

**SUPERIOR COURT OF JUSTICE
(TORONTO REGION)**

BETWEEN:

GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

Applicant

- and -

**JOHN DOE, JANE DOE, TAYLOR DOE, PERSONS UNKNOWN, ABDURRAHEEM
DESAI, AVIRAL DHAMIJA, ERIN MACKEY, HEIGO PARSA, KABIR SINGH,
KALLIOPE ANVAR MCCALL, MOHAMMAD YASSIN, SARA RASIKH, SERENE
PAUL and SAIT SIMSEK MURAT**

Respondents

**FACTUM OF THE INTERVENER, THE UNIVERSITY OF TORONTO FACULTY
ASSOCIATION (UTFA)**

June 11, 2024

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TO: SERVICE LIST

PART I – OVERVIEW

1. An interlocutory injunction would substantially and irrevocably interfere with academic freedom, a freedom that is necessary to the continuance of any mature democracy.¹ The Applicant contracted with UTFA to protect the academic freedom of its members. That contract includes a commitment by the Applicant to refrain from interfering, restricting, or coercing UTFA members in the exercise of academic freedom, and to protect against “unilateral changes to approved policies and practices relating to terms and conditions of employment.”² Academic freedom cannot survive if the parameters of freedom of expression on campus are unilaterally decided by the Applicant and enforced through state power, including the power to arrest those who exceed the imposed limits. An injunction would deny UTFA members their full right to academic freedom by unilaterally setting new limits on its exercise. As such, the considerations of irreparable harm and balance of convenience inescapably lead to the conclusion that the application must be denied.³

PART II –FACTS

2. UTFA is the official representative of University of Toronto faculty members and librarians with respect to the terms and conditions of their employment. Since 1977, a Memorandum of Agreement (the “MoA”) has governed the relationship between the Applicant and UTFA.⁴ The MoA can only be amended by mutual consent of the parties.

3. The Applicant’s obligations to UTFA and its members are enshrined in the MoA. These obligations include the Applicant’s agreement to:

1 *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 69.

2 [Memorandum of Agreement](#) between The Governing Council of the University of Toronto and The University of Toronto Faculty Association, amended January 1, 2024, at Article 1 (“MoA”).

3 *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (“*RJR-MacDonald*”) at 334, 340-349.

4 MoA, [supra note 2](#).

- abide by the principles of academic freedom, including the right to criticize the University and society at large, and freedom from institutional censorship;⁵
- provide freedom from discrimination, interference, restriction, or coercion in respect of any activity pursuant to the principles of academic freedom, and on the basis of political affiliation or belief; and⁶
- refrain from unilaterally altering policies and practices applicable to UTFA members, including those affecting the employment security of members.⁷

4. The MoA incorporates, by reference, Applicant policies governing terms and conditions of employment, including the *Statement of Institutional Purpose*, which reads:

Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.⁸

5. In its Reply affidavits, the Applicant included three affidavits from UTFA members. One of those affidavits incorrectly asserted UTFA’s support for the encampment.⁹ In fact, UTFA has not taken a position on the encampment. Some members support and participate in the encampment. Others oppose it. UTFA simply takes the position that its duty is to safeguard the MoA, under which UTFA’s members have the protected right to participate in, support, or oppose the encampment.

PART III - ISSUES AND LAW

⁵ *Ibid.*, Article 5.

⁶ *Ibid.*, Article 9.

⁷ *Ibid.* at Articles 1 and 2.

⁸ Statement of Institutional Purpose, University of Toronto Governing Council, online:

<https://governingcouncil.utoronto.ca/university-toronto-statement-institutional-purpose> [“Statement of Institutional Purpose”].

See also Statement on Freedom of Speech, University of Toronto Governing Council, online:

<https://governingcouncil.utoronto.ca/secretariat/policies/freedom-speech-statement-may-28-1992> [“Statement on Freedom of Speech”]; Code of Behaviour on Academic Matters, University of Toronto Governing Council, online:

<https://governingcouncil.utoronto.ca/secretariat/policies/code-behaviour-academic-matters-july-1-2019> [“Code of Behaviour”],

Appendix B; Statement on Prohibited Discrimination and Discriminatory Harassment, University of Toronto Governing Council, online:

<https://governingcouncil.utoronto.ca/secretariat/policies/harassment-statement-prohibited-discrimination-and-discriminatory-harassment> [“Statement on Prohibited Discrimination”] at para 1; Code of Student Conduct, University of Toronto

Governing Council, online: <https://governingcouncil.utoronto.ca/secretariat/policies/code-student-conduct-december-13-2019>

[“Code of Student Conduct”], Article A at para 8.

⁹ Affidavits of Professors Brian Schwartz, Mark Fox, and Matthew Light, affirmed June 5, 2024. See, especially, the affidavit of

Professor Light at para 3 and exhibit “1”.

A. THE COURT CANNOT RELIEVE THE APPLICANT OF ITS POLICY OBLIGATIONS

6. The Applicant has an obligation to protect all members of the University community when allegations of harassment, discrimination, violence, and hate speech are raised. Before seeking relief from the Court, the Applicant must follow and enforce its own internal policies.¹⁰ These policies—which include the *Code of Behaviour*, the *Statement on Prohibited Discrimination*, and the *Code of Student Conduct*—allow the Applicant to investigate and take remedial steps when harm is proven, without violating academic freedom in the process. The balance of convenience does not permit the Applicant to take drastic legal steps in place of its own policies.

B. THE PRESENT MATTER IS A LABOUR DISPUTE

7. Any restriction on academic freedom falls squarely within the statutory meaning of “labour dispute”¹¹ under the *Courts of Justice Act*. Academic freedom is a term and condition of employment for UTFA members under the MoA. As such, particular “care, balance and sophistication” must be brought to the determination of the application.¹²

8. The injunctive relief sought would restrict the ability of UTFA members to engage in specific types of organized criticism of the Applicant’s actions and policies. This would restrict academic freedom in a manner that was never bargained with UTFA and is plainly contrary to the MoA, which protects “the right to criticize the University of Toronto and society at large” and prohibits the Administration from exercising coercion in response to that criticism by dictating the time, place, or manner of the critique.¹³

¹⁰ Code of Behaviour, *supra*; Statement on Prohibited Discrimination, *supra*; and Code of Student Conduct *supra*.

¹¹ *Courts of Justice Act*, RSO 1990, c C.43, s. 102(1).

¹² *Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Workers of Canada, Local 2693* (2001), 52 O.R. (3d) 694 (CA) at para 15.

¹³ MoA, *supra* note 2, Article 5 and Article 9.

9. The Applicant’s contractual commitments in the MoA are consistent with the case law that defines academic freedom as the “freedom [of the individual] to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution.”¹⁴ The Applicant’s request for injunctive relief unilaterally upends this founding principle governing the relationship between UTFA and the Applicant. If granted, the relief sought by the Applicant will immediately, directly, and substantially affect the academic freedom of UTFA members by using the Court to enforce new limits.

C. THE REQUESTED RELIEF WILL HAVE DIRECT, LASTING, AND IRREPARABLE EFFECTS ON UTFA AND ITS MEMBERS

10. Courts have highlighted the importance of judicial restraint when academic freedom is engaged, “no matter how controversial or provocative” the ideas may be.¹⁵ In its recent denial of an injunction at McGill University, a Quebec Court reasoned that universities are special places, where it may well be that the rights to freedom of expression and peaceful assembly must be given special weight.¹⁶

11. Yet, the injunctive relief sought in this case would empower police to arrest UTFA members for protected activities, without engaging any of the bilateral processes the Applicant agreed to in the MoA. Crucially, the injunction will effectively amount to a final determination of the matter, as the interlocutory relief mirrors the permanent relief precisely and would include the dismantling of the encampment protest.¹⁷ If an injunction is granted and UTFA pursues an action for breach of the MoA in another forum, a contractual remedy that makes UTFA or its members whole may be impossible.

¹⁴ *Pridgen v University of Calgary*, [2012 ABCA 139](#) (“*Pridgen*”) at para [114](#).

¹⁵ *Maughan v UBC*, 2008 BCSC 14 at para [493](#); aff’d [2009 BCCA 447](#); *McKenzie v Isla*, [2012 HRTO 1908](#) at para 35

¹⁶ *Medvedovsky c. Solidarity for Palestinian Human Rights McGill (SPHR McGill)*, [2024 QCCS 1518](#) at para [37](#)

¹⁷ See *RJR-MacDonald*, [supra](#) at 338; and *WCP V Montreal Industrial c. 12176254 Canada inc.*, [2023 QCCS 363](#) at paras [4-6](#).

12. The relief sought in this application would therefore substantially undermine UTFA's representational role by unilaterally imposing limits on the scope of the MoA's protection of academic freedom. Given UTFA's associational rights to represent its members without interference or undue employer action, this could impede UTFA's ability to legitimately advance collective goals in the future. This extreme interference with the MoA weighs heavily against the granting of an interlocutory injunction. As this Court has reasoned, in the context of a labour dispute, it is "an extraordinary remedy to be granted 'only in the most exceptional circumstances' and 'only when the necessity for it is manifest' since it may tip the balance in favour of the employer".¹⁸

13. Beyond the harm to UTFA and its members, the order sought would harm the public interest.¹⁹ "Academic freedom and freedom of expression are inextricably linked."²⁰ This link is heightened in a context where the Applicant is governed by the *Charter*.²¹

14. Above all, academic freedom must be protected where academic speech is controversial—or even distressing. This is precisely the moment for which the parties bargained. The Court should not allow the Applicant to renege on its commitments to UTFA, its policies, and on core democratic values.

PART IV – CONCLUSION

15. UTFA remains available to provide assistance to the Court, including in the form of a brief reply, in the event that the Applicant or Respondents make submissions that invoke UTFA's role, UTFA members, or the MoA and incorporated policies.

¹⁸ *ECP, Engineered Coated Products v. United Steel et al*, [2010 ONSC 7197](#) at para [8](#)

¹⁹ *RJR-MacDonald*, [supra](#) at 343-344, 346.

²⁰ *Pridgen*, [supra](#) at para [115](#). See also para [117](#).

²¹ UTFA's position is that the Applicant is governed by the *Charter* and adopts the submissions of the Canadian Association of University Teachers et al. Further, this is a labour dispute, where, even if the *Charter* were not directly engaged, "free expression is particularly critical...the values associated with free expression relate directly to one's work...free expression in the labour context benefits not only individual workers and unions, but also society as a whole." *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, [2002 SCC 8](#) at paras [33-34](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 11th day of June, 2024.

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SCHEDULE “A” – LIST OF AUTHORITIES

1. Legislation

Courts of Justice Act, RSO 1990, c C.43, s. 102(1)

2. Case Law

ECP, Engineered Coated Products v. United Steel et al, [2010 ONSC 7197](#)

Industrial Hardwood Products (1996) Ltd. v. International Wood and Allied Workers of Canada, Local 2693 ([2001](#)), [52 O.R. \(3d\) 694 \(CA\)](#)

Maughan v UBC, 2008 BCSC 14 at para [493](#)

Maughan v University of British Columbia, [2009 BCCA 447](#)

McKenzie v Isla, [2012 HRTO 1908](#)

McKinney v University of Guelph, [\[1990\] 3 SCR 229](#)

Medvedovsky c. Solidarity for Palestinian Human Rights McGill (SPHR McGill), [2024 QCCS 1518](#)

Pridgen v University of Calgary, [2012 ABCA 139](#)

RJR-MacDonald Inc v Canada (Attorney General), [\[1994\] 1 SCR 311](#)

RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd, [2002 SCC 8](#)

WCP V Montreal Industrial c. 12176254 Canada inc., [2023 QCCS 363](#)

3. University Policies and Agreements

Code of Behaviour on Academic Matters, University of Toronto Governing Council, online:
<https://governingcouncil.utoronto.ca/secretariat/policies/code-behaviour-academic-matters-july-1-2019>

Code of Student Conduct, University of Toronto Governing Council, online:
<https://governingcouncil.utoronto.ca/secretariat/policies/code-student-conduct-december-13-2019>

Memorandum of Agreement between The Governing Council of the University of Toronto and The University of Toronto Faculty Association, amended January 1, 2024

Statement of Institutional Purpose, University of Toronto Governing Council, online:
<https://governingcouncil.utoronto.ca/university-toronto-statement-institutional-purpose>

Statement on Freedom of Speech, University of Toronto Governing Council, online:
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Court File No.: CV-24-00720977-0000

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Proceeding commenced at Toronto

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