COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Federation of Students v. Ontario (Colleges and Universities), 2021 ONCA 553
DATE: 20210804
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Fairburn A.C.J.O., van Rensburg and Huscroft JJ.A.

BETWEEN

The Canadian Federation of Students and the York Federation of Students

Applicants (Respondents)

and

Ontario (Minister of Training, Colleges and Universities)

Respondent (Appellant)

and

University of Toronto Graduate Students' Union and B'nai Brith of Canada League for Human Rights

Interveners (Interveners)

Sunil S. Mathai, Ananthan Sinnadurai and Colin Bourrier, for the appellant

Mark Wright, Louis Century and Geetha Philipupillai, for the respondents

Ewa Krajewska, Teagan Markin and Mannu Chowdhury, for the intervener University of Toronto Graduate Students' Union

David Elmaleh and Aaron Rosenberg, for the intervener the B'nai Brith of Canada League for Human Rights

Phil Tunley, for the intervener Canadian Journalists for Free Expression, the Ryerson Centre for Free Expression, the Canadian Association of Journalists,

PEN Canada, World Press Freedom Canada and the Canadian Association of University Teachers

Danny Kastner and Vinidhra Vaitheeswaran, for the intervener the Association for Canadian Clinical Legal Education

Robert A. Centa and Lauren Pearce, for the intervener University of Ottawa, Queen's University at Kingston, Governing Council of the University of Toronto, University of Waterloo, and University of Western Ontario

Pam Hrick and Dragana Rakic, for the intervener Start Proud and Guelph Queer Equality

Heard: March 23, 2021 by video conference

On appeal from the order of the Divisional Court (Justices Harriet E. Sachs, David L. Corbett and Lise G.Favreau), dated November 21, 2019, with reasons reported at 2019 ONSC 6658, 147 O.R. (3d) 721.

Huscroft J.A.:

OVERVIEW

[1] Ontario provides billions of dollars in operating grants to the province's colleges of applied arts and technology and universities annually. The question raised by this appeal is whether receipt of these funds can be conditioned on compliance with a framework the Minister of Training, Colleges and Universities has established governing the payment of student ancillary fees. The framework requires colleges and universities to allow students to opt out of payments for what are deemed to be non-essential ancillary fees, including fees charged by student associations – fees that have long been compulsory.

[2] The Divisional Court quashed the ancillary fees framework, holding that it was unlawful because it was inconsistent with the Ontario Colleges of Applied Arts

and Technology Act, 2002, S.O. 2002, c. 8, Sched. F, (the "OCAATA") and the Acts that establish each Ontario university (the "University Acts").1 The Minister appeals.

[3] In my view, although the Divisional Court erred by characterizing the framework as an exercise of prerogative power, the court reached the correct conclusion: the ancillary fees framework conflicts with the legislation governing Ontario's colleges and universities and cannot be imposed upon them by the exercise of executive authority. If the framework is to be established, the OCAATA and University Acts must be amended.

[4] I would dismiss the appeal for the reasons that follow.

BACKGROUND

[5] Although both Ontario colleges and universities operate as not-for-profit corporations, they differ in significant respects. Colleges are established pursuant to the *OCAATA* and operate as highly controlled agents of the Crown. In contrast,

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[1] *Algoma University Act*, 2008, S.O. 2008, c. 13; *Carleton University Act*, S.O. 1952, c. 117, as amended by S.O. 1957, c. 130; *Nipissing University Act*, 1992, S.O. 1992, c. Pr52; *Ontario College of Art and Design University Act*, 2002, S.O. 2002, c. 8, Sched. E; *The Brock University Act*, S.O. 1964, c. 127; *The Lakehead University Act*, 1965, SO 1965, c. 54; *The Laurentian University of Sudbury Act*, 1960, S.O. 1960, c. 151; *The McMaster University Act*, 1976, S.O. 1976, c. 98; *The Ryerson University Act*, 1977, S.O. 1977, c. 47, as amended by S.O. 2002, c. 8, Sched. Ps5; *The Trent University Act*, 1962-63, S.O. 1962-63, c. 192; *The University of Guelph Act*, 1964, S.O. 1964, c. 120; *The University of Toronto Act*, 1971, S.O. 1971, c. 56; *The University of Windsor Act*, 1962-63, S.O. 1962-63, c. 194; *University of Ontario Institute of Technology Act*, 2002, S.O. 2002, c.8, Sched. O; *University of Ottawa Act*, 1965, S.O. 1965, c. 137; *University of Waterloo Act*, 1972, S.O. 1972, c. 200; *University of Western Ontario Act*, 1982, S.O. 1982, c. 92; *Wilfrid Laurier University Act*, 1973, S.O. 1973, c. 87; *York University Act*, 1965, S.O. 1965, c. 143.

each university is established by a separate Act and operates independently in accordance with its statutorily mandated governance structure.

[6] Both colleges and universities are funded, in part, through annual operating grants made by the Minister of Training, Colleges and Universities from the Ministry's budget. These grants cover a significant portion of the institutions' operating expenses – over $5 billion annually, or about one-third of overall operating revenue.

[7] Students pay compulsory ancillary fees to colleges and universities in addition to tuition fees. These fees cover non-academic services provided by the college or university such as athletic centres and career services, as well as fees paid to student associations. The respondent York Federation of Students ("YFS") is one such body. Its membership fee is approved in a student referendum and is collected and remitted to the YFS by York University, which requires students to pay the fee as a condition of enrolment.

[8] YFS is a member of the respondent Canadian Federation of Students ("CFS"), an umbrella organization of college and university student federations. YFS remits fees to the CFS, which are collected by York University in the same manner as YFS fees.

The impugned directives and guidelines

[9] Ontario has long used the college directives and university guidelines to regulate tuition fees, imposing tuition freezes and limits on tuition increases as conditions in its operating grants. The Minister revised the college directives and university guidelines in 2019 to require a 10% reduction in tuition fees, and in addition established a framework governing ancillary fees called the “Student Choice Initiative” (the “framework”).

[10] The stated purpose of the framework is to help reduce the cost of education while enhancing transparency regarding fee payment and giving students greater choice regarding the services and activities they wish to support. The framework differentiates between what are deemed essential and non-essential services and requires that the payment of fees for non-essential services be made optional. Essential services include athletics, career services, student buildings, health and counselling, academic support, student ID cards, student achievement and records, financial aid offices, and campus safety programs, subject to compliance with the definitions set out in the guidelines.[2] All other ancillary fees are deemed non-essential and so must be made optional, including the fees of student associations.

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[2] Health and dental plans and student transit passes may be charged on a compulsory basis, subject to conditions not relevant here.

[11] Compliance with the framework is enforced by the threat of reductions to the colleges and universities' operating grants. According to the directives, non-compliance by colleges "could result in a deduction from the college's allocation under the Core Operating Grant." Universities "may be required to reimburse students for the excess or non-compliant fees charged" and if "the students cannot be reimbursed, the Ministry will have the option of reducing the institution's operating grants."

[12] YFS and CFS brought an application for judicial review seeking to quash the framework.[3] They argued that the framework:

1. is inconsistent with the statutory schemes regulating colleges and universities;
2. was made for an improper purpose and in bad faith; and
3. was made in breach of the requirements of procedural fairness.

The Divisional Court's Decision

[13] The Divisional Court rejected the Minister's argument that the application was non-justiciable. The court acknowledged it had no authority to assess the wisdom of the framework but held that the case turned on a question of legality the court could properly resolve: whether the Minister has the legal authority to require

[3] I note that no universities were party to the judicial review application and that no question of standing appears to have arisen in the Divisional Court. Several universities intervened in the appeal as friends of the court and took no position on the disposition of the appeal.

colleges and universities to comply with the framework. This conclusion is not challenged on appeal.

[14] The Divisional Court characterized the framework as a decision made pursuant to the exercise of the Crown's power to spend, which it described as a prerogative power. The court accepted that the Minister has wide latitude to decide whether and how to spend public funds, including whether to impose conditions on the use of those funds, but questioned the purpose of the framework and, in particular, the government's claim that it was intended to lower the cost of education. The court also questioned the wisdom of the distinctions drawn between essential and non-essential fees; whether conditions attached to the annual grants had to be relevant or material to the purpose for which the funds were provided; and whether conditions could interfere with the financing and activities of third parties that do not receive public funds. However, the court concluded it was not necessary to decide these questions given the limitations on the exercise of the Crown's prerogative power that governed the outcome of the case. To wit: "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."

[15] Dealing first with colleges, the court noted that the Minister's authority pursuant to s. 4(1) of the *OCAATA* to "issue policy directives in relation to the

manner in which colleges carry out their objects or conduct their affairs" is restricted by s. 7, which provides:

> 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 a student governing body from doing so.

[16] The court held that the effect of the ancillary fee directives was to restrict student associations from carrying out their normal activities, in contravention of s. 7 of the *OCAATA*.

[17] As for universities, the court found that although there were no specific statutory provisions in the University Acts addressing the Minister's authority concerning student associations, the independent governance structure of the universities precluded the Minister from implementing the guidelines. The court held that the University Acts "occupy the field" when it comes to internal university governance, including student activities, and that the framework interfered with universities' autonomous governance.

[18] In light of these conclusions it was not necessary for the court to address the respondents' second and third arguments. The court quashed the framework on the basis that it was inconsistent with the *OCAATA* and the University Acts.

ISSUES ON APPEAL

[19] The Minister argues that the Divisional Court erred in law by holding, first, that s. 7 of the *OCAATA* prohibited the Minister from implementing the framework,

and second, that the University Acts occupy the field such that they displace or limit the exercise of the Crown's spending power.

The standard of review

[20] It is well established that on an appeal from an order of the Divisional Court concerning an application for judicial review of a tribunal decision, this court must determine whether the Divisional Court identified the proper standard of review and applied it correctly. This is sometimes described as the court "stepping into the shoes" of the Divisional Court. The appeal is, in effect, a *de novo* review of the tribunal decision. See e.g., *Longueépée v. University of Waterloo*, 2020 ONCA 830, 153 O.R. (3d) 641, at paras. 47-48, applying *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46.

[21] In this case, however, the Divisional Court was not reviewing a tribunal decision; it was reviewing an exercise of executive authority by the Minister. The Divisional Court made the findings of fact and applied the relevant legal tests. In these circumstances, the proper approach is to follow the standard normally applied on appeal, as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: the Divisional Court's conclusions on questions of law are reviewed on the correctness standard, but its findings of fact and on questions of mixed fact and law are entitled to deference, subject to review on the palpable and overriding

error standard. This is the approach followed in the Federal Court. See, e.g., *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 157 C.P.R. (4th) 289, at paras. 57-61, and the authorities cited therein, leave to appeal refused, [2018] S.C.C.A. No. 397.

DISCUSSION

The nature of the power exercised by the Minister

[22] The imposition of the framework by the Minister in this case is variously described by the Divisional Court and the parties as an exercise of the prerogative, the prerogative spending power, the spending power, or the natural person spending power. Although it is common ground that the Minister's power can be limited or ousted by legislation, it is important to attend to the nature of the power being exercised given relevant juridical distinctions.

[23] Prerogative powers are unique in nature – vestiges of powers once enjoyed by the Monarch and now exercised by the Crown, whether federally or provincially. For example, the prerogative includes such things as the conduct of international relations and the granting of honours. See, generally, Dwight Newman and Guy Régimbald, *The Law of the Canadian Constitution*, 2nd ed. (Toronto: LexisNexis, 2017) at § 1:19-1:22. However, the prerogative enjoys no greater status than common law and much of it has been overtaken by statute law: see

Black v. Canada (Prime Minister) (2001), 199 D.L.R. (4th) 228 (Ont. C.A.), at para. 27.

[24] The Supreme Court has described the prerogative power as the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 34, citing *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J. The court further described the prerogative power as "a limited source of non-statutory administrative power accorded by the common law to the Crown": *Khadr*, at para. 34, citing Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2009-Rel. 1), 5th ed. (Scarborough, Ont.: Thomson/Carswell, 2007), at p. 1-17.

[25] This description, based on A. V. Dicey's observation in *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan and Co., 1915), at p. 352, is not uncontroversial; there is considerable debate in the Commonwealth as to the nature and scope of the prerogative, as well as its continued relevance: see e.g., Thomas Poole, "The Strange Death of the Prerogative in England", LSE Law, Society and Economy Working Papers 21/2017, discussing Dicey's conception as well as those of John Locke and William Blackstone; and Jennifer Klinck, "Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada" (2017) 54:4 Alta. L. Rev. 997. But there is no need

to resolve any issues about the prerogative for purposes of this appeal, for this case does not concern the prerogative.

[26] The Crown's so-called "spending power" is not a prerogative power; it is simply a description of executive authority to spend money in support of government policies and programs. This authority is sometimes described as an example of the exercise of the "third source" of government authority – the first two being statute law and the prerogative. See e.g., B.V. Harris, "The 'third source' of authority for government action revisited" (2007) 123 L.Q.R. 225. The basic idea is that, like a natural person, the government has the authority to do anything that it is not legally prohibited from doing.

[27] The analogy holds to some extent: for example, like natural persons, the Crown can make commercial arrangements involving employment or the purchase and sale of goods and services. But the Crown's ability to spend money is different in kind given its scale, its impact, and the political purposes in support of which it may be exercised, as this case demonstrates.

[28] The Minister has conditioned receipt of the government's annual multi-billion dollar contribution to college and university education on compliance with a detailed framework governing the payment of student ancillary fees. That framework is neither mandated nor authorized by legislation, yet it involves the

government in matters of internal college and university governance involving third party student associations.

[29] Whether the framework conflicts with the legislation that establishes colleges and universities and regulates their governance is a matter of statutory interpretation but the analysis differs in each context, for the *OCAATA* confers extensive authority on the Minister to direct college operations while the University Acts contemplate virtually no role for the Minister in university governance. In both contexts, however, the same principle governs: the framework is an exercise of executive authority and it is axiomatic that it must yield in the event of legislative conflict. As the Supreme Court put it in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 55: “Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments, and neither can usurp or interfere with the legislature’s law-making function.”

[30] Colleges and universities perform different functions and their relationships with the government differ significantly. I will address the situation of colleges first.

Colleges

[31] Ontario colleges are highly regulated Crown agents. They are established by regulations made under the *OCAATA* as corporations without share capital, and

among other things provide vocational training, apprenticeships, and applied research designed to meet the needs of employers and support economic and social development in Ontario. The Minister enjoys extensive control over Ontario colleges, as s. 4 makes plain. That section specifically empowers the Minister to direct college operations:

> 4 (1) The Minister may issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs.
>
> (2) The policy directives are binding upon the colleges and the colleges to which they apply shall carry out their objects and conduct their affairs in accordance with the policy directives.
>
> (3) A policy directive of the Minister may be general or particular in its application.

[32] Ministerial control over colleges is reiterated throughout the *OCAATA*. For example, s. 5 of the Act authorizes the Minister to intervene in the affairs of a college if, in the Minister's opinion, the college is not providing services as required, the college fails to follow a policy directive, or it is in the public interest to do so. The Act permits the Minister to define the public interest having regard to such considerations as the quality of a college's management and administration and the quality of the education and training services it is providing.

[33] Cabinet exercises considerable control over colleges and their boards of governors through its regulation-making authority under s. 8 of the *OCAATA*, which among other things includes the authority to vary or expand the objects and

responsibilities of any college and to prescribe any matters related to the manner in which a college carries out its affairs.

[34] No question as to the legality of the framework at issue in this case would arise but for s. 7 of the *OCAATA,* the only section of the Act that deals with student associations. That section provides:

> 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 a student governing body from doing so.

[35] The consistency of the framework with the *OCAATA*, and hence its legality, hinges on the interpretation of s. 7, which plainly is designed to protect the independence and autonomy of student governing bodies (student associations).

[36] The Minister argues that s. 7 cannot be used to read down her authority under s. 4 of the *OCAATA*. The first component of s. 7 confirms only that nothing restricts student associations from carrying on their normal activities but does not refer to the powers of the Minister or the government, and according to the Minister is not intended to fetter their authority to restrict the activities of student associations. Although colleges' power over student associations has been curtailed by the second component of s. 7, that section is silent as to what the Minister or the government may do, so it must be presumed that the Legislature did not intend to curtail their authority (an example of implied exclusion). The Minister argues that the Legislature intended to authorize the Minister to direct

colleges to take action that they could not otherwise take in respect of student associations.

[37] I disagree.

[38] The modern principle of statutory interpretation is well established: legislation is to be interpreted in a manner that gives effect to the intention of the Legislature, and legislative intention is to be determined having regard to the text, context, and purpose of the legislation: see e.g., *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at paras. 117-18, and the helpful discussion by Miller J.A. (dissenting) in *R. v. Walsh*, 2021 ONCA 43, 154 O.R. (3d) 263, at paras. 135-50.

[39] Section 7 of the *OCAATA* includes two components, both of which specifically protect the ability of student associations to carry out their normal activities. The first component is declaratory in nature; it states that *nothing* in the Act restricts a student organization from carrying on its normal activities. This must be understood as an instruction not to interpret any provisions of the *OCAATA* as authorizing interference in the normal activities of student associations, including s. 4. The second component of s. 7 applies only to colleges and specifically prohibits them from preventing student associations from carrying on their normal activities.

[40] The text of s. 7 establishes a clear limit on what is otherwise extensive executive authority over colleges' internal governance. Whatever else it entails, that authority may not be exercised in a manner that restricts the normal activities of student organizations.

[41] Contrary to the Minister's submission, there is nothing "absurd" about this interpretation. Student associations are not public bodies; they neither exercise public authority nor expend public funds. The *OCAATA* is concerned with the regulation of colleges, not student associations.

[42] The Minister argues that even if s. 7 limits her authority to make directives, the Divisional Court erred in concluding that the framework restricted the normal activities of a student association.

[43] Again, I disagree.

[44] Although the *OCAATA* does not define "normal activities", it was not necessary for the Divisional Court to do so. The Act neither establishes student associations nor oversees their operation. There was ample evidence about the nature of the student associations' activities and the impact of the ancillary fee framework on those activities. The Minister's witness, the Acting Director of the Postsecondary Accountability Branch of the Ministry of Training, Colleges and Universities, acknowledged in cross-examination what follows as a matter of common sense: if student associations receive less funding because students can

opt out of paying their fees, their ability "to engage in the scope of the activities they've historically engaged in" will be affected. The Minister's statement in the *Q & A* document accompanying the framework that "student governing bodies may need to adjust their scope and activities based on the demand at their institutions", acknowledges as much.

[45] The expert evidence of Dr. Glen Jones, Professor at the Ontario Institute for Studies in Education, provides additional support. I note that, although the Minister, at first instance, objected to the admission of Dr. Jones' evidence – not because Dr. Jones did not qualify as an expert but because admission of the evidence did not satisfy the necessity test in *R. v. Mohan*, [1994] 2 S.C.R. 9 – the Minister did not contest the Divisional Court's decision to admit Dr. Jones' evidence on this appeal.

[46] Dr. Jones' evidence was emphatic. He stated:

> These Directives represent an unprecedented intrusion into the normal activities of self-governing college student associations, including their ability to determine fees through democratic processes and enter into agreements with colleges for the collection and remittance of those fees, which will in turn adversely affect the governance and operations of colleges as well.

[47] The Divisional Court's findings reveal no palpable and overriding error and are entitled to deference. The court properly interpreted s. 7 as prohibiting the Minister from exercising her statutory authority over colleges in a manner that would interfere in the ability of student associations to carry out their normal

activities, and properly concluded that the framework had precisely this effect. The Minister cannot impose the ancillary fees framework on the colleges. If an opt-out ancillary fees framework is to be established, the *OCAATA* must be amended.

Universities

[48] In contrast with colleges, Ontario universities are not Crown agents and are not highly regulated by the government. In general, they provide broader education as opposed to vocational training. This is made clear in the purpose statements of the various University Acts, which speak of "the advancement of learning and the dissemination of knowledge"; "the intellectual, social, moral and physical development of [the university's] members and the betterment of society;"[4] and "pursui[ng] … learning through scholarship, teaching and research within a spirit of free enquiry and expression".[5]

[49] The achievement of these goals requires that universities be self-governing, and so they are: although there are minor differences across the University Acts, in general they establish boards of governors and senates to run the universities and empower them to do so. The *Algoma University Act, 2008*, is typical in this regard.

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[4] See, e.g., *The Lakehead University Act*, 1965, s. 3; *The Laurentian University of Sudbury Act*, 1960, s. 3; *The Trent University Act*, 1962-63, s. 3; *The University of Guelph Act*, 1964, s. 3. See also similar language in *York University Act*, 1965, s. 4 and *Ryerson University Act*,1977 (amended), s. 3.
[5] See, e.g., *Nipissing University Act*, 1991, s. 3; *Algoma University Act*, 2008, s. 3; *University of Waterloo Act*, 1972, s. 3; *Wilfrid Laurier University Act*, 1973, s. 4.

[50] Section 5 of that Act accords the university “all the powers necessary and incidental to its objects” and Parts III and IV establish a bicameral governance structure. Section 8 specifies that there shall be a board of governors with 12-30 members, a small minority of which (3) shall be appointed by the government. But the ultimate size of the Board and its membership is determined by the Board through its bylaw-making authority. Management of the university is vested in the Board, whose authority is set out inclusively rather than exhaustively. The Board is responsible for “governing and managing the affairs of the University” and has “the necessary powers to do so”: s. 17(1). Members of the Board are required to exercise their authority “diligently, honestly, in good faith, in the best interests of the University and in accordance with any other criteria set out in the by-laws of the board”: s. 15. The Senate at Algoma University has up to 60 members, no government appointees, and like the Board of Governors has bylaw-making authority as to its composition: s. 18. The Senate’s powers, set out under s. 24 of the Act, include “the power to determine and regulate the educational policy of the University” and are subject only to the approval of the Board concerning the expenditure of funds.

[51] In short, like all of the University Acts, the *Algoma University Act, 2008* establishes self-governing independence and autonomy. There is no residual ministerial or government authority concerning university operations. Indeed, there

is but one reference to the Minister in the Act, s. 32, which requires the university to make reports to the Minister.

[52] The Minister argues that the Divisional Court erred by applying an "occupy the field" test to determine whether the University Acts displaced the Crown's power to impose the framework, rather than asking whether the framework conflicted with any specific provisions in the University Acts. The Minister argues, further, that the court erred in interpreting the University Acts as complete codes governing the relationship between the Crown and universities. Finally, the Minister argues that the University Acts do not bind the Crown, and so cannot displace the Crown's power to impose the framework.

[53] I reject these arguments.

[54] First, the Minister's objection to the "occupy the field" language used by the Divisional Court is based on the premise that the Minister has exercised a prerogative power and that such a power could be limited only by legislation "explicitly prohibit[ing] the Minister from imposing government policy on universities as a condition of receiving public funds". This premise is incorrect. The Minister has not exercised a prerogative power; she has simply exercised executive authority. Thus, the tests set out for ousting the prerogative in cases such as *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816, at para. 4, and *Attorney General v. De Keyser's Royal Hotel,* [1920] A.C. 509

(H.L.), are irrelevant, even assuming that the Minister's statement of the law governing the ousting of the prerogative is correct.

[55] As I outlined above, using the example of the *Algoma University Act, 2008*, the University Acts make plain that universities are self-governing bodies. This follows from their text and is consistent with their context and purpose. The expert evidence provided by Dr. Jones concerning university governance and higher education policy in Canada confirms the relevant context and purpose. Institutional autonomy is and has long been the fundamental principle of university governance, a matter that was recognized recently by this court in *Ball v. McAulay*, 2020 ONCA 481, 452 D.L.R. (4th) 213, at para. 59.

[56] As Dr. Jones explained, the requirement of institutional autonomy began to develop following the recommendation in the 1906 report of the Royal Commission on the University of Toronto (the Flavelle Commission) that universities be free from partisan political control. Ontario universities came to be established as autonomous, self-governing institutions, normally with bicameral governing boards overseeing administrative and academic matters. The *University of Toronto Act*, S.O. 1906, c. 55, formed the model for other universities in the province,[6] all of which are created by their own statutes as independent, not-for-profit corporations.

[6] With the exception of Queen's University and Royal Military College, for reasons not relevant here.

[57] Student associations cannot neatly be separated from university governance. On the contrary, they are an important part of it. Student associations formed with their own independent governance structures, with leadership positions filled by annual democratic elections. As Dr. Jones explained, student representatives came to be added to university governing bodies following the recommendations of the Duff-Bergdahl Report in 1966, but the core governance principles of universities remained intact.

[58] Mandatory fees for student associations – collected by universities and remitted to the student associations – have been in place in universities since the 1960s. Student associations have joined umbrella provincial and/or national student organizations, which are similarly dependent on mandatory fees collected by the universities. This funding structure has permitted student associations to play important roles in university governance.

[59] The Divisional Court was entitled to accept Dr. Jones' evidence and made no error in doing so. The University Acts do not all protect the institutional autonomy of universities in the same way. But what is explicit in some of the Acts – for example, s. 8 of *the University of Ottawa Act, 1965*, states that "management, discipline and control of the University shall be free from the restrictions and control of any outside body" – is implicit in the others, given the self-government structures that all the University Acts establish.

[60] Indeed, given the role played by student associations in university governance, the framework is a profound interference in university autonomy – not a mere fettering of the universities' discretion, as the Minister submits. The Minister has no authority to fetter the exercise of the universities' discretion concerning student associations in any event – again, not because universities are immune from regulation, but because the Legislature has chosen not to regulate them. Instead, the Legislature has chosen to establish the universities as autonomous entities, free from government interference in matters of internal governance. The Minister cannot exercise executive action in a manner that conflicts with the University Acts.

[61] The Divisional Court made no error in concluding that the framework constitutes an incursion into university autonomy by interfering with the funding of student associations, and as a result their ability to play a role in university governance. Universities have exercised their authority to establish a mandatory fee system in order to promote student associations and support their participation in university governance. That is a choice the universities are entitled to make under the University Acts and the Minister cannot exercise executive authority in a manner that interferes with this decision.

[62] That the University Acts do not specifically prohibit the Minister from imposing government policy on universities as a condition of receiving public funds

is of no moment; the University Acts establish that universities are autonomous institutions. Specific prohibition of ministerial interference was not required.

[63] Nor does it matter that relationships with student associations and the means pursuant to which fees are collected and distributed differ across universities. In the case of York University, student fees are the subject of Presidential Regulation Number 4, approved by the Board of Governors, which requires that "[e]very student must be represented by, and pay a fee to, a central student government" – in this case, the respondent YFS. The framework is plainly in conflict with York University's regulation. But, as I have said, the existence of a conflict with the University Acts does not depend on specific legislative provisions or regulatory authorization. The framework interferes with university governance simply by virtue of limiting universities' authority to make decisions regarding the role played by student associations, however they choose to make them.

[64] The Minister's argument that the University Acts do not bind the Crown is untenable. This argument relies on the premise that no provision in any of the statutes expressly binds the Crown, but again, it overlooks the very nature and purpose of universities and the individual Acts and the governance structures they establish: universities are created to be independent, self-governing bodies, and it is fanciful to suggest that they are not. To conclude that the University Acts do not bind the Crown would wholly frustrate their clear purpose, and this is sufficient to establish that the legislation binds the Crown: *Alberta Government Telephones v.*

Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225, at p. 281. Universities' receipt of government funding does not alter this.

[65] The Minister makes the alternative argument that the government is free to contract with universities to provide public funds subject to conditions that include the framework. There is no principled reason, the Minister submits, why it could impose the framework by contract while being prohibited from doing so as a condition in the guidelines.

[66] This is another example of the difference between spending done by executive action and spending done by a natural person. The government can, like a natural person, enter contracts, and the framework is in some ways analogous to a contract, but there is a significant difference: public universities are dependent on the monies they receive annually as part of their operating budgets. This dependence is one of the things that gives rise to the need for operational independence from government that the University Acts establish. Although government funding has decreased significantly as a percentage of university budgets over the course of the last generation, its contribution to university operating expenses remains significant. It is simply unrealistic to suggest that universities could refuse these operating grants if they were unwilling to implement the ancillary fees framework.

[67] The Minister argues that a conclusion that she cannot impose the framework necessarily puts the government's ability to regulate tuition fees at risk. This issue was not fully developed in argument and need not be resolved for the purposes of determining this appeal: the respondents do not contest the government's ability to regulate tuition fees in the context of providing annual operating grants and no submissions were made on the matter by any universities. In any event, I would note that the issue is not whether tuition fees may be regulated, but *how* they may be regulated, and in particular whether they can be regulated by means of executive action rather than legislation.

[68] In summary, the ancillary fees framework is inconsistent with the University Acts and cannot be imposed on universities by executive action. That is sufficient to resolve this appeal, and there is no need to address the remaining arguments.

CONCLUSION

[69] I would dismiss the appeal.

[70] The respondents are entitled to their costs from the appellant, fixed in the agreed amount of $20,000, all inclusive. No costs order is made concerning the interveners.

Released: August 4, 2021 JMF

"I agree. K. van Rensburg J.A."