CITATION: **University of Toronto v. Doe et al. 2024 ONSC 3299**

COURT FILE NO.: CV-24-00720977
DATE: 20240610

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: THE 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, KALLIOPÉ ANVAR MCCALL, MOHAMMAD YASSIN, SARA RASIKH, SERENE PAUL and SAIT SIMSEK MURAT

Respondents

BEFORE: Koehnen J.

COUNSEL: See attached counsel sheet

HEARD: In writing

ENDORSEMENT

[1] On June 1, 2024 and June 3, 2024, I issued dispositive endorsements with respect to a number of motions to be added as necessary parties and/or as intervenors in this matter. Both endorsements provided that reasons would follow. These are those reasons.

Background

[2] The University of Toronto seeks an urgent interlocutory injunction the effect of which would be to compel the removal of an encampment of protesters on the grassy area of what is known as Kings College Circle at the centre of the University of Toronto. The urgency

arises because the encampment is adjacent to Convocation Hall, the building in which graduation ceremonies are historically carried out. They are scheduled to run between June 3 and June 21, 2024. The area is scheduled to be used for a variety of other activities throughout the summer, including a children's camp.

[3] A group of protesters has set up an encampment on that grassy area. They say they will not leave unless the University, among other things, divests itself of investments in companies that provide weapons to Israel and terminates relationships with Israeli academic institutions that are perceived to aid the Israeli military or have campuses on occupied territories. For the reasons set out below, and as set out in my dispositive endorsements, I dismiss the motions to be added as a necessary party, dismiss the motions to be added as added party intervenors under Rule 13.01 and grant the motions to be added as intervenors under Rule 13.02.

The Necessary Parties

[4] The Canadian Union of Public Employees 3902 and the University of Toronto Faculty Association apply to be joined as necessary parties to the proceeding pursuant to Rule 5.03 of the Rules of Civil Procedure. In my dispositive endorsement I denied both standing as necessary parties.

[5] Rule 5.03(1) provides:

> Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

[6] Rule 5.03(4) provides:

> The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

[7] The parties seeking to be added as necessary parties submit that Courts have added parties under Rule 5.03 (1) when they are likely to be affected or prejudiced by the order being sought or if the order sought will determine the rights of a person who is not a party. In support of those propositions, they rely on *Ontario Federation of Anglers and Hunters v Ontario*,[1] *Abrahamovitz v. Berens*,[2] and *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*.[3] I will address those cases later in these reasons.

[8] Both CUPE and the Faculty Association submit that they meet the test to be added as necessary parties because they are the official representatives of individuals whose rights will be directly affected by the relief sought. They say the order sought would bypass CUPE and the Faculty Association and change the terms of the agreements pursuant to which their members work for the University. Among the examples that the Faculty Association gives of such infringements are breaches of: guarantees of academic freedom, the right to criticize the University, the right to criticize society at large and agreements about the circumstances in which the employment of its members can be terminated.

[9] The University denies that it is changing any terms of any employment agreements.

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[1] *Ontario Federation of Anglers and Hunters v Ontario*, 2015 ONSC 7969 at paras 10-11
[2] *Abrahamovitz v. Berens,* 2018 ONCA 252 at para 44
[3] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc*., 2020 ONSC 399.

[10] I do not find the alleged changes to employment agreements to be a critical factor. If there is any attempt to change such agreements, those efforts are properly the subject of a grievance procedure under the agreements between the University and CUPE or the Faculty Association.

[11] CUPE further submits that it is a necessary party because:

(i) The named respondents include some of its members.

(ii) CUPE has been involved as a neutral party in ongoing negotiations with the University.

(iii) CUPE was involved in addressing some of the health and safety concerns within the encampment.

[12] I do not find those to be persuasive reasons to add CUPE as a necessary party. One CUPE member is already a named respondent. She is being defended by the same law firm and same lawyers as those who filed CUPE'S necessary party motion. I was not given any reason for which CUPE cannot advance whatever position it wishes to through the defence of that named respondent. I presume that the positions of the named respondent and CUPE will not conflict, otherwise the same lawyers and law firm could not be acting for both.

[13] The Faculty Association submits that it is a necessary party because, in addition to allegedly changing employment agreements between the University and its members, the relief sought would force its members to vacate the encampment and would authorize the removal of members who violate any order requiring them to vacate. It does not appear that any of the named respondents are members of the Faculty Association. To the extent that its members are present at the encampment, I was given no reason for which they could not swear affidavits in support of the named respondents.

[14] In my view, the approach of CUPE and the Faculty Association to the issue either ignore or do not place sufficient weight on the word "necessary" in the phrase "necessary party."

[15] A necessary party is someone whose presence is *necessary* to adjudicate the issues in the litigation in the sense that the proceeding is not properly founded without such parties. The University seeks an injunction against individuals who have formed an encampment on King's College Circle. The Faculty Association and CUPE have not done that. The University seeks no relief against either of them.

[16] Rule 5.03 is about naming those parties that a claimant must sue if it seeks certain relief. It is not about including parties who happen to have a social or political interest in the issue being litigated either as a member of society at large or as a member of a particular interest group. As the editors of Holmested and Watson: *Ontario Civil Procedure* put it:

> The necessary parties principle is one requiring compulsory joinder of parties. It is concerned with the minimum size of the litigation — how few parties may a plaintiff join in the litigation and still have the court adjudicate a claim? Whereas issues of the permissive joinder of parties (i.e., how large may the action become through joinder of parties?) arise quite frequently, problems of compulsory joinder are a relatively rare occurrence since the necessary parties principle is a very narrow one. Ordinarily it is up to the plaintiff to decide which persons will be involved in the litigation. Should the plaintiff choose to sue B alone and not B and A, that is ordinarily of no concern to B or to A or to the court.[4]

[17] There is a material difference between situations in which a court decision might affect the general interests of parties who have an opinion about an issue before the court and a

[4] Holmested and Watson: *Ontario Civil Procedure*, at § 19:9.

situation in which the court will make an order that affects a specific right that a party who is not before the court has. In the former, the person is not a necessary party. In the latter the person is a necessary party. The three cases on which CUPE and the Faculty Association rely illustrate this distinction.

[18] In Ontario *Federation of Anglers and Hunters v Ontario*,[5] the province had issued a policy which preserved hunting and fishing rights that certain First Nations had received under their treaties with the Crown. The Applicant brought a proceeding against Ontario arguing that the First Nations did not have such rights under their treaties but did not name the First Nations in its Application. That claim was a direct attack on a specific right the First Nations had. It was not an attack on a general government policy in which some members of certain First Nations might merely have been interested in the sense that many members of the public are interested in government policy.

[19] In *Abrahamovitz v. Berens*,[6] the plaintiffs claimed to be entitled to an income stream from a property. The defendant property manager had withheld part of the income because of an acknowledgment that gave a former property manager a right to a part of the income. The plaintiffs had not joined the former property manager. There again, the claim was a direct attack on the former property manager's right to a part of the income, not a dispute between the plaintiff and his own property manager in which other property managers might be interested because they are in the same industry.

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[5] *Ontario Federation of Anglers and Hunters v Ontario*, 2015 ONSC 7969 at paras 10-11
[6] *Abrahamovitz v. Berens,* 2018 ONCA 252 at para 44

[20] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*[7] concerned a commercial property that was subject to easements in favour of three owners of the parcels that comprised the property. A dispute arose between two of the owners when the first owner proposed a development on its land that affected certain easements in favour of the second owner. The third property owner was joined out of a concern that it was a necessary party. The Court dismissed the action against the third owner and found it was not a necessary party because it was not the beneficiary of the specific easements in dispute. Once again, although the third owner might have been interested in the outcome of the case in the sense that it could create a precedent that could affect it in the future, it did not have a specific legal right that was being affected by the proceeding.

[21] Here, the proposed necessary parties have no interest in the outcome of the court proceeding apart from the interest that any member of the University community or the public might have. That does not require the University to join all members of its community or join organizations that reflect all members of its community. Indeed, the proposed necessary parties have less of an interest in the outcome of the case than do groups like University students or donors to the University. Students and donors contribute to the University financially. It is money that they have paid to the university that is being invested in ways to which the protesters object, not the money of CUPE or the Faculty Association.

The Motions to Intervene

[7] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc*., 2020 ONSC 399.

[22] There are two bases on which a party can seek to intervene in a proceeding. They are set out in Rules 13.01 and 13.02.

[23] Under Rule 13.01, a person can move for leave to intervene as an added party. Intervention as a party gives the intervenor the same rights to participate in fact-finding as any other party. This includes leading evidence, cross-examining witnesses, making oral submissions at the hearing and having a right of appeal.[8] Such rights are, however, subject to the limitation that an intervenor under this provision cannot introduce new issues and that the court has the authority to impose limits on the extent of the intervenor's participation.

[24] The groups seeking to intervene as added parties under Rule 13.01 are: CUPE 3902, the University of Toronto Faculty Association, Hillel Ontario, the National Council of Canadian Muslims, the Council of Ontario Universities, and the Network of Engaged Canadian Academics. In my dispositive endorsement dated June 3, 2024, I denied standing to all intervenors under Rule 13.01.

[25] Intervention under Rule 13.01 is available where the person claims:

> (a) an interest in the subject matter of the proceeding;
>
> (b) that they may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

[26] Courts have applied these three criteria in light of the following principles:

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[8] Morden & Perell, *The Law of Civil Procedure in Ontario*, 5th edition at page 581.

(a) An "interest in the subject matter of the proceeding" has been interpreted to include a public interest in the proceeding, to the extent that the party's interest is over and above that of the general public.[9]

(b) The court takes a liberal approach to the interpretation of Rule 13.01(1)(a), at least in relation to appeals,[10] but may take a more limited approach in cases of first instance.[11]

(c) The court considers the nature of the case, the issues which arise, and the likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties.[12]

(d) A party will not make a useful contribution to a proceeding if the intervenor simply proposes to repeat the issues put forward by the main parties, although some overlap may be permissible.[13]

[27] I agree that each of the proposed intervenors could be seen to have an interest in the subject matter of the proceeding over and above that of the general public.

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[9] *Halpern v. Toronto (City) Clerk,* 2000 CanLII 29029 (ON SCDC) at para. 15.
[10] *Butty v. Butty* (2009), 2009 CanLII 92125 (ON CA), 98 O.R. (3d) 713 (C.A.), at para. 8.
[11] *Canadian Blood Services v. Freeman*, 2004 CanLII 35007at para. 26; *Halpern v. Toronto (City) Clerk,* 2000 CanLII 29029 (ON SCDC) at paras. 9-10; *Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2005 ABCA 320;
[12] *Halpern,* at para. 17, citing *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd*. (1990), 1990 CanLII 6886 (ON CA), 74 O.R. (2d) 164 (C.A.), at p. 167; *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2023 ONSC 3604 at para. 27.
[13] *Six Nations of the Grand River Band of Indians v The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2023 ONSC 3604 at para. 28.

[28] CUPE in the Faculty Association have an elevated interest due to their involvement with university issues. Hillel Ontario it is a Jewish student organization which has an interest in protecting its members and others against antisemitic communications which they allege emanate from the encampment. The National Council of Canadian Muslims has an interest in protecting its members and others from anti-Palestinian or Islamophobic rhetoric which they say has arisen in connection with the encampment. The Council of Ontario Universities represents, as its name suggests, universities in Ontario, some of which have had similar encampments form on their campuses. The Network of Engaged Canadian Academics represents the views of university faculty which may also have a heightened interest in protests of this nature above and beyond the ordinary member of the public.

[29] If a proposed intervenor meets one of the three criteria in Rule 13.01(1), the court turns to Rule 13.01(2) and asks whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding. In this context, the court asks itself whether "the contribution that might be made by the intervenors is sufficient to counterbalance the disruption caused by the increase in the magnitude, timing, complexity and costs of the original action."[14]

[30] In my view, the intervenors would unduly delay or prejudice the determination of the rights of the parties to the proceeding. Their contributions do not strike me as warranting the disruption that their participation as parties would cause. It struck me that many of the

[14] *Six Nations of the Grand River Band of Indians v The Attorney General of Canada and His Majesty the King in Right of Ontario*, 2023 ONSC 3604 at para. 30

contributions of the proposed added parties would duplicate those of the University and the Respondents. I have already addressed this point in connection with CUPE and the Faculty Association. With respect to Hillel Ontario, I note that one of its "General Executives" has sworn an affidavit in support of the University's position which was included in the University's motion record.

[31] It is important to keep in mind that this matter is an injunction involving some urgency. The University and the named respondents advised me that, without necessary parties or intervenors, they would require two days of court time to argue the matter. The University has framed the motion narrowly as calling on the court to determine whether protesters have a right to appropriate private property of the University and exclude other members of the University community or the general public from it. If additional entities were added as parties with a right to file evidence and cross-examine, the record would be expanded considerably. In particular, I note in this regard that the Council of Ontario Universities sought to introduce evidence and argument about encampments at other universities and the effect that any order of this court would have on those campuses. That would considerably broaden the scope of the matter before me. The matter before me involves a single encampment at the University of Toronto. If I admitted into the record evidence about events at other universities, there would no doubt be parties who would want to (and would be presumptively entitled to) deliver responding evidence. That evidence would have little, if anything, to do with the encampment at the University of Toronto apart from the fact that the protesters on other campuses appear to be asking for similar action from their universities.

[32] I was also concerned that the nature of the submissions of the other intervening parties on issues such as antisemitism, Islamophobia, anti-Palestinian discrimination and competing historical narratives of events in the Middle East would unduly complicate and quickly derail this proceeding if they were made by entities who had been accorded rights of participation as parties.

[33] At the same time, I recognize that the manner in which the University has framed the issue may not be the appropriate way of doing so. It was clear from the scheduling case conference that the respondents and certain intervenors will be arguing that the issue is more appropriately framed as a breach of Charter rights to freedom of speech and freedom of association. They also submit that the University cannot properly be considered to be private property which is exempt from the Charter in the same way that the front lawn of a private residence might be. In light of the uncertainty at this early stage about the precise nature and scope of the application, it would, in my view, be inappropriate to exclude entirely those who sought status as added party intervenors. I therefore granted them standing as intervenors under Rule 13.02.

[34] Intervention under 13.02 is commonly described as intervening as a friend of the court. It does not give the intervenor the right to participate in the fact-finding process but more commonly allows the intervenor to assist the court by way of argument.

[35] When considering intervention under Rule 13.02, the court weighs the same factors that it does under Rule 13.01, namely:

(a) the nature of the case;

(b) the issues which arise;

(c) the likelihood that the proposed intervenor will make a useful and distinct contribution not otherwise offered by the parties; and

(d) whether the intervention will cause injustice to the parties or undue delay.[15]

[36] Eighteen parties sought status as intervenors under Rule 13.02. I granted all status as intervenors when considering the factors set out in paragraph 35 above.

[37] The nature of the case is one that has captured widespread public interest. It also appears to have aroused passion on the part of those who support and those who oppose the encampment. That passion has given rise to a sense of injury on both sides with some being injured by allegedly antisemitic conduct and others being injured by allegedly anti-Palestinian conduct that has arisen in connection with the encampment. Those are issues on which people should have the right to be heard. I would be loath to deprive the court of the competing information and views that the various intervenors can bring to the table.

[38] At this early stage I am unable to determine the extent to which those issues will be relevant to my determination of the motion. I would, however, prefer to err on the side of over inclusion than on the side of over exclusion. I am satisfied that the intervention of the large number of intervenors I have allowed will not delay the proceeding. All intervenors will be restricted to written submissions of between 5 and 10 pages depending on the intervenor. None will have the ability to introduce evidence, cross-examine or make oral submissions.

[39] Granting status as an intervenor on the motion, however, does not mean that all or any of those entities will have intervenor status on any appeals arising out of the motion or in any

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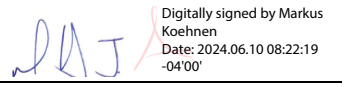
[15] *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd*. (C.A.), 1990 CanLII 6886 (ON CA)

other proceedings that may arise out of similar protests. Those determinations will have to be made by the relevant courts in light of the circumstances with which those courts are confronted.

Date: June 10, 2024



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