE

13. I am advised by James Turk, the Executive Director of CFE, and I believe that CFE is a non-partisan research, public education and advocacy centre based in the Faculty of Communication and Design at Ryerson University. The objects of CFE include serving as a hub for public education, research and advocacy on free expression and the public's right to seek, receive and share information. It works collaboratively with other academic and national and provincial organizations to promote better understanding of the importance of freedom of expression in democratic society and to advance expressive freedom rights in Canada and internationally.

14. The CFE is guided by an Advisory Board made up of fourteen prominent Canadians: **Faisal Bhabha**, Associate Professor, Osgoode Hall Law School, and Legal Advisor to the National Council of Canadian Muslims; **Jamie Cameron**, Professor of Constitutional Law, Osgoode Hall Law School; **Andrew Clement**, Professor Emeritus & Co-Founder, Identity Privacy and Security Institute, Faculty of Information, University of Toronto; **Brendan De Caires**, Executive Director, PEN Canada; **Latoya Farrell**, Staff Counsel-Policy, **David Hughes**, Executive Producer, CTV National News; **Peter Jacobsen**, Founding Partner, Bersenas Jacobsen Chouest Thomson Blackburn LLP; **Meghan McDermott**, Senior Staff Counsel, British Columbia Civil Liberties Association; **Shelagh Paterson**, Executive Director, Ontario Library Association; **Brian Rogers**, Former President, Ad IDEM / Canadian Media Lawyers Association; **Toni Samek**, Chair at the

School of Library and Information Studies, University of Alberta; **Robin Sokoloski**, Director of Organizational Development, Mass Culture / Mobilisation Culturelle; **Laura Tribe**, Executive Director, OpenMedia; **David Walmsley**, Editor-in-Chief, *The Globe and Mail*; and **Cara Zwibel**, Director, Fundamental Freedoms Program, Canadian Civil Liberties Association.

15. CFE has significant experience in court interventions on freedom of expression issues, as can be seen from the list of recent interventions by Coalition members in this Court and in the Supreme Court of Canada that is attached as **Exhibit "A"** to this Affidavit. CFE has also intervened in other cases before tribunals and at the trial court level that relate to its mandate.

16. CFE is committed to helping ensure all members of civil society are able to engage in robust debate and expression on matters of public interest, substantial interest in freedom of expression and the promotion of public discourse. It does this through engagement with legislative and policy initiatives federally, provincially, and municipally and through undertaking research and public education relating to expressive freedom and the public's right to know and be engaged, including matters related to access-to-information, anti-SLAPP legislation, whistleblower protection, press freedom, protection of research confidentiality, academic and intellectual freedom, censorship, surveillance, privacy, speech-restrictive laws, disinformation, regulation of social media, and promotion of *Charter* values.

CAJ

17. I am advised by Brent Jolly, the President of CAJ, and I believe that CAJ is Canada's largest national professional organization for journalists from all media, representing over 700 members across the country, whose primary roles are to provide high-quality professional development for its members and public-interest advocacy.

18. CAJ has significant experience in court interventions on freedom of expression issues, as can be seen from the list of recent interventions by Coalition members in this Court and in the Supreme Court of Canada that is attached as **Exhibit "A"** to this Affidavit. CAJ has also intervened in other cases before tribunals and at the trial court level that relate to its mandate.

PEN Canada

19. I am advised by Richard Stursberg, the President of PEN Canada, and I believe that PEN Canada is the Canadian member of PEN International, which is an organization of writers, and readers, that works with others to defend freedom of expression as a basic human right, at home and abroad.

20. PEN Canada has significant experience in court interventions on freedom of expression issues, as can be seen from the list of recent interventions by Coalition members in the Supreme Court of Canada that is attached as **Exhibit "A"** to this Affidavit. PEN Canada has also intervened in other cases before tribunals and at the trial court level that relate to its mandate. Most recently, PEN Canada intervened in the successful action brought by the Canadian Civil Liberties Association against the Attorney General of Ontario, (the so-called “gas stickers” case: *CCLA v. Attorney General of Ontario*, 2020 ONSC 4838). PEN Canada also intervened in an application brought by the Canadian Constitution Foundation against the Attorney General of Canada (pending before the Superior Court of Justice of Ontario, Court File No. CV-19-00627380-00) claiming that section 91 of the *Canada Elections Act* was a violation of the right to freedom of expression under s. 2(b).

WPFC

21. I am advised by Shawn McCarthy, the President of WPFC, and I believe that WPFC is an Ottawa-based volunteer group that comprises journalists, former journalists and other supporters. It advocates on issues of press freedom in Canada and abroad. It has been active for 23 years, and it operates with the patronage of the Canadian Commission for UNESCO.

22. WPFC pursues its advocacy role on various fronts.

23. WPFC has provided briefs to parliamentary committees on access to information law and other media freedom issues. It has held information sessions for journalists, policymakers and media consumers, including recent sessions on media relations with the police and what journalists should do when confronted by police demands; on the misinformation/disinformation campaigns that were expected in the runup to the 2019 election; and on the particular threats faced by women journalists.

24. Each year, WPFC hosts the World Press Freedom luncheon in Ottawa, which attracts parliamentarians, diplomats, business people and journalists to mark the United Nations' World Press Freedom Day. The programme includes a keynote speaker, a press freedom award given to a Canadian journalist, and an international editorial cartoon contest that draws entries from across the globe.

25. This fall, WPFC hosted a webinar on the growing threats to media freedom around the world, featuring keynote speaker Maria Ressa, the publisher of The Rappler in The Philippines. Ms. Ressa has been an outspoken critic of the Duherte government, and currently faces an appeal

from convictions which media-defence groups believe were contrived by the President, with the aim of silencing her criticism.

CAUT/ACPPU

26. I am advised by David Robinson, Executive Director of CAUT/ACPPU, that CAUT/ACPPU is the national federation of post-secondary academic staff associations and unions. CAUT/ACPPU represents over 72,000 teaching staff, librarians, researchers, and academic professionals across Canada. Mr. Robinson informs me, and I do believe, that CAUT/ACPPU is the only national organization that represents the interests of post-secondary professionals as teachers, employees, and academics.

27. CAUT/ACPPU's By-law No. 1 sets out that the purposes and functions of the organization are to "...promote the interests of Academic staff, including, but not limited to, professors, professional librarians and researchers, to advance the standards of their professions, and to seek to improve the quality of post-secondary education in Canada." CAUT/ACPPU pursues a number of activities to fulfil this mandate. CAUT/ACPPU investigates allegations of breaches of professional rights, issues reports, lobbies government and university and college administrations, and publishes articles and books on issues of relevance to the profession and the sector. More specifically, CAUT/ACPPU has intervened in the court cases listed in **Exhibit "A"**. Since its inception in 1951, CAUT/ACPPU has advocated for high quality and accessible post-secondary education that permits academic staff and students to serve the public interest by promoting, through free expression, the preservation, dissemination and advancement of knowledge.

The Coalition's Perspective and Proposed Position

28. If leave is granted to the Coalition to intervene, the Coalition will present submissions and an approach on the interpretation and application of the legislation in issue between the parties.

29. The Coalition's arguments will advance the position that the freedom of expression and the values on which it is based in our law underlie or affect almost every aspect of the mandates, institutional structure, legal frameworks and day-to-day life and activities of universities and colleges in Canada, and specifically in Ontario. As such, the Coalition will argue that s. 2(b) of the *Charter*, and the *Charter* values that are recognized as underlying and informing that provision, provide an obvious and appropriate interpretive lens through which to assess the issues of statutory interpretation and legal jurisdiction that have been raised by parties before the Divisional Court, and that are at issue in this Appeal.

30. The Coalition recognizes that it must take the record of evidence filed before the Divisional Court as it stands, and it will not seek to file additional evidence. The Coalition also recognizes that it may not add new legal issues to those that were argued before the Divisional Court and a raised again by the parties on this Appeal. As such, the Coalition will not argue that the rights and freedoms protected by s. 2(b) have been directly infringed: while the Coalition members all believe that issue may arise in future, if the Ontario government's "Student Choice Initiative" were ultimately to be implemented in some form, we recognize that that issue was not before the Divisional Court, and is not addressed in that Court's decision under appeal, such that it cannot be raised in this Appeal.

31. Rather, the Coalition's position will be limited to the use of s. 2(b) as an interpretive aid, based upon the well-settled case law that distinguishes such arguments from a direct assertion that

constitutional rights have been infringed. Moreover, our submissions on the use of s. 2(b) as an interpretive aid will be focussed specifically on the statutory provisions and sources of jurisdiction relied upon by the parties before the Divisional Court, and again raised by one or more parties in this Appeal, which include the statutes enacted in respect of the governance of universities and colleges referred to in (among others) paragraphs 97, 103-104, 106 and 107 of the Divisional Court's decision, applicable funding conditions such as those found in the Tuition Fee Framework and Ancillary Fee Guidelines for universities and in the Tuition and Ancillary Fees Minister's Binding Policy Directive for colleges, the Crown's spending power or powers, the Crown prerogative, and of course the Student Choice Initiative policy changes that are in issue. The Coalition will argue that this Court's interpretation of these statutes and policies, and its determinations as to the proper scope and limitations on these sources of Ministerial power, should all be informed and guided by s. 2(b) of the *Charter* and the values which underlie it.

32. The Coalition's arguments will therefore focus on the broad policy implications of the Divisional Court's decision, and on the arguments advanced by the Appellant against that decision in this Court. Those arguments will support the position that, when viewed through the lens of the free expression values and purposes that underlie Ontario's legislative scheme for the governance of universities and colleges, the Divisional Court decision is correct in its conclusions respecting the interpretation of the legislation and the scope of prerogative jurisdiction and powers in issue, and that the contrary arguments made by the Appellant herein should be dismissed

Conditions of Intervention

33. As noted, the Coalition will accept the record as it stands, and will not seek to add to the evidence on this Appeal.

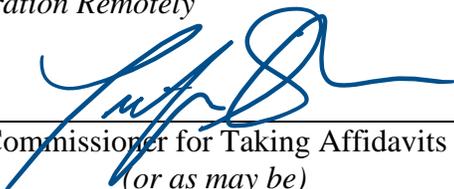
34. The Coalition will also not add to the legal issues that have to be determined in this Appeal, although it will make distinct legal arguments with respect to those issues as set out above.

35. The Coalition seeks leave to file a factum not more than 15 pages in length, and to have the opportunity to present oral argument at the hearing of this Appeal. A Draft of that Factum will be filed by the Coalition in connection with the hearing of this motion for leave to intervene.

36. The Coalition will not ask for costs in connection with its intervention in this Appeal, and asks that it not be subject to any order to pay the costs of the parties related to this Appeal.

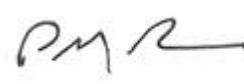
37. The Coalition will abide by all orders the Court may make as regards the schedule and procedures for perfecting and hearing the appeal.

AFFIRMED BEFORE ME *via*
videoconference, Mr. Jacobsen being in
 Huntsville, Ontario, before me at Toronto,
 Ontario on November 30, 2020 in accordance
 with O. Reg. 431/20, *Administering Oath or*
Declaration Remotely



 Commissioner for Taking Affidavits
 (or as may be)

Jennifer P. Saville



Peter Jacobsen

This is Exhibit "A" referred to in the Affidavit of Peter Jacobsen affirmed on November 30, 2020.

A handwritten signature in blue ink, appearing to be 'J. Saville', written over a horizontal line.

Commissioner for Taking Affidavits (or as may be)

J. SAVILLE

Exhibit “A”

Recent Court Interventions by members of the Coalition

CJFE

WIC Radio Ltd. v Simpson, [2008] 2 SCR 420
Quan v Cusson, [2009] 3 SCR 712 and *Grant v Torstar Corp.*, [2009] 3 SCR 640
Canadian Broadcasting Corp. v. Canada (Attorney General), [2011] 1 SCR 19
R v National Post, [2010] 1 SCR 477
Crookes v. Newton, [2011] 3 SCR 269
Saskatchewan (Human Rights Commission) v Whatcott, [2013] 1 SCR 467
Vice Media Canada Inc., et al. v. Her Majesty the Queen in Right of Canada, 2018 SCC 53
Marie-Maude Denis v. Marc-Yvan Cote, 2019 SCC 44
Bent v. Platnick, 2020 SCC 23

CAJ

R. v. Vice Media Canada Inc., 2018 SCC 53
Marie-Maude Denis v. Marc-Yvan Cote, 2019 SCC 44
1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22
Attorney General for Ontario v. Information and Privacy Commissioner, 2020 ONSC 5085

CFE

R. v. Vice Media Canada Inc., 2017 ONCA 231
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**THE CANADIAN FEDERATION OF
STUDENTS et al**
Respondents

**and ONTARIO (MINISTER OF TRAINING, COLLEGES
AND UNIVERSITIES**
Appellant

Court of Appeal File No. C68262

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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PART I - OVERVIEW

1. The *Charter*'s guarantee of freedom of expression in s. 2(b) is a fundamental right that operates within, and is essential to, our democracy.

2. Free expression interests and values underlie all aspects of university and college life in Ontario, and must underlie all aspects of the current legislative scheme respecting colleges and universities. Education, both as an activity and as a social service, is inherently expressive in nature. Education is also inextricably linked to the goals of truth-seeking and self-realization that underlie s. 2(b), as well as the values of cultural diversity and political debate and accountability that s. 2(b) serves.

3. The statutory and jurisprudential governance of Ontario's current statutory scheme governing universities and colleges reflects these goals and values in various important ways.

These include:

- (a) the institutional independence of each university and college;
- (b) the academic freedom of academic staff; and
- (c) a system of student self-government that includes
 - (i) participation in the academic and governance processes of each institution;
 - (ii) the ability of students to hold faculty and administration to account; and
 - (iii) the provision, by students and for students, of specific services that support these goals and values, including campus news and radio.

4. The direction issued by Cabinet to the Minister of Education dated December 12, 2018 (the "Directive") that is in issue in this appeal directly impacts these foundational values, and their

operational implementation through Ontario's legislative scheme governing colleges and universities. In particular, the provisions of the Directive that would "[r]equire institutions to allow students to opt-out of ancillary fees related to student associations, products and special services", ironically referred to by the Ontario government as its Student "Choice" Initiative (the "SCI"), directly targets the ability of students to participate in, and benefit from, democratic and expressive activities on campus.¹

5. The issues on appeal therefore implicate principles, conventions and rights that go well beyond the parties.

6. A full appreciation of the meaning of freedom of expression is indispensable to the resolution of this case, and in particular

- (a) whether the SCI conflicts with the legislative scheme in which it is proposed to operate; and
- (b) whether the Crown prerogatives relied upon by the government provide the necessary legal authority for its issuance.

7. The Coalition therefore intervenes in this appeal to assist this Court in determining whether the SCI is consistent with the statutory schemes regulating higher education in Ontario. The Coalition supports an interpretation of the relevant statutory provisions that reflects the values and purposes of free expression by students in colleges and universities across Ontario.

8. Specifically, the Coalition urges this Court to use the fundamental freedom of expression grounded in s. 2(b) of the *Charter*, and the values which underlie that *Charter* protection, as an interpretive aid in resolving the issues raised by the parties before the Divisional Court that are

¹ Decision of the Divisional Court, *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 (CanLII) (the "Decision") at paras. 56-57.

before this Court on the appeal. The Coalition submits that this Court ought to consider these *Charter* values when determining whether the Directive “restricts” the “normal activities” of a student government body, both within s. 7 of the *Ontario Colleges of Applied Arts and Technology Act, 2002* (the “*OCAATA Act*”) and within the equivalent provisions applicable to universities, and when determining the proper scope of the Crown prerogative and spending powers.

9. In doing so, the Coalition will not argue that the rights and freedoms protected by s. 2(b) of the *Charter* have been directly infringed. While all Coalition members believe that issue may need to be addressed in future, if the SCI is ultimately implemented in some form, they recognize that that issue was not before the Divisional Court. It is not addressed in the Divisional Court’s decision under appeal, and the Coalition accepts that it cannot be raised in this appeal.

PART II - SUMMARY OF FACTS

10. For the purpose of these submissions, the Coalition will refer to those facts set out in the findings of the Divisional Court, or otherwise in the record before this Court, that relate to the free expression values relevant to this intervention. The Coalition does not seek to rely on any additional facts. If granted leave to intervene, the Coalition may set out in more detail the findings of fact upon which it bases its submissions.

PART III - ISSUES AND THE LAW

11. The Coalition’s submissions are intended to assist this Court in answering the following question on appeal: Did the Divisional Court err by holding the Minister’s decisions were inconsistent with statutory authority, namely the *OCAAT Act* and the *University Acts*?

12. As set out below, the Coalition argues that this Court’s interpretation of these statutes, and its determinations as to the proper scope and limitations on these sources of Ministerial power, should all be informed and guided by s. 2(b) of the *Charter* and the values which underlie it.

A. THE CHARTER APPLIES TO STATUTORY INTERPRETATION WHERE THERE IS A GENUINE AMBIGUITY

(i) The use of Charter values has been recognized by this Court

13. The concept of “*Charter* values” informing the interpretation or enforcement of specific *Charter* rights can be traced to the 1986 decision in *RWDSU v Dolphin Delivery Ltd.* In that case, the Supreme Court held that common law principles ought to be consistent with the “fundamental values enshrined in the Constitution”.² Similarly, in *R v Oakes* the Court held that “the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter*”.³

14. More recently, this Court has held that *Charter* values are “a catalogue of some of the human goods that judges can use in legal reasoning, all of which were known to the common law prior to the enactment of the *Charter*, though of course imperfectly realized.”⁴

15. *Charter* values in this sense have been applied in five main adjudicative contexts: (1) in common law reasoning, (2) in statutory interpretation, (3) in the exercise of discretion by judges and administrative decision-makers, (4) in the analysis of *Charter* limitations in administrative law, and (5) in the analysis of *Charter* limitations in direct *Charter* challenges to legislation and government action.⁵ In each context, slightly different rules govern how *Charter* values are used.

² [1986] 2 SCR 573.

³ *R v Oakes*, [1986] 1 SCR 103, p 136.

⁴ *McKitty v Hayani*, 2019 ONCA 805, para. 89.

⁵ *McKitty v Hayani*, 2019 ONCA 805, para. 91.

16. On this appeal, we are concerned with the use of *Charter* values in the interpretation of statutes, and in determining the scope of common law prerogative powers.

(ii) *Charter values in the context of statutory interpretation*

17. The “modern principle” approaches statutory interpretation by “discerning legislative intent”.⁶ An underlying presumption is that “legislation is enacted to comply with constitutional norms”.⁷ Importantly, the *Charter’s* role in this context is not confined to rendering legislation inoperative. It is also an interpretive tool which forms part of the “broader interpretive context contemplated by our ‘modern rule of interpretation’”.⁸

18. Following the holding in *Dolphin Delivery*, case law also relied on *Charter* values to interpret statutes. This was established as early as 1988 in the Supreme Court’s decision in *Hills v Canada (Attorney General)*,⁹ which involved the *Unemployment Insurance Act*. At issue in that case was whether unemployment benefits extended to employees who were not working due to a strike by members of their own union. In determining whether the non-striking workers were “financing” the striking local for the purposes of the Act, L’Heureux-Dubé J. noted that in interpreting a statute affecting the freedom of association, an interpretation reflecting “the values embodied in the *Charter* must be given preference over an interpretation that would run contrary to them”.¹⁰

19. Subsequent case law confirms that, in the interpretation of a statute, *Charter* values play a role as an interpretative tool where there is a genuine ambiguity in the legislation. Where

⁶ 2018 SCC 36.

⁷ *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, para 35; *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, para. 123.

⁸ *R v Clarke*, 2014 SCC 28, para. 1.

⁹ [1988] 1 SCR 513.

¹⁰ *Hills v Canada (Attorney General)*, [1988] 1 SCR 513, para. 93.

legislation permits two different interpretations, it is appropriate to prefer the interpretation that best accords with *Charter* principles.

20. However, where a statute is not ambiguous, the court must give effect to a clearly expressed legislative intent, even if it runs counter to those values.¹¹ The *Charter* cannot be used to create ambiguity when none is otherwise present. This reflects a concern that infusing the interpretation of unambiguous statutes with *Charter* values would “deprive the *Charter* of a more powerful purpose, namely, the determination of a statute’s constitutional validity.” [emphasis in original]¹²

21. An ambiguity, in law, must be “real”.¹³ The words used must be “reasonably capable of more than one meaning”.¹⁴ This requires that courts consider the “entire context” of a provision before determining if it is reasonably capable of more than one interpretation.¹⁵

B. THE AMBIGUITY IN THIS CASE

22. This is not a case in which the Coalition seeks to use *Charter* values to create ambiguity where none otherwise exists. Nor does the Coalition invoke *Charter* values as a means to avoid the evidentiary and legal requirements involved in a direct *Charter* challenge. Rather, it is the very different interpretations of s. 7 of the *OCAAT Act* offered by the parties which demonstrates a genuine ambiguity. It is then appropriate to use *Charter* values as an interpretive aid in determining whether the Divisional Court erred in finding the SCI is inconsistent with applicable statutes.

¹¹ *R v Clarke*, 2014 SCC 28, paras. 12 - 14; *Bell ExpressVu*, para. 62.

¹² *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 64.

¹³ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 29.

¹⁴ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 29.

¹⁵ *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 29.

(i) *Section 7 of the OCAAT Act*

23. Colleges in Ontario are established by regulation under the *OCAAT Act* and are subject to the Minister's direct authority to issue binding policy directives (s. 4) and to intervene in the affairs of a college (s. 5). Pursuant to s. 4(1), the Minister has power to "issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs."¹⁶

24. While this provision authorizes the Minister to issue directives, however, s. 7 of the *OCAAT Act* provides as follows:

7. 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.

25. Ontario takes the position that, while s. 7 provides that a *college* must not prevent a student governing body from carrying out its "normal activities", nothing in s. 7 prevents the *Minister* from making binding policy directives to that end. In effect, according to Ontario, s. 7 does not restrict the Minister from directing colleges to do what s. 7 prevents them doing, themselves.¹⁷

26. By contrast, the Respondent argues that the discretion in s. 4(1) is specifically confined by s. 7, such that the Minister cannot exercise his policy-making and directive authority to prevent student governing bodies from carrying out their normal activities.¹⁸

27. These positions are opposed and irreconcilable. Given these opposing interpretations, it is open to this Court to find that a genuine ambiguity exists, such that *Charter* values should be considered when determining whether the SCI "restricts" the "normal activities" of student associations.

¹⁶ Decision, para. 98.

¹⁷ Factum of the Appellant, paras. 71-72.

¹⁸ Factum of the Respondents, para. 46.

(ii) *Application to universities*

28. The Coalition submits that this interpretive analysis is equally applicable in the university setting. Indeed, s. 7 of the *OCAAT Act* can be seen as a codification of certain principles and practices that had previously developed and become standard in the university context. As such, the proper interpretation of s. 7 should be based upon a distillation of the established practices at both universities and colleges, and a limitation on Ministerial discretion equivalent to s. 7 should also be implied in each of the statutes creating and governing the universities in Ontario.

29. These principles and practices include the institutional independence of each university and college, the academic freedom of academic staff, the systems of student self-government at each institution, and the provision, by students and for students, of services that support these goals and values, specifically including campus news and radio.

C. CHARTER VALUES UNDERLYING THE REGULATION OF UNIVERSITY AND COLLEGE CAMPUSES IN ONTARIO

30. The Supreme Court has not provided a comprehensive enumeration of *Charter* values to be used as an interpretive aid, but has indicated that they include: “liberty, human dignity, equality, autonomy, and the enhancement of democracy”.¹⁹ The Coalition submits that, in resolving the issues raised in this case, the enumeration should also include those values that have been held to underlie the fundamental freedom of expression grounded in s. 2(b) of the *Charter*, specifically democratic discourse and participation in the community, the pursuit of truth, and the individual self-fulfillment and human flourishing.

¹⁹ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

(i) *The values that underlie freedom of expression*

31. The guarantee of freedom of expression in s. 2(b) of the *Charter* is based on values and purposes that include democratic discourse and participation in community, the pursuit of truth, individual self-fulfillment and human flourishing.²⁰ Importantly, freedom of expression was not created by the *Charter* but rather was recognized, even before its entrenchment in the Constitution in 1982, as “one of the most fundamental values of our society”.²¹

32. In *Edmonton Journal*,²² Cory J. wrote about how fundamental this freedom is in any democracy:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. (emphasis added)

33. Freedom to criticize old ideas and to express new ideas is the breath of life of public institutions. The free flow of expression enables individuals to form free and informed opinions, call their representatives to account and evaluate new policy proposals. Colleges and universities are the formative institutions that help all students develop practices and thought processes to achieve these goals, and provide the opportunity to implement these practices in their own right.

34. The values underlying s. 2(b) protect more than just a person’s right to express himself or herself. It also ensures a right to receive information or a “right to know”.²³ In the present context, this includes the right of students to inform themselves, to discuss and debate ideas, to bring the

²⁰ *Grant v Torstar Corp*, 2009 SCC 61, paras. 47-50.

²¹ *Libman v QC AG*, [1997] 3 SCR 569, 1997 CanLII 326, para. 28; *Grant v Torstar Corp*, 2009 SCC 61, para. 28.

²² at p. 1336.

²³ *Harper v Canada (Attorney General)*, para. 18.

institution and faculty to account, to participate in debate on academic and institutional matters, and to take positions and provide services on all matters relevant to the campus setting.

D. APPLICATION TO THE STUDENT CHOICE INITIATIVE

35. There is no doubt that expressive activity is at issue on this appeal, given that the SCI subjects existing, and “normal” campus news and radio services to a new student opt-out, where they were previously subject to a mandatory dues check-off.

36. *Charter* values must be applied to determine whether the Directive “restricts” these “normal activities” of a student government body.

37. A generous and liberal application of the *Charter* values underlying freedom of expression ought to be used by this Court. Specifically, the interpretation of the provisions at issue should prefer the meaning that would enhance democratic discourse and participation in the community, the pursuit of truth, and the individual self-fulfillment and human flourishing, over a meaning that would restrict those values.

38. Academic institutions are where young adults first learn key skills and participate as active citizens in a democracy. This is often accomplished through student associations, which function as private not-for-profit corporations with their own independent governance structures.²⁴ Student associations are democratically elected: elections are held each year for executive positions for the following academic year. Importantly, student associations are not created or funded by Ontario or by universities. In the words of the Divisional Court, “[t]hey belong to and are funded by

²⁴ Decision, para. 49.

students.”²⁵ It is through these student associations and the services they provide that students exercise their fundamental freedoms and authorities are held to account.

39. As discussed by the Divisional Court, with representation comes a need for communication with students about their needs and preferences. This is typically accomplished through student newspapers and radio, which offer “fora for discussion of issues of interest to students and communication from student leaders.”²⁶ There can be no doubt that this offers students, collectively, the opportunity to participate in their community, pursue truth, and find individual self-fulfillment. The legislative provisions at issue on this appeal must be interpreted in a way that encourages these and other *Charter* values that underlie freedom of expression.

40. This is not achieved if Ontario’s interpretation of the relevant legislative provisions and common law prerogative powers, is accepted. As found by the Divisional Court, the SCI does not promote these values. Rather, it directly interferes with and restricts the “normal activities” of student government bodies that have previously promoted them.²⁷ The Divisional Court specifically found that the uncertainty caused by the SCI could have a real impact on student groups and activities funded through levies such as student newspapers.²⁸ This undoubtedly erodes the *Charter* values that are fundamental to campuses across Ontario.

41. This is highlighted in the very purpose of the SCI, which specifically directs that student association fees must be non-essential, and can no longer be the subject of a mandatory dues check-

²⁵ Decision, para. 49.

²⁶ Decision, para. 51(c).

²⁷ Decision, paras. 103, 104, 118

²⁸ Decision, para. 72.

off. Nowhere in the record is it explained why, of all the components of ancillary fees charged to students, only one – student association fees – was deemed by Cabinet to be non-essential.²⁹

42. This is confirmed by the Premier's stated reasons for targeting student associations through the SCI, revealed in a fundraising letter³⁰ sent by the Premier to his supporters. While the Divisional Court questioned the relevance and admissibility of this evidence on the arguments before it, it shows that the SCI is intended to target free expression. This evidence will clearly be relevant if the SCI is ever implemented and a *Charter* challenge to the legislation's validity is brought. The Coalition submits it is also relevant to an interpretation of the legislative scheme that takes *Charter* values into account.

43. When the provisions at issue are considered in the context of the underlying values of freedom of expression, namely, democratic discourse and participation in the community, the pursuit of truth, and the individual self-fulfillment and human flourishing, the only proper interpretation is that proposed by the Respondents.

44. Given that the Respondent's interpretation is more consistent with constitutional norms, and therefore is to be preferred, Ontario's arguments about spending power and the Crown's prerogative must also necessarily fail. The same values that ought to underpin this Court's interpretation of the applicable legislation, also inform the common law relating to the Crown prerogative powers on which Ontario relies.

45. Once it is found that the proper interpretation, based on *Charter* values, of the Minister's discretionary authority in the applicable statutes is subject to conditions and limitations, then there

²⁹ Decision, para. 68.

³⁰ Decision, para. 67.

can be no recourse to prerogative powers to circumvent those conditions and limitations. The tests recited in the case law at paragraphs 42-43 of Ontario's Factum are met, and the Minister's discretion can only be exercised in accordance with and subject to the conditions and limits so found. The argument to the contrary advanced by Ontario, that the Minister is free to impose governance decisions on universities and colleges without regard for the limits and conditions in the legislation so long as it is done using the prerogative power, would plainly frustrate the statutory scheme. The Coalition submits that the Crown cannot use its prerogative power in a manner that is inconsistent with the statutory scheme.³¹

PART IV - ORDER REQUESTED

46. The Coalition asks that these submissions be considered by the Court in the disposition of this appeal.

47. The Coalition does not seek costs, and requests that no order as to costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____ day of _____, 202__.

M. Philip Tunley / Jennifer P. Saville
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³¹ *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121, para. 45.

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-and- ONTARIO (MINISTER OF TRAINING, COLLEGES AND
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**MOTION RECORD OF THE PROPOSED
INTERVENERS,**

**Canadian Journalists for Free Expression, The Centre for
Free Expression, The Canadian Association of Journalists,
PEN Canada, World Press Freedom Canada and The
Canadian Association of University Teachers
(Motion for Leave to Intervene)**

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