Court File No. C68262

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

ONTARIO (MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)
Appellant

and

THE CANADIAN FEDERATION OF STUDENTS and
THE YORK FEDERATION OF STUDENTS
Respondents

FACTUM OF THE 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

January 22, 2021

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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 public discourse and accountability that s. 2(b) serves.

3. The current statutory scheme governing Ontario's 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) representation of the views and interests of students to the university community, to governments, and to the public at large; 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 and in relation to campus issues.[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 (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) 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.

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

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 now before this Court on the appeal. The Coalition submits that this Court ought to consider *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 does 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 does not intend to raise it in this appeal.

PART II - SUMMARY OF FACTS

10. For the purpose of these submissions, the Coalition relies on 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.

11. Going as far back as the Flavelle Commission, it was recognized that universities need to be protected from government interference. Each university must be an autonomous, self-governing entity, rather than an arm of the state.[2]

[2] Decision of the Divisional Court, para. 40.

12. The democratization of universities gave student associations an important role in internal university affairs. With representation came the requirement for communication with students about their needs and preferences, which "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".[3] To support this expressive activity, certain ancillary fees have been set by referenda – a democratic process - to fund and support campus newspapers.[4] The uncertainty caused by the SCI could have a real impact on student groups and activities funded through these non-ancillary fees, including student newspapers.[5]

PART III - ISSUES AND THE LAW

13. 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*?

14. As set out below, the Coalition argues that this Court's interpretation of these statues, 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

15. The concept of "*Charter* values" informing the interpretation or enforcement of enumerated *Charter* rights can be traced to the 1986 decision in *RWDSU v Dolphin Delivery Ltd*.

[3] Decision of the Divisional Court, para. 51(c).
[4] Decision of the Divisional Court, paras. 27, 55.
[5] Decision of the Divisional Court, para. 72.

In that case, the Supreme Court held that common law principles ought to be consistent with the "fundamental values enshrined in the Constitution".[6] 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*".[7]

16. 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."[8]

17. *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.[9] In each context, slightly different rules govern how *Charter* values are used.

18. 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

19. The "modern principle" approaches statutory interpretation by "discerning legislative intent".[10] An underlying presumption is that "legislation is enacted to comply with constitutional norms".[11] Importantly, the *Charter's* role in this context is not confined to rendering legislation

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[6] *RWDSU v Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 SCR 573, para. 39.
[7] *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, p. 136.
[8] *McKitty v Hayani*, 2019 ONCA 805, para. 89.
[9] *McKitty v Hayani*, 2019 ONCA 805, para. 91.
[10] *British Columbia v Philip Morris International, Inc.*, 2018 SCC 36 (CanLII), para. 17.
[11] Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42 (CanLII), [2004] 2 SCR 248, para. 35; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350, para. 123.

inoperative. It is also an interpretive tool which forms part of the "broader interpretive context contemplated by our 'modern rule of interpretation'".[12]

20. 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),*[13] 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".[14]

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

22. An ambiguity, in law, arises where the words are "reasonably capable of more than one meaning".[15] This requires that courts consider the "entire context" of a provision before determining if it is reasonably capable of more than one interpretation.[16]

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[12] *R v Clarke*, 2014 SCC 28, para. 1.
[13] *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 SCR 513.
[14] *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 SCR 513, para. 93.
[15] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 29.
[16] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 29.

23. Where a statute is not ambiguous, the courts have given effect to a clearly expressed legislative intent, even if it runs counter to those values.[17] The *Charter* cannot be used to create ambiguity when none is otherwise present. The Coalition's argument herein respects this position.

B. THE AMBIGUITY IN THIS CASE

24. 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.

(i) Section 7 of the OCAAT Act

25. 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."[18]

26. While that provision authorizes the Minister to issue directives, s. 7 of the *OCAAT Act* qualifies that authority 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.

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[17] *R v Clarke*, 2014 SCC 28, paras. 12 - 14; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, para. 62.
[18] Decision of the Divisional Court, para. 98.

27. 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.[19]

28. By contrast, the Respondent argues that the discretion in s. 4(1) is specifically confined by s. 7, such that the Minister simply has no policy-making or directive authority to prevent student governing bodies from carrying out their normal activities.[20]

29. 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.

(ii) Application to universities

30. 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 and college 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.

31. The Coalition submits that these principles and practices must, at a minimum, include the institutional independence of each university and college, the academic freedom of academic staff,

[19] Factum of the Appellant, paras. 71-72.
[20] Factum of the Respondents, para. 46.

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, including campus news and radio.

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

32. 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".[21] 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.

(i) The values that underlie freedom of expression

33. 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.[22] 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".[23]

34. In *Edmonton Journal*,[24] 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

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[21] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 88.
[22] *Grant v Torstar Corp*, 2009 SCC 61, paras. 47-50.
[23] *Libman v QC AG*, [1997] 3 SCR 569, 1997 CanLII 326, para. 28; *Grant v Torstar Corp*, 2009 SCC 61, paras. 28.
[24] *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326 at p. 1336.

> 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)

35. 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 formative institutions that help all students develop practices and thought processes to achieve these goals, and that provide the opportunity to implement these practices in their own right.

36. Section 2(b) protects 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".[25] In the present context, this includes the right of students to inform themselves, to discuss and debate ideas, to bring the institution and faculty to account, to participate in debate on academic, institutional, and public matters, and to take positions and provide services on all matters relevant to the campus setting.

D. APPLICATION TO THE STUDENT CHOICE INITIATIVE

37. There is no doubt that expressive activity is at issue on this appeal, given that the SCI subjects the funding of 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.

38. A generous and liberal application of the *Charter* values underlying freedom of expression must be used by the Court to determine whether the Directive thereby "restricts" these "normal activities" of a student government body.

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[25] *Harper v Canada (Attorney General)*, 2004 SCC 33 (CanLII), paras. 17 and 18.

39. Specifically, in interpreting the provisions at issue, this Court 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.

40. Academic institutions are where young adults first learn key skills and participate as enfranchised 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.[26] 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 students."[27] It is through these student associations and the services they provide, including student news and radio, that students exercise their fundamental freedoms, and hold universities and colleges to account. The important role discharged by the student media in the expression and communication of information cannot be overlooked by this Court.

41. 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."[28] This offers students, collectively, the opportunity to participate in their community, pursue truth, and find individual self-fulfillment.

[26] Decision of the Divisional Court, para. 49.
[27] Decision of the Divisional Court, para. 49.
[28] Decision of the Divisional Court, para. 51(c).

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.

42. 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.[29] 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.[30] This undoubtedly erodes the *Charter* values that are fundamental to campuses across Ontario.

43. This is highlighted in the express terms of the SCI, which specifically direct that student association fees must be non-essential and can no longer be the subject of a mandatory dues check-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.[31]

44. However, the true purpose is confirmed by the Premier's stated reasons for targeting student associations through the SCI, as revealed in a fundraising letter[32] 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

[29] Decision of the Divisional Court, paras. 103, 104, 118
[30] Decision of the Divisional Court, para. 72.
[31] Decision of the Divisional Court, para. 68.
[32] Decision of the Divisional Court, para. 67.

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.

45. When the legislative provisions and prerogative powers 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.

46. Given that the Respondents' 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.

47. 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 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 statutory 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

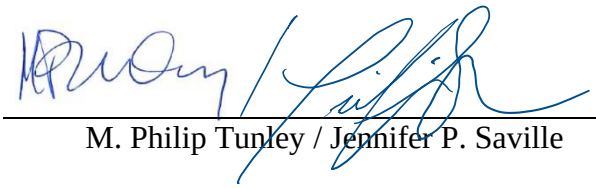
frustrate the statutory scheme. The Coalition submits that the Crown cannot use its prerogative power in a manner that is inconsistent with the statutory scheme.[33]

PART IV - ORDER REQUESTED

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

49. 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 22nd day of January 2021.



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[33] *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121, para. 45.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.
2. Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42 (CanLII), [2004] 2 SCR 248.
3. *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42.
4. *British Columbia v Philip Morris International, Inc.*, 2018 SCC 36 (CanLII).
5. *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 (CanLII).
6. *Castrillo v Workplace Safety and Insurance Board*, 2017 ONCA 121.
7. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350.
8. *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326.
9. *Grant v Torstar Corp*, 2009 SCC 61.
10. *Harper v Canada (Attorney General)*, 2004 SCC 33 (CanLII).
11. *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 SCR 513.
12. *Libman v QC AG*, [1997] 3 SCR 569, 1997 CanLII 326.
13. *McKitty v Hayani*, 2019 ONCA 805.
14. *R v Clarke*, 2014 SCC 28.
15. *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.
16. *RWDSU v Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 SCR 573.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Ontario Colleges of Applied Arts and Technology Act, 2002*, SO 2002, c 8, Sched F**

Policy directives
4 (1) The Minister may issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs. 2002, c. 8, Sched. F, s. 4 (1).

Intervention
5 (1) The Minister may intervene into the affairs of a college or a subsidiary of a college in such manner and under such conditions as may be prescribed, if the Minister is of the opinion that,

a) the college is not providing services in accordance with this Act or the regulations or with any other Act that applies to the college;
b) the college fails to follow a policy directive under section 4; or
c) it is in the public interest to do so. 2002, c. 8, Sched. F, s. 5 (1).

Public interest
(2) In determining whether an intervention is in the public interest, the Minister may take into consideration, among other things,

a) the quality of the management and administration of the college;
b) the college's utilization of its financial resources for the management and delivery of core education and training services;
c) the accessibility to education and training services in the community where the college is located; and
d) the quality of education and training services provided to students. 2002, c. 8, Sched. F, s. 5 (2).

Student governing body
7 Nothing in this Act restricts a student governing body of a college elected by the students of the college from carrying on its normal activities and no college shall prevent the student governing body from doing so. 2002, c. 8, Sched. F, s. 7.

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982

2. Everyone has the following fundamental freedoms:

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

ONTARIO (MINISTER OF TRAINING, COLLEGES AND UNIVERSITIES)
Appellant

-and-

THE CANADIAN FEDERATION OF STUDENTS et al.

Respondents

Court File No. C68262

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE 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

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