CITATION: Courchene v. Carleton University Students' Association Inc, 2016 ONSC 3500
COURT FILE NO.: 16-68352
DATE: 2016-05-27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ASHLEY COURCHENE Applicant	Ken Dunham, for the Applicant
– and –	
CARLETON UNIVERSITY STUDENTS' ASSOCIATION, INC., CARLETON UNIVERSITYSTUDENTS' ASSOCIATION, and FRENA HAILEKIROS Respondents	Katie Black & Erik Labelle for the CARLETON UNIVERSITY STUDENTS' ASSOCIATION, INC., Respondent Ben Mills and Linden Dales for CARLETON UNIVERSITYSTUDENTS' ASSOCIATION, Respondent Colin Baxter for FRENA HAILEKIROS, Respondent
	HEARD: April 29, May 3, 5, and 24, 2016

T.D.RAY, J

Background

[1] The applicant brings this interim injunction and application to prevent the respondent Hailekiros from taking the position of Vice-President, Student Affairs, Carleton University Students' Association ("CUSA") pending the hearing of this application, following an election January 27-28, 2016, and the applicant's disqualification from taking the position even though he received the greatest number of votes. The applicant seeks an order setting aside her disqualification, and ordering that he be permitted to occupy the post of Vice-President, Student Services in accordance with the decision of the electors.

[2] The election of the various positions within CUSA took place January 27 and 28, 2016. CUSA has a procedure for the conduct of the election, rules for the conduct of candidates seeking election, plus a complaint and appeals process. On January 29, a complaint was received by the Chief Electoral Officer (CEO) that two students, one of whom had been a candidate (but not the applicant), had breached the rules of the election by entering a class room on election day, and addressed the students by way of campaigning on behalf of their 'change' slate. Without conducting an investigation, questioning the students in question or anyone in the class at the time, the CEO determined on January 29, 2016, that the two students had breached the election rules and that three offences had been established. He ordered that not only the student seeking elective office was to be disqualified, but also disqualified the rest of the slate running under the name "change" under a three-strikes-and-you-are-out rule. His decision was appealed to an Electoral Board. After hearing submissions but no evidence, the Board decided on February 22, 2016 that there was no merit to the complaint that the student in question had impersonated a professor at the material time, and ordered that those running under the "change" slate were not to be disqualified en masse (since the three strikes rule had become inapplicable), but that other punishment would remain as against the slate.

[3] The competing slate "Your Carleton" appealed under the procedures in place to the Constitutional Board. No party sought to adduce evidence before the Board although they knew they had that right. On March 22, 2016, the Constitutional Board upheld the Electoral Board's decision but also determined a new and additional offence had been committed. The new offence that was determined by the Constitutional Board was that the students in question had violated a section of the Voting Day Policy that prohibits candidates from having voters vote using the candidate's own computer, smartphone or tablet. With the additional finding, there were again three offences; and again the entire slate, including the applicant, was disqualified. Since the applicant had received the most votes and had won the election but had been disqualified, the second place person, the respondent Hailekiros, was considered the successful candidate for Vice-President, Student Services.

[4] It is acknowledged that the principal time and challenges for the job of VP Student Services occur during May through August so there is some urgency in dealing with this issue. After hearing brief submissions concerning the injunction, I advised the parties that in the interests of an early decision, I felt that their time and mine would be better spent dealing with the merits of the application. I adjourned for two days to hear argument on the application, and requested that counsel attempt to keep their arguments to one hour each. We re-assembled. Regrettably submissions occupied all of the second day without completion; and because of my schedule adjourned to my next available day: two weeks hence.

Jurisdiction and Preliminary Issues

[5] The jurisdiction of the Court to deal with this matter has been raised. The respondent CUSA Inc. claims there is no connection between it and CUSA, that CUSA Inc. should not be a party; and should be let out of the application. Hailekeros adopts the same argument and argues that CUSA is like a political party in that it is an unincorporated student association not intended to have a legal presence and is therefore not subject to judicial revi ew

[6] It seems that CUSA Inc. was incorporated to deal with a campus pub, and a medical and dental insurance plan for the students. CUSA Inc.'s By-Laws provide that CUSA Inc. will be governed by three trustees, who are to be chosen from and elected by Students' Council, which consists of the individuals elected by the undergraduate student body in the January election. The elected members of Students' Council are paid by CUSA Inc. The students that work in what is called CUSA are employees of CUSA Inc., including all the students involved in the election and appeal process. Out of an abundance of caution I adjourned the motion to permit service of the materials on those students that consider themselves representative of CUSA (i.e. Students' Council members), even though counsel for CUSA Inc. advised that all of those students were in court.

[7] Following an adjournement to May 3, 2016 to allow CUSA representatives to retain counsel, counsel for the applicant agreed to let CUSA Inc. out of the application on the basis of an undertaking agreeable to the applicant that all parties would be bound by my decision. In the meantime CUSA had retained counsel. I advised the parties that I would hear the application on its merits on May 5, and therefore it would not be necessary to hear the injunction application.

[8] Having heard submissions of all parties on the issue, and notwithstanding the agreement by the applicant to let CUSA Inc. out of this proceeding, I am satisfied that CUSA Inc. and CUSA are one and the same. They have the same objects, the same activities and the same students. There is nothing to distinguish CUSA students from CUSA Inc. employees. The website shows the two to be the same. The corporate structure invites that conclusion, with elected members of Students' Council being members of CUSA Inc. The applicant was seeking election to Students' Council. He actually won the election but was disqualified by reason of another student's behaviour. Something he knew nothing about until well after the fact. I am not prepared to dismiss this proceeding as against CUSA Inc. If I am wrong, then I can still be assured that all persons affected by my decision have had an opportunity to be heard. I am satisfied the proper parties are before the court.

[9] Notwithstanding my finding, I am satisfied that even if CUSA were a separate and distinct unincorporated association entity, it is open to the applicant to seek judicial review. Carleton University is a publicly supported institution, and holds a

prominent place in Canadian post-secondary education. CUSA holds a prominent place in the life of the student body. All students are required to be members. Its website describes itself as an *"incorporated, not-for-profit, student run organization. We are your undergraduate student government, your campus services, your clubs and societies, your student life, your community campaigns, your students' association. Every Carleton undergraduate student is a member of CUSA.......*". It is expected by the public and the students, particularly in light of the educational objects of the University, that the student-run institutions such as CUSA will conduct themselves in accord with the rules of natural justice. While deference is owed to the procedures, practices and decisions of CUSA in the conduct of its affairs, its decisions are not immune from judicial review. The applicant was the successful elected candidate for a paid position but has been denied the right to hold that position because of the alleged conduct of another student. The votes for the successful applicant of more than 2340 students have effectively been declared void.

[10] If CUSA exists as an unincorporated association under these circumstances, it must still conduct its affairs in accordance with the rules of natural justice; and that invites judicial scrutiny.[1] In considering the test recently described by Goudge, J.A., in *Setia v. Appleby College* [2], I find that the following factors relevant to whether judicial is available:

a. The nature of the decision maker- CUSA and CUSA Inc. are interchangeable, are an integral part of Carleton University, a public university, and are responsible for a million dollar budget for student services in circumstances that require considerable public funds.

b. The decision maker's relationship to other parts of government or other statutory schemes- This factor is less important here since CUSA apparently has fewer dealings with government.

c. The character of the matter for which review is sought- Apparently the Vice–President, Student Services has responsibility for overseeing or providing all student services; and in company with the VP-Finance administers a budget of almost half a million dollars. Election to this position is an important part of the governance of the students at Carleton University. The successful candidate has an important role to play in the life and health of students. This person also decides – along with the five other executive members – on the Trustees for CUSA Inc. It manages a considerable budget on behalf of the student population. All students are members of CUSA.

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[1] *Rakowski v. Malagerio*, [2007] O.J. No. 369 (S.C.), at paras. 29-30.
[2] *Setia v. Appleby College*, 2013 ONCA 753, at para. 34ff.

d. The extent to which the decision is founded in and shaped by law as opposed to private discretion- There is little discretion allowed, and no private discretion. CUSA has a regulatory framework and governance process that clearly anticipates that the rules be followed. They are clear and have wide ranging consequences.

e. The suitability of public law remedies- There is a substantial public interest in student services, parents' investments, students' investments, and the financial responsibilities of CUSA. This is not a private club that would expect to conduct its business in private, and without a level of accountability.

In view of these factors, I conclude that the electoral decisions made by the Chief Electoral Officer, the Electoral Board and the Constitutional Board, whether made by employees of CUSA Inc. or CUSA, are deserving of judicial review.

Facts and Procedural History

[11] The Constitution of CUSA provides for six executive positions on Council, including Vice-President, Student Services. In addition it provides for 28 other positions that represent other faculties, schools, and associations. Council, including the executive members and other councillors, elects the three trustees of CUSA Inc. Council sets the budgets and policies for both CUSA and CUSA Inc. Council's By-Laws give effect to the Constitution, including establishing and regulating its governance framework. Council also established an 'Electoral Code' regarding its elections. The Chief Electoral Officer (CEO) administers the Electoral Code. The Code and the Constitution provide that decisions of the CEO may be appealed to an 'Electoral Board' which is made up of the University ombudsman, and four members appointed by Council. The Electoral Board has broad authority over all electoral matters including interpretation of the Electoral Code.

[12] Finally, an appeal may be taken to the 'Constitutional Board' from a decision of the Electoral Board. This Board is chaired by the University ombudsman and includes four student members who are not Council members. Its responsibilities extend beyond hearing only appeals from the Electoral Board, and include ruling on any challenges to an act of Council and its members or officers; and whether its acts contravene the Constitution, By-Laws, or Policies. It includes the power to rule on any challenge based on the Constitution, By-Laws, and Policies beyond those appearing in submissions or presentations. It has the authority to hear evidence as well as submissions. Any rulings of the Constitutional Board are final, and copies of its written decisions shall be made available at CUSA's offices for CUSA's student members.

[13] The Electoral Code authorizes the Constitution Board to interpret the Electoral Code Policy, and defines the CEO. It also defines a number of electoral offences;

and provides that a first offence will result in a warning, a second will result in the candidate being denied a 50% refund of campaign expenses, and a third will result in disqualification. Three strikes and you are out. The Code defines certain offences as "very serious"; these offences may require disqualification even for a single offence. These include 'ballot tampering' and failure to file a campaign expense report. Candidates for election to the executive are permitted to register and campaign as a slate. If the CEO receives a complaint of a breach, the candidate in question must be notified and permitted to respond. An investigation by the CEO may then take place. Decisions of the CEO are subject to appeal to the Electoral Board, and then to the Constitutional Board.

[14] On January 28, 2016 at 3pm, the CEO received a complaint from Professor Bruce Wallace. He came to the CEO's office and filed a written statement that student Ahmed Gitteh had entered a lab during a lab period, told them he was Professor Ahmed, and contacted students to get them to vote for his 'change' slate, which included the applicant. When approached by teaching assistants he admitted to being a student and left. The CEO emailed the teaching assistants for their version. The following morning Professor Wallace spoke to the CEO, provided him with the TAs' responses and gave a further statement. In his further statement Prof. Wallace said that he was never in the classroom when Gitteh was in the room and that he had been given the information by the TAs. He also said that Gitteh had sat at the back of the room, encouraged students to support his slate, and encouraged students to use the lab PCs to cast their votes. Later, on February 11, after the CEO had rendered his decision, Professor Wallace clarified in writing to the Electoral Board that he had met with all of the students and TAs involved with his lab, plus Gitteh. He said that Gitteh had not introduced himself as a professor, but a student had assumed he was a professor. When Gitteh asked the same TA if he could address the class, the TA agreed since he assumed he was a professor. The same TA had told the other TAs that Gitteh was a professor since he believed that to be the case. It was a case of mistaken identity.

[15] In the meantime, the CEO issued his ruling at 3pm on January 29, 2016, in which he disqualified the entire slate for the three following offences: entering a class without the permission of the instructor, violation of the 'Voting Day Policy' for having given a class talk on voting day, and impersonating a professor. The slate appealed to the Electoral Board. The additional information from Professor Wallace plus written submissions were presented to the Electoral Board. There was no oral hearing. The Electoral Board decided that the offence of impersonating a professor had not been made out, dismissed the finding of the third offence and upheld the CEO's decision with respect to the first two offences. As mentioned above, this eliminated the "third strike" and therefore the Electoral Board overturned the CEO's decision to disqualify the slate en masse.

[16] The opposition slate 'Your Carleton' appealed to the Constitutional Board seeking reinstatement of the CEO's findings. All parties made oral submissions

but no further evidence was adduced. A majority (all four were not present) of the Constitutional Board agreed with the Electoral Board that there was insufficient evidence of impersonation, agreed that the student had entered the lab without the professor's permission, and in addition found a breach of the Voting Day Policy in that the student had encouraged the students in the lab to access their own laptops or phones to vote, similar to and therefore contrary to the Voting Day Policy that "candidates not persuade students to vote on any candidates' personal technology" – including laptops, smart phones and tablets. This final finding had never been the subject of submissions, was never advocated by 'Your Carleton', or commented on by the applicant's slate. Nor did the Constitutional Board ask for submissions from any of the parties before making this finding. This being the third offence – and described by the Constitutional Board as a most serious form of cheating the election process – re-imposed the disqualification of the entire slate, including the applicant who had nothing to do with any of the events.

The Parties' Positions

[17] The applicant's position is that the Voting Day Policy considered by the Constitutional Board was never adopted as policy by the Council and therefore could not support a finding of an offence. I do not accept that argument. The Voting Day Policy had been accepted as setting out the practices that were permitted and those that were not for some considerable time. All parties were aware of these policies and must be taken to be aware of them.

[18] The applicant also contends that the Constitutional Board had no authority to impose an offence that had not been considered by the CEO or the Electoral Board. The respondents' position is that the Constitutional Board has the explicit authority to decide all matters of policy and is not restricted to the issues coming before them as defined by the CEO and the Electoral Board.

Analysis

[19] Although the interests at stake in this application warrant this court's exercise of its jurisdiction to review the decision of the Constitutional Board, the court's review of the Constitutional Board's decision—that of a private tribunal—is limited to an examination of whether the Board (1) exceeded its jurisdiction or acted contrary to its rules, (2) acted in bad faith or (3) acted contrary to the rules of natural justice:[3]

[20] It is not the function of judicial review to re-hear the evidence and decide how the matters ought to have been decided. While I may not agree with the decision

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[3] *Street v. B.C. School Sports*, 2005 BCSC 958; *North Shore Independent School Society v. B.C. School Sports*, 1999 CarswellBC 136; *Association of Part-Time Undergraduate Students of the University of Toronto v. University of Toronto Mississauga Students' Union* (2008), 297 D.L.R. (4th) 122 (Ont. S.C.)

reached that Gitteh had gone into the classroom without seeking permission, when the contrary appears to be in the TA's statement, I don't consider that finding to be totally unsupported. I accept that the Constitutional Board had policy-making authority, and perhaps in the right circumstances the right to make a finding of an electoral offence that had not been previously considered by the CEO or the Electoral Board. I also accept that the Constitutional Board felt the conduct of the student in the lab on voting day was wrong. However it was not the Voting Day Policy on January 28, 2016 that a candidate was forbidden to talk to other students and have the student access in order to vote his or her own laptop or phone, as the Constitutional Board found. That offence may well be something the Council or the Constitutional Board may want to include in the Voting Day Policy for the future. But it is quite different from the admonition that candidates may not persuade students to vote on any candidates' personal technology. If that had been the intention at the time then all students, including the applicant, had a right to expect that the policy would have said so.

[21] I expressed the concern during argument that disqualifying the entire slate seemed unfair to those candidates who had nothing to do with the incident in question. I am satisfied that this had been well known practice that had been considered and imposed in particular circumstances for several years in order to encourage compliance with the election rules. I do not consider that the 'breach' described by the Constitutional Board, however, falls into the same category of circumstances since the Board's interpretation constitutes a serious expansion of the written policy. How do you punish an entire slate of candidates for election for malfeasance of one candidate when it was clearly not an offence at the time?

[22] The respondents suggested that if I were concerned about the Constitutional Board deciding as they did without first hearing submissions, I should set its decision aside and send it back for further consideration with the requirement that the Board first hear submissions from the parties. I do not consider that to be an appropriate order in this case. The Constitutional Board exceeded its jurisdiction in defining the offence beyond the language of the Voting Day Policy. Sending it back would not cure the jurisdictional issue, namely that the Board purported to define a Voting Day Policy that was not in force at the time of the voting, and thereby exceeded its jurisdiction.

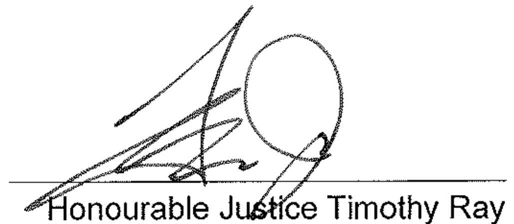
[23] The respondent Hailekiros argued that I should consider certain equitable factors as being relevant to a judicial review. In particular the respondent argued that if she is unsuccessful in resisting this application, she would lose the stipend of some $44,000 as a Vice-President, and also noted that as she is a foreign student she in any event faces an increase in fees of some $14,000, and without the additional earnings she would have to withdraw. She also argues that the conduct of the applicant's slate in using unacceptable language on social media should be taken into consideration. I note the respondent's slate also used unacceptable language, and had been served with a Libel notice. I found the language of the students from both slates to be quite disturbing. One likes to

imagine that a university is a refuge where free expression and creative thought are to be encouraged and protected. There is nothing creative about the repeated use of four-letter words and sexual innuendo. This kind of language reflects on the inability of the speakers to express themselves. I earnestly pray that those students who felt obliged to express themselves so poorly will mature somewhat before they graduate and learn how to express themselves in a more meaningful way. The kind of language that was used at the time is not acceptable. I do not consider the equities advanced in argument to be useful in deciding this case.

Conclusion

[24] The decision of the Constitutional Board with respect to the third offence is therefore set aside as is its decision to disqualify the applicant. The applicant is therefore reinstated as Vice-President, Student Services.

[25] If the parties cannot agree on costs they may make written submissions of two pages or less within 14 days, and a further 5 days for any reply.



Honourable Justice Timothy Ray

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Respondents

REASONS FOR DECISION

Honourable Justice Timothy Ray

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