Judicial Review in the Community of Scholars: A Short History of *Kulchyski v. Trent University*

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In 1999-2000, the Trent University community fractured over the president's proposal to close two of the university's residential colleges. This proposal became a jurisdictional squabble between the University's Senate and Board of Governors and the dispute ended up before the Ontario Court of Appeal, which decided that, as a matter of economic expediency, the Board could close the colleges in question.

This article reviews the history of the dispute, the legal status of universities, judicial review of university decisions, and the court's decision and concludes that the court erred in applying the rules of standing, did not recognize the administrative law principle of fairness and chose to focus on the irrelevant question of financial necessity. Most significantly, however, the court did not resolve the underlying problem: the question of how to resolve disputes over competing jurisdictions arising from bicameral university governance models remains largely unanswered. The decision, however, could be interpreted to mean that Board powers are to be read broadly and Senate powers narrowly, which may prove disastrous for the long-term significance of elected Senates within Canadian universities.

En 1999-2000, la communauté de l'Université Trent a été divisée à cause de la proposition faite par le président visant à fermer deux des collèges résidentiels de l'université. Cette division s'est transformée en dispute juridictionnelle entre le Sénat et le Conseil des gouverneurs de l'université et a fini par se retrouver en cour, devant la Cour d'appel de l'Ontario, laquelle a décidé que le Conseil pouvait, pour une raison d'opportunisme économique, fermer les collèges visés.

Cet article passe en revue l'historique du litige, le statut juridique des universités, le contrôle judiciaire des décisions de l'université et la décision du tribunal, pour arriver à la conclusion que le tribunal s'est trompé en appliquant les règles de l'intérêt requis, qu'il a omis de reconnaître le principe de l'équité en droit administratif et qu'il a choisi de mettre l'accent sur la question non pertinente des besoins financiers. De façon plus significative, le tribunal n'a pas résolu le problème sous-jacent : la question de savoir comment résoudre les litiges concernant les juridictions concur-

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rentielles, qui découlent du bicaméralisme des modèles de gouvernance universitaire, demeurait en général sans réponse. La décision pourrait cependant être interprétée comme signifiant que les pouvoirs du Conseil doivent être interprétés plus largement alors que ceux du Sénat devraient l'être plus étroitement, ce qui pourrait avoir un effet désastreux sur la pérennité des sénats élus au sein des universités canadiennes.

1. INTRODUCTION

Nestled between ancient drumlins, surrounded by a vast campus of woodlands, wetlands and open fields, and sliced by the sinewy Otonabee River, sits the Symons Campus of Trent University, just north of the City of Peterborough, Ontario. Careful planning inserted a human space into the land; the spot was well selected: "All that space and light and silence. Nothing could disturb the life of the mind here."[1] It is the very definition of bucolic natural splendour; a fusion of land and place where human structure and human activity merge with wilderness in a balance that is as near as possible under the circumstances. In this perfect place to think emerged a body politic that is fiercely valued. There is a passion for all sorts of causes: social, political or otherwise and a belief, driven by idealism, that it is possible to change the world. Trent exemplifies the statement that "a university is so inherently, and rightly, a battleground of clashing ideas...."[2] Perhaps this is why it has been a locus for significant political activism, demonstrations, innumerable labour strikes,[3] dysfunctional governance, and, most recently, litigation over the division of powers between the University's Senate and Board of Governors.

This passionate and idealistic community divided over University President Bonnie Patterson's proposal to close Peter Robinson College and Catherine Parr Traill College. These colleges are two of Trent's five non-faculty based colleges — one of which every student and faculty

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1 Sean Kane, *Virtual Freedom* (Toronto: McArthur & Company, 2001) at 11.

2 Sir James Duff and Robert O. Berdahl, *University Government in Canada: Report of a Commission sponsored by the Canadian Association of University Teachers and the Association of Universities and Colleges of Canada* (Toronto: University of Toronto Press, 1966) at 86.

3 *Trent University v. T.U.F.A.* (1997), 35 O.R. (3d) 375, 1997 CarswellOnt 2899, 150 D.L.R. (4th) 1 (Ont. C.A.); *Trent University v. T.U.F.A.* (1994), 45 L.A.C. (4th) 325, 1994 CarswellOnt 1343 (Ont. Arb. Bd.); *Trent University v. T.U.F.A.* (1992), 60 O.A.C. 225, 1992 CarswellOnt 1725, 99 D.L.R. (4th) 451 (Ont. Div. Ct.), affirmed (1997), 1997 CarswellOnt 2899, 150 D.L.R. (4th) 1 (Ont. C.A.); *Trent University v. T.U.F.A.* (1990), 10 L.A.C. (4th) 10 (Ont. Arb. Bd.), reversed (1992), 1992 CarswellOnt 1725, 99 D.L.R. (4th) 451 (Ont. Div. Ct.), affirmed (1997), 1997 CarswellOnt 2899, 150 D.L.R. (4th) 1 (Ont. C.A.); and *Assn. of Teaching Staff of Trent University v. Trent University*, [1980] O.L.R.B. Rep. 922, 1980 CarswellOnt 996 (Ont. L.R.B.).

member belongs to, regardless of degree programme. These two particular colleges are unique because they are not situated on the Symons campus like the other three but are located in downtown residential areas of the city; they are an urban counterpoint to the more rural Symons campus. The Senate refused to permit the President to close them by declaring that the matter affected the university's educational policy and was, as such, within their jurisdiction. The Board of Governors ignored the Senate's resolution and voted to close the colleges despite mass protests and petitions from students, staff, professors, and members of the Peterborough community. When these measures failed, three professors requested a judicial review to determine the validity of the Board's decision.

This was an unusual application. Virtually all university litigation in Canada prior to this case dealt with the rights of students and faculty or the constitutional status of universities. The courts' decisions regarding this jurisdictional tug-of-war have now established a precedent that will profoundly shape any future discourse regarding bicameral university governance in Canada. However, there is an even broader significance as students, faculty, and external governors grow increasingly adversarial; these competing interest groups will likely look to the courts to resolve their disputes and this case will no doubt inform these future conflicts. Yet, the decisions remain flawed. Despite all of the effort and litigation, the Ontario courts misunderstood the problem: the dispute was not about dollars and cents but about balancing competing jurisdictional interests in a university. This article analyzes the results of the judicial review within its context by discussing the legal place within which universities in Canada exist and by examining the dispute itself in detail.

2. TRENT UNIVERSITY AND THE DISPUTE

Paradoxes confront many when they first visit the Symons Campus of Trent University. It is a newly constructed place set in an ancient place. A place where new ideas and old ideas are fused; where the founding fathers dreamed of creating an Oxford on the Otonabee River — an English university in the New World built in the 1960s when anything was possible. But the idea itself emerged in the burgeoning 1950s when members of the Peterborough community sensed that they needed a university not so much to create an new Oxford but as a means to promote the growth of the city. One such proponent was Reginald Faryon who, at the time, was president of the Quaker Oats Company of Canada, which is headquartered in the city. He suggested that revenues generated from

the sale of the city's public utilities gas franchise be used to fund the foundation of a college. This led to the creation of a committee, set up by the mayor in 1957, to investigate the possibility. Quaker Oats and Canadian General Electric Company (CGE) — two of the largest employers in the area — supported the process. The *Peterborough Examiner*, then headed by Robertson Davies as editor, was also a promoter of the scheme.

Despite opposition from other universities and officials in government, the committee pressed on and incorporated Trent College Ltd., assisted by a grant of $100,000 from the city in 1960. The committee began to search for accommodations for the school and for a President. In April 1961, the committee unanimously selected T. H. B. Symons but he did not assume the office until July 1, 1963. He was only thirty-three. The University also received the support of the former Premier, Leslie Frost, whose riding abutted Peterborough.[4] The University was formally created by an Act of the Ontario Legislative Assembly in April 1963.[5] Students arrived in September, 1964. Facilities were all located downtown and included Rubidge Hall,[6] which was used for administrative and teaching space, and the two downtown colleges created from historic homes within residential areas of the city: Traill and Peter Robinson. Only later was land acquired to the north of the city (an area then known as Nassau Mills) through an initial donation of about 40 hectares by CGE followed by significant expropriation activity by the University.[7] The site now totals some 580 hectares. This became the nucleus of what is now known as Symons Campus, which would come to include three colleges — Lady Eaton, Otonabee, and Champlain — the Bata Library, the Science Complex, a childcare centre, an administrative building, and athletic facilities.[8]

Professor Symons and the other founders were committed to the idea of small, independent, non-faculty based colleges that would foster vital communities within the university, creating, in effect, a community of

4 The Hon. Leslie M. Frost was the first Chancellor of the University. The graduate programme in Canadian Studies and Native Studies is also named for him.

5 *The Trent University Act, 1962-63,* S.O. 1962-63, c. 192.

6 The Hall was later sold and is now a retirement residence.

7 A University has the power to expropriate under the *University Expropriation Powers Act,* R.S.O. 1990, c. U.3, s.2(1), which permits it to "enter upon, take, use and expropriate all such land, as defined in the *Expropriations Act*, as it considers necessary for the purposes of the university or of any university or college federated or affiliated with the university." One farmer took the University to court over the valuation of his expropriated farm. See *Victoria & Grey Trust Co. v. Trent University* (1969), [1970] 1 O.R. 622, 1969 CarswellOnt 910, 9 D.L.R. (3d) 134 (Ont. C.A.) (hereinafter "Campbell").

8 Information on the history of the University is drawn from A.O.C. Cole, *Trent: The Making of a University, 1957-1987* (Peterborough, Trent University, 1992).

communities but this polity would later create an unwieldy system for reaching decisions.[9] The late Peter Gzowski, as Chancellor of the University, remarked on "how Canadian it [Trent University] is — right down to its collegial regionalism and its virtually nonstop constitutional wrangling."[10] Relations between the Board of Governors and Senate at Trent have not, historically, been congenial. Parties within the University have skirmished over the collegial system, administration, and labour relations, establishing a reputation that the University was not kind to its presidents who often did not last long.[11] Internal conflict led to the establishment of an external review of the University's governance in 1997. Prophetically, the *Arthurs-Lorimer Report,* as it was known colloquially, noted the existence of a "system of multiple vetoes" where "the informal habits of earlier and smaller days [were translated] into a politically fragmented system, which, while properly anticipating widespread consultation of all constituencies, has no clear means of moving on from disagreement amongst them."[12]

Governance problems, however, are not necessarily unique to Trent; they were noted in other universities in the 1960s just as Trent was being founded. The Duff-Berdahl Commission was created to investigate the state of universities in Canada at the time and its conclusions resonate even now. Commissioners Sir James Duff and Robert O. Berdahl found that boards of governors were too homogenous in membership and had been generally appointed for their abilities with fundraising and financial management yet were increasingly involving themselves in educational policy. Senates, on other hand, were found to be ineffective. Instead, they should be "the responsible, representative voice of the whole academic community on all, literally all, questions of university policy" and must ensure that their Boards listen to them.[13] The Commission also noticed the problem, even then, that Boards, believing that they had control over

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9 This may have been motivated by a general trend in the 1960s towards decentralization as a "break with the restrictiveness and uniformity" of the system at the time. See Caleb Foote, *et al*., *The Culture of the University: Governance and Education. The Majority Report of the Study Commission on University Governance, University of California, Berkeley* (San Francisco: Jossey-Bass Inc., 1968) at 28.

10 Peter Gzowski, " The Trouble is everyone loves Trent too much" *The Globe and Mail* (17 March 2001) A10.

11 Tom Symons served for the first eleven years from 1961-1972. Since 1972, there have been ten presidents. By way of comparison, the University of Windsor has had only five presidents since 1963.

12 *Final Report of the External Review of the Administration of Trent University*, online: Trent University homepage <http://www.trentu.ca/adreview/memo5.html> (date accessed: 30 November 2002).

13 Duff and Berdahl above, note 2 at 8.

finances, would consider all academic policy involving expenditures, or even priorities among academic projects, as part of their jurisdiction.[14]

One of the most controversial issues for Trent's Senate and Board has been the college system, which involves intertwined questions of academic policy, finances, and property management. Proponents celebrate the college system's strengths. Opponents point out its inefficiencies. This was particularly true for the two downtown colleges, the existence of which was questioned periodically. Vehement opposition by many constituencies within the University prevented any action until the Ontario government announced the creation of the SuperBuild Growth Fund on October 18, 1999. Universities had until November 15th to submit proposals for new capital project applications.[15] Trent's President responded by issuing *Capital Development Strategies: Opportunities and Challenges*, which called for, among other things, the closure of Catherine Parr Traill College and Peter Robinson College and the creation of new space on the Symons campus.[16] The Senate, at its meeting on November 9, 1999, voted 28 to 16 (with one abstention) to adopt the following policy:

> Whereas the college system, including the two downtown colleges, forms an integral part of Trent's educational policy which falls under the jurisdiction of Senate as defined in the Trent Act, be it resolved, that Senate supports an application to the SuperBuild Program, but under no circumstances can such an application be based on either a change of location or a net reduction of facilities at any downtown or Symons Campus college.[17]

Students were equally concerned. Assembling at the Dining Hall of Scott House, Traill College, on November 11th, the Trent Central Student Association (TCSA) and all of the College Cabinets met in an emergency concurrent session, which was itself an unprecedented move, to consider the report. The TCSA, together with virtually all of the College Cabinets,

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14 *Ibid*. at 10.

15 *News Release: Government moves forward with SuperBuild Growth Fund*, online: Ontario Government Homepage <http://mettowas21.edu.gov.on.ca/eng/document/nr/99.10/super.html> (date accessed: 11 December, 2002).

16 *Trent University Capital Development Strategy,* online: Trent University Homepage: <http://www.trentu.ca/news/capstrategy.html> (date accessed 11 December 2002). Hopefully, Sean Kane's following observation regarding hearsay in a university is not true in this instance: "If a person issues a report in the morning, by mid-afternoon there are a thousand versions of it. Nobody ever reads the report—nobody ever reads anything here. Everybody just hears about it from everybody else. The original report, whatever it was, is clean forgotten." Kane above, note 1 at 111.

17 *Trent University Senate Minutes*. Trent University Homepage <http://www.trentu.ca/secretariat/senmin326-nov9-99.html> (date accessed: 30 November 2002).

unanimously voted against the move to close the two colleges.[18] The following day dawned blustery and dreary — a portent that captured the mood of many of the 600 students who rallied just outside the Bata Library, where the Board of Governors had gathered. Over 1000 people signed a petition to urge the Board to keep the two colleges. After much emotion and acrimony, and the presentations of seventeen guests, the Board voted to close by adopting the following resolution:

> THAT the Capital Development Strategy, 2000-04 dated November 12, 1999 ... be approved; and
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> THAT the President be authorized to submit, on behalf of the University, a proposal under the SuperBuild Growth Fund consistent with this strategy for a $39,653,000 capital development project.[19]

The motion, not surprisingly, did not even begin to capture the sense of loss, betrayal, hurt, and exhaustion felt by many people, on both sides of the debate, who were there that day.[20] Opponents of the resolution forecasted doom. Proponents, wisely, did not celebrate openly. The protests continued. Some sixty students camped outside of the Bata Library for the next four days.

Foreshadowing the legal dispute that was coming, the Senate passed the following resolution at a meeting on November 16th:

> Whereas the Chair of Senate has failed to respect a resolution of Senate, and whereas the two governing bodies of the University now find themselves in opposition, therefore, be it resolved that in accordance with Senate by-law VIII (7) a special committee of Senate be created to review University governance focussing on the responsibilities of the Chair of Senate in respect to the resolutions of Senate; the jurisdiction of Senate in relation to the Board of Governors; and any related by-laws or policies of Senate. The special committee will report and make recommendations at the March 2000 meeting of Senate.[21]

Strangely, however, the matter was tabled until the next meeting but does not seem to have been brought back for consideration and so the resolution died. In December, the Faculty Council voted a compromise solution that would delay the closure of the colleges until the "double cohort" —

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18 *Trent Central Student Association Minutes.* Trent University Homepage <http://www.trentu.ca/tcsa/archives/minutes/1999/1999-11-11.txt> (date accessed: 30 November 2002).

19 *Trent University Board of Governors Minutes*. Trent University Homepage <http://www.trentu.ca/secretariat/bognov12-99.html> (date accessed 30 November 2002).

20 Jason Boudreau, "BoG approves sale of downtown colleges. Is Trent forgetting its history?" Arthur Newspaper Homepage http://www.trentu.ca/arthur/archive/34/34-09/cover01.html (date accessed 11 December 2002).

21 Trent University Senate Minutes, Trent University Hompepage <http://www.trentu.ca/secretariat/senmin327-nov16-99.html> (date accessed 30 November 2002).

created as the result of the provincial government's having abolished Grade 13 — moved through the system. One hundred and four professors signed this proposal but they were denied the opportunity to present it to the Board of Governors.

People who were not members of the Board of Governors felt shut out of the process. This was particularly true for students who are aware of how little power was actually extended to them and how "the symbols of government have aggravated the tendency to cast students and administration in the roles of contending interest groups."[22] On February 26th, 2001, eight women began a non-violent occupation of the office of Vice-President (Academic) Graham Taylor in their stated effort to "draw attention to the crisis that has swept over this institution and to put pressure on the BoG [Board of Governors] to restore due process and democracy at Trent."[23] This included stopping the closure of the two colleges. At 3:00 a.m. on March 1st between twenty and twenty-five constables with the Peterborough-Lakefield Police, in full riot gear with a police dog, smashed through the windows and arrested those inside. Some were dragged out.[24] They were handcuffed and later strip-searched. Despite the violent response, which bordered on the ridiculous, Peter Gzowski, the Chancellor, wrote an *apologia* for the administration in *The Globe and Mail*: "I am equally convinced that the administration has acted with compassion and understanding, and, in the end, in asking the police to remove the young women, did only what had to be done. University President Bonnie Patterson is a decent, fair-but-tough-minded leader who has been unfairly and personally attacked (and deeply wounded) by some of her opponents."[25] The students were driven to this extreme because, in the words of then TCSA president, Derrick McIntosh, they were "consistently ignored."[26]

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22 Foote above, note 9 at 39.

23 "What's Going on at Trent Now?" Pamphlet in the collection of the author.

24 Jessie White and Rose Spencer, "Eight students arrested during Trent office occupation." Arthur Newspaper Homepage <http://www.trentu.ca/arthur/archive/35/032101news.shtml> (date accessed: 11 December 2002).

25 Gzowski above, note 10.

26 Rose Spencer and Alyssa Evetts, "Trent students occupy administration office." Arthur Newspaper Homepage <http://www.trentu.ca/arthur/archive/35/022701news.shtml> (date accessed: 11 December 2002).

3. UNIVERSITIES AND THE LAW

At the heart of the debate that enveloped Trent are questions involving the very nature of a university. Is it a state organisation for the delivery of knowledge and training or is it a community of scholars; a place of the mind; a place to "waste time creatively"?[27] The answer to that question is not easy. Firstly, a university is a specific institution that has been authorised by statute or royal prerogative to grant degrees but "university" is not a legal term of art. The university's enabling documents must expressly or implicitly declare the institution to be a university.[28] The university has only the power it is granted under its incorporating statute.[29] Trustees, officers, and administrators of post-secondary institutions can take only the action that they have the authority to take and must adhere to the scope of their authority which flows from the statute. Gaps and ambiguities in authority may be addressed by resort to custom and usage.[30]

Modern universities, subject to this authority, are a paradoxical blend of public and private action. They are heavily dependent on public money so that they can provide education, which can be seen as a public purpose; yet they are self-governing institutions that have been long been conceptualised by some courts as analogous to private clubs. For instance, American courts have held that attendance at a university is a privilege and not a right.[31] Evolving from the medieval notion of *universitas* and following the guild model,[32] universities were set apart from the rest of society with their own agendum, mores, and politics and were often regulated through tradition and consensual agreement. They became "a Victorian gentle-

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27 Marshall McLuhan, quoted in *New Canadian Quotations,* ed. John Robert Colombo (Edmonton: Hurtig Publishers, 1987) at 80.

28 *St. David's College, Lampeter v. Ministry of Education,* [1951] 1 All ER 559. In Roman law, *universitas* was a union of persons considered as a whole or a corporation. *Black's Law Dictionary*, 7th ed., *s.v.* "Universitas".

29 *Re Specht Estate* (1993), 82 B.C.L.R. (2d) 267, 1993 CarswellBC 227 (B.C. Master). In this case, a university did not have the power to act as an executor to a will. See also *R. v. Whatcott* (2002), 2002 CarswellSask 637 (Sask. Q.B.). The University of Regina was authorised by statute to regulate parking matters within its campus but this did not extend to the ability to ban unauthorised distribution of advertising material on University property.

30 William A. Kaplin and Barbara A. Lee, *A Legal Guide for Student Affairs Professionals* (San Francisco: Jossey-Bass Publishers, 1997) at 67-68.

31 *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934).

32 G.R. Evans and Jaswinder Gill, *Universities & Students: A Guide to Rights, Responsibilities, and Practical Remedies* (London: Kogan Page, 2001) at 2.

men's club whose sacred precincts were not to be profaned by the involvement of outside agents in its internal governance."[33]

Despite the passage of time, universities are still often seen, at least in popular culture, as places apart from modern society but they do not enjoy any particular legal status beyond their statutes of incorporation. Although subject to the jurisdiction of the provincial governments pursuant to the *Constitution Act, 1867*, Canadian universities are not, themselves, directly referenced in the *Act*. Section 93 provides that "In and for each Province the Legislature may exclusively make Laws in relation to Education...."[34] As such, Ontario universities fall under the jurisdiction of the Ministry of Training, Colleges and Universities, and the *Post-secondary Education Choice and Excellence Act, 2000* and the *Ministry of Training, Colleges and Universities Act*, which were enacted or amended by the *Ministry of Training, Colleges and Universities Statute Law Amendment Act, 2000*.[35] These acts reserve the right to grant degrees to universities authorised by the province. Furthermore, provinces have the exclusive jurisdiction over "the Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province...."[36] The province, exercising its jurisdiction, sets up the university's operating structure and grants the university the power to govern itself, not unlike many other private charitable organisations. Universities are both provincial educational institutions and self-governing charitable organisations.

This duality is evidenced in the convoluted attempts by the courts in Canada to determine whether or not universities are public or private actors. Courts have been consistent in finding that community colleges are public bodies furthering government aims; they are not independent actors.[37] Universities, on the other hand, likely due to their ancient char-

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33 William A. Kaplin, *The Law of Higher Education: Implications of Administrative Decision Making* (San Francisco: Jossey-Bass Publishers, 1978) at 4.

34 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5, s. 93.

35 S.O. 2000, c. 36. *Post-secondary Education Choice and Excellence Act*, 2000 S.O. 2000, c. 36, Sched. Ministry of Training, Colleges and Universities.

36 *Constitution Act, 1867, supra* note 34 at s.92(7).

37 *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1988), 49 D.L.R. (4th) 749, 1988 CarswellBC 3(B.C. C.A.), affirmed (1990), 1990 CarswellBC 278, 1990 CarswellBC 766, 77 D.L.R. (4th) 94 (S.C.C.); *Ontario Council of Regents for Colleges of Applied Arts & Technology (St. Lawrence College) v. O.P.S.E.U.* (1986), 24 L.A.C. (3d) 144, 1986 CarswellOnt 1220 (Ont. Arb. Bd.), reversed (April 13, 1988), Callaghan A.C.J.H.C., Galligan J., Trainor J. (Ont. Div. Ct.), leave to appeal refused (1988), 32 O.A.C. 80 (note), 93 N.R. 325 (note) (S.C.C.); and *Canadian Imperial Bank of Commerce v. Monette* (1971), [1972] 1 O.R. 407, 1971 CarswellOnt 222 (Ont. Co. Ct.).

itable status and academic independence, have, for the most part, been found not to be agents of the Crown.[38] Their independence, however, is not so clear in light of recent constitutional developments regarding the *Canadian Charter of Rights and Freedoms*.[39] Early cases, such as *Bancroft v. University of Toronto*, followed pre-*Charter* rulings and held that universities were not government actors even when there were elements of governmental control.[40] The Supreme Court of Canada agreed in *McKinney v. University of Guelph*: "It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subject to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*."[41]

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38 Athabasca University was held not to be an agent of the Crown for the purposes of a building lien: *Johnson & Herbert Construction Ltd. v. Athabasca University* (1985), 38 Alta. L.R. (2d) 39, 1985 CarswellAlta 84 (Alta. Master). In *Howard v. York University* (1974), 8 O.R. (2d) 175, 1974 CarswellOnt 409 (Ont. Co. Ct.), the university was not a public authority for the purposes of the *Public Authorities Protection Act,* R.S.O. 1970, c. 374 because a university is incorporated by private statute and controls, through private individuals, its own administration, curricula, and assets. The advancement of learning was not seen to be a public duty. In *Re Taxation of University of Manitoba Lands*, [1940] 1 D.L.R. 579 (Man. C.A.), the University of Manitoba was also held not to be an agent of the Crown even if the Crown had the authority to appoint a majority of the Board of Governors. Likewise, appointment of officers to the University of Toronto and the University of Alberta by the particular province in question did not make them agents of the Crown: *Powlett v. University of Alberta*, [1934] 2 W.W.R 209, 1934 CarswellAlta 25 (Alta. C.A.) and *Scott v. University of Toronto* (1913), 10 D.L.R. 154, 1913 CarswellOnt 190(Ont. H.C.). Similarly, in Australia, the University of Melbourne did not exercise a governmental function even though it was created by statute; it was a self-governing institution and affected only those who brought themselves within its ambit: *Clark v. University of Melbourne*, [1979] V.R. 66 (Vic. Sup. Ct. F. C.). There is one pre-Charter case, however, that held that a university was an agent of the Crown: see *University of Toronto v. Minister of National Revenue*, [1950] 2 D.L.R. 732, 1950 CarswellNat 176 (Can. Ex. Ct.).

39 *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

40 *Bancroft v. University of Toronto* (1986), 53 O.R. (2d) 460, 1986 CarswellOnt 1102, 24 D.L.R. (4th) 620(Ont. H.C.). The University of Toronto was not subject to the *Charter* as it was not acting for the provincial government and was not controlled by it even though the provincial government nominated some of the members of the governing council of the University. Employees in a university context could hardly be considered civil servants.

41 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 1990 CarswellOnt 1019F, 1990 CarswellOnt 1019, 76 D.L.R. (4th) 545 (S.C.C.) at para 34 per La Forest J. See also *Harrison v. University of British Columbia,* [1990] 3 S.C.R. 451, 1990 CarswellBC 764, 1990 CarswellBC 279, 77 D.L.R. (4th) 55 (S.C.C.), where the majority dismissed the appeal based on the reasons in *McKinney* even though, in British Columbia, all of the universities were incorporated and governed by a single Act of the Legislature. There was a higher level of government control but this was still insufficient to make a university a state actor.

Even in the realm of criminal law, university security agents have been found, albeit reluctantly, not to be agents of the Crown nor were they acting on behalf of the police.[42] This clear position, however, may have been undermined by the subsequent Supreme Court decision in *Eldridge v. British Columbia*, which dealt with the failure of a hospital to provide translation services for the hearing impaired.[43] The Supreme Court distinguished the conflicting decisions by suggesting that the *Charter* does not apply to the hospital's "day-to-day operations."[44] The distinction, however, is weak.[45]

4. THE APPLICATION FOR JUDICIAL REVIEW

It is relatively easy to place a university within its legal and constitutional framework but it is not so clear how to model the particular problem facing Trent University; it does not fall neatly into an established area of administrative law. Ultimately, judicial review was chosen because there was no internal process to cope with the conflict between the Senate and the Board of Governors. Three professors, Peter Kulchyski,[46] Ian McLachlan, and Andrew Wernick, decided to solve the impasse by court action and retained John Laskin of Torys, who filed an application for judicial review on January 21, 2000. The student newspaper, *Arthur,*

42 *R. v. Fitch* (1994), 93 C.C.C. (3d) 185, 1994 CarswellBC 1003 (B.C. C.A.). A university security official saw stolen property in a dormitory room during a routine process to determine whether students had moved out. A student was subsequently arrested after a warrant was issued to search the room based on information from the security official. There was no unreasonable search and seizure by the official because the university was not subject to the *Charter*.

43 [1997] 3 S.C.R. 624, 1997 CarswellBC 1939, 1997 CarswellBC 1940, 151 D.L.R. (4th) 577 (S.C.C.). This may be significant because, like universities, hospitals usually have been seen as independent bodies run by independent boards even though they carry out a public function such as the delivery of health care. Both have ancient charitable beginnings and have now become heavily dependent on public money. They often have religious connections as well. Previously, in *Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483, 1990 CarswellBC 277, 1990 CarswellBC 765, 76 D.L.R. (4th) 700 (S.C.C.), the Supreme Court had followed the precedent established in *McKinney* and *Harrison* and found that a hospital's mandatory retirement age was not subject to *Charter* scrutiny.

44 *Eldridge*, *ibid.* at para. 43.

45 Hogg has argued that "*Eldridge* is inconsistent with *Stoffman*, and the absence of statutory compulsion should have led to the conclusion that the Charter did not apply in *Eldridge*." Peter W. Hogg, *Constitutional Law of Canada,* Student Ed. (Scarborough: Carswell, 2000) at 702. He suggests that it was the "understandable sympathy for the plight of the deaf hospital patients" that led to this inconsistent result. *Ibid*. at 702 (footnote 57e).

46 Kulchyski would later withdraw from the application after taking a position at another university.

quoted Professor Kulchyski: "We are taking this action because we care about the future of Trent. Important academic and educational issues are involved in decisions affecting the downtown and other colleges. We believe that the Board did not ... have the right to approve a plan to close them."[47] Many in the Peterborough community were embroiled in the debate as well. Concerned students, alumnæ and alumni, faculty, and members of the community continued their protests; some of them organised the Downtown Action Group, which was created to stop the closure. In February 2000, the Friends of the Trent Colleges trust was officially launched to financially assist the application for judicial review.[48] A seven-hour musical benefit concert and auction held the following month in a downtown tavern included local and university musicians including well-known Ottawa folk musician and alumnus Ian Tamblyn.[49]

The professors' lawyer set out to establish that the Board did not have jurisdiction to make the decision it did and thus breached its statutory power of decision. It was not a question of the merits of the decision reached but rather one of power-sharing and the limits of lawful authority.[50] The applicants argued that a system of concurrent jurisdiction existed between the Board and the Senate because of the overlap between the Senate's power over educational policy decisions and the Board's right to make decisions regarding finances and the physical plant of the University. These matters were fundamentally interwoven. To allow the Board to make this decision without any input from the Senate would amount to an invasion of the jurisdiction of the Senate and allow the Board to decide what is and what is not educational policy. To establish this, they argued that the colleges were integral to the University's educational process and were more than mere buildings. The closure of the colleges would "transform the character of the colleges and impair the college system; it would adversely affect students' involvement in social, artistic and community events as an essential part of their education; it

47 Allen Pinkerton, "Faculty take legal action against Trent" Arthur Newspaper Homepage<http://www.trentu.ca/arthur/archive/34/34-15/news01.html> (date accessed: 11 December 2002).

48 Lisa Pirone, "Trust fund launched for downtown college lawsuit" Arthur Newspaper Homepage <http://www.trentu.ca/arthur/archive/34/34-16/news05.html> (date accessed: 11 December 2002).

49 Ken Ramsden, "The Bonnie Bash," Arthur Newspaper Homepage <http://www.trentu.ca/arthur/archive/34/34-19/ae06.html> (date accessed: 11 December 2002). It was called the "Bonnie Bash" after university President Bonnie Patterson.

50 Information regarding the appellants' arguments is taken from John B. Laskin, *Appellant's Factum to the Supreme Court of Canada.* Collection of the author.

will harm teaching programs."[51] They also emphasised the past practice of the University, which saw the Board and Senate collectively involved in this type of decision. Even the President of the University, Bonnie Patterson, admitted on cross-examination that educational policies with financial implications required the approval of both assemblies.

The University's solicitor, John Murray of Heenan Blaikie, responded by placing great importance on the need to make this decision to restore the University's financial viability. Closure was an economic necessity and not a matter of educational policy since it involved closing buildings and residences only. He argued that *The Trent University Act, 1962-63* gave paramountcy to the Board and did not give Senate a veto. If the Senate did have jurisdiction over all decisions regarding the resources of the University then the polity would be paralysed and require government intervention, which is contrary to the idea of autonomous self-governing universities that are free from external interference.[52]

The positions of the parties were clear but the Byzantine world of administrative law they were entering was much less so; it is a quagmire of contradictions and variables, which is only exacerbated by curial deference. Courts do not want to overburden administrative decision makers with overly complex judicial processes; after all, many such bodies are officiated by non-lawyers without the extensive training required of lawyers. This judicial defence is especially true in the area of educational policy. Courts in Canada are unwilling to second-guess educational experts[53] and are very reluctant to intervene in internal university affairs.[54]

Not unlike the debate over the applicability of the *Charter*, universities also fall within a grey area between public action, which is judicially reviewable, and private action, which generally is not. This influences whether or not a decision is amenable to judicial review. Traditionally, *certiorari*, prohibition, and *mandamus*, are available only for a breach of a public duty; declarations and injunctions, while derived from private

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51 *Ibid*. at 25.

52 Information regarding the respondent's arguments is taken from John Murray, *Respondent's Factum to the Supreme Court of Canada*. Collection of the author.

53 See Wayne MacKay, "The Judicial Role in Educational Policy-making: Promise or Threat?" (1988-1989) 1 *E.L.J.* 127.

54 *Lavoie v. University of Ottawa* (1986), 12 O.A.C. 317, 1986 CarswellOnt 883, 27 D.L.R. (4th) 763 (Ont. Div. Ct.). In *Aylward v. McMaster University* (1991), 79 D.L.R. (4th) 119, 1991 CarswellOnt 972 (Ont. Div. Ct.) the Divisional Court was quite clear: "The courts should be reluctant to interfere with the internal process of the university" (at para. 14).

law, have also been applied in public matters since the 1960s.[55] Generally speaking, private organisations are not subject to judicial review via prerogative writs such as prohibition or *certiorari*.[56] Instead, they must rely on private remedies such as those arising from tort and contract law.[57] However, reviewable decisions made by private bodies acting for the public good can be subject to judicial review if, in effect, they were exercising a public power.[58] This is particularly true where the decision involves the expulsion of members from private clubs as well as the administrative decisions of churches.[59]

Some argue that institutions such as universities should be conceptualised as an area of mixed law rather than forced into a private versus public dichotomy.[60] Universities and hospitals are properly conceived as a partnership; an area of the law that is a blend of public and private law. This would be in sympathy with the finding of the Supreme Court of Canada in *Harelkin v. University of Regina.* Beetz J., for the majority, noted:

> The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute and subsidised by public funds may in a sense be regarded as a public service entrusted with the responsibility of ensuring the higher education of a large number of citizens ... its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy

55 Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) at 1-3.

56 See, for instance, *Walton (Litigation Guardian of) v. Saskatchewan Hockey Assn*. (1998), 166 Sask. R. 32, 1998 CarswellSask 265 (Sask. Q.B.).

57 *R. v. Disciplinary Committee of the Jockey Club, Ex Parte Aga Khan*, [1993] 1 W.L.R. 909 (Eng. C.A.). Courts are prepared, however, in disputes involving voluntary associations to apply administrative law principles: see *Lakeside Colony of Hutterian Brethren v. Hofer,* [1992] 3 S.C.R. 165, 1992 CarswellMan 138, 1992 CarswellMan 221, 97 D.L.R. (4th) 17 (S.C.C.).

58 *R. v. Panel on Take-overs & Mergers*, [1987] Q.B. 815 (Eng. C.A.).

59 See *Sabados v. Canadian Slovak League* (1982), 133 D.L.R. (3d) 152, 1982 CarswellOnt 846 (Ont. Div. Ct.) and *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191, 1985 CarswellOnt 864 (Ont. Div. Ct.), affirmed (1987), 1987 CarswellOnt 899 (Ont. C.A.). In the case of the United Church of Canada, it is significant that the decision was made pursuant to the statutory powers granted it by Parliament when the church was incorporated. See *The United Church of Canada Act*, S.C. 1924, c. 100**.**

60 Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action*. 2nd ed. (Pyrmont, NSW: LBC Information Service, 2000) at 98-99.

> of the university by making provision for the solution of conflicts within the university.[61]

In this case, a student was asked to withdraw from a programme after his academic progress had been assessed. A committee of the university confirmed the withdrawal and refused a rehearing. Rather than appeal to the Senate, the student applied for relief from the court in the manner of *mandamus* and *certiorari,* which are discretionary common law remedies. The student was unsuccessful, by a majority decision of the Supreme Court, because an effective alternative appeal process to the Senate was given by statute and, regardless, the courts need to allow universities to conduct their own affairs with as little interference as possible. However, in the Trent case, no internal dispute resolution mechanism existed to deal with the impasse.

Much of the common law regarding judicial review in Canadian universities deals with disputes with unions[62] or over procedures relating to students, including disciplinary action and rustication.[63] These areas attract judicial review because the courts must ensure that universities act according to the established standards of natural justice when individual rights are affected.[64] Thus, standards for a degree or an assessment of a student's work are clearly the responsibility of the university and courts usually will not intervene.[65] Universities may also be responsible for promises they make in their calendars. The Ontario Court of Appeal recently approved a class action involving Laurentian University's School of Engineering and promises they made regarding transferability and portability that may not have been true.[66] This seems to follow an English

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61 [1979] 2 S.C.R. 561, 1979 CarswellSask 79, 1979 CarswellSask 162, 96 D.L.R. (3d) 14 (S.C.C.) at para. 78.

62 As a recent example see, for instance, *York University Board of Governors v. York University Faculty Assn.* (1999), 1999 CarswellOnt 2576 (Ont. Arb. Bd.).

63 *Neville v. Holland College* (1995), 137 Nfld. & P.E.I.R. 91, 1995 CarswellPEI 51 (P.E.I. T.D.); *Dhillon v. University of Alberta (General Faculties Council Academic Appeals Committee)*, [2000] 9 W.W.R. 59, 2000 CarswellAlta 516 (Alta. Q.B.); *Forestell v. University of New Brunswick* (1988), 89 N.B.R. (2d) 1, 1988 CarswellNB 138 (Visitor of the University of N.B.); and, *P. (A.) v. Student Affairs Committee of Osgoode Hall Law School York University* (2001), 2001 CarswellOnt 1144 (Ont. Div. Ct.).

64 *University of Ceylon v. Fernando*, [1960] 1 W.L.R. 223 (Ceylon P.C.).

65 *R. v. Aston University*, [1969] 2 All E.R. 964 (Eng. Q.B.); *Polten v. University of Toronto* (1975), 8 O.R. (2d) 749, 1975 CarswellOnt 411, 59 D.L.R. (3d) 197 (Ont. Div. Ct.); and *R. v. University of Cambridge ex parte Persaud*, [2000] W.L. 1027054 (H.J.C. Q.B.D), online: WL (ALL-RPTS).

66 *Olar v. Laurentian University*, [2002] O.J. No. 3881 (Ont. C.A.). See also John Jaffey, "Appeal Court allows class action against Ontario university." *The Lawyers Weekly* (1 November 2002) 8.

precedent where the court applied a commercial contract paradigm to university calendars.[67] The school was bound by promises in its prospectus, charters and other documents, which the student accepted on the understanding that they were true and then relied on them.[68]

In Ontario, common law remedies and procedures in administrative law have been consolidated in the *Judicial Review Procedure Act* (*JRPA*)[69] and the *Statutory Powers Procedure Act* (*SPPA*).[70] The *SPPA* provides for standardised rules in administrative proceedings where a statutory power of decision is made and a hearing is required before that decision is made; the *Act* has been held to apply to university disputes.[71] The *JRPA* streamlines the process by which a party may seek relief. Remedies in the manner of *certiorari, mandamus,* prohibitions, declarations, or injunctions may be sought through an application for judicial review. Following the codification of the common law rules in the *JRPA*, an impugned decision must have been decided pursuant to a statutory power in order to apply for review. This is a right or a power granted by statute to make regulations or rules, to require a person or party to do something or to refrain from doing something or where, but for the power or right, the decision would breach the person's or party's legal rights. It also includes a "statutory power of decision," which includes a power or right, granted by statute to determine the legal rights, powers, privileges, immunities, duties or liabilities of any person or party or involving eligibility or continuation of a benefit or license of a person or party. It must be a "specific power or right to make the very decision at issue"[72] but does not include decisions such as the approval of a community college's budget by its Board of Governors.[73]

Courts, it would seem, do not like finding that universities have made decisions under a statutory power, particularly where an internal appeal process exists. In *Paine v. University of Toronto*, the Ontario Court of

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67 *D'Mello v. Loughborough College of Technology*, (1970) 114 S.J. 665, 1970 WL 3034.

68 *Casson v. University of Aston in Birmingham,* [1983] 1 All E.R. 88. However, the Ontario Court of Appeal has rejected a breach of contract argument regarding the withdrawal of one thesis supervisor who was replaced by another: *Wong v. University of Toronto* (1992), 4 Admin. L.R. (2d) 95, 1992 CarswellOnt 916 (Ont. C.A.).

69 R.S.O. 1990, c. J.1.

70 R.S.O. 1990, c. s.22.

71 See *Polten* above, note 65.

72 *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770, 1981 CarswellOnt 661, 131 D.L.R. (3d) 325 at 722 (O.R.) (Ont. C.A.), leave to appeal refused (1982), 42 N.R. 270 (S.C.C.).

73 *Hancock v. Algonquin College of Applied Arts & Technology* (1981), 33 O.R. (2d) 257, 1981 CarswellOnt 1134, 124 D.L.R. (3d) 148 (Ont. H.C.J.).

Appeal refused to review the decision of a university committee regarding the denial of tenure to the plaintiff. The Court held that decisions involving the appointment of professors did not constitute a statutory power of decision.[74] The same court held two years later that judicial review was available in the nature of *certiorari* but that the power to appoint faculty or grant tenure does not necessarily create a reviewable statutory power of appointment.[75] Furthermore, a university "may conduct its hearings in any manner that it thinks proper, bearing in mind the community interest of the university."[76] Universities can potentially escape a finding that a decision is statutory in nature if there are no formal procedures when disciplining a student.[77]

There are a few general rules limiting the use of the writ of *certiorari*. It is available as a remedy only when the applicant's rights or interests have been affected. The decision must be capable of being quashed as a means of supervising the decision-making of a public body that has the power to decide matters respecting the rights, interests, property, privileges, or liberty of any person.[78] The Ontario Divisional Court, speaking about the use of the writ of prohibition in the university context, held that "[p]rohibition is an extraordinary remedy used to restrain an excess of jurisdiction. The excess in this case is such that the tribunal has lost jurisdiction to make a decision."[79]

A declaration of the court may also have been a potentially effective means to resolve the impasse. This writ was once a private remedy but has been expanded to apply to public matters as well; it allows a court to declare that a particular state of affairs is or is not consistent with the law. Applicants seek the court's guidance regarding the validity of actions taken by an administrative body.[80] This highly adaptable remedy does have limits however; there must be an element of justicability, it must be within the jurisdiction of the court, and must not be something that it is unsuitable for the court to intervene in, such as issues of morality or politics. There must also be some practical value or use; the issue(s) should not be moot or have lost practical significance. The dispute should not be

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74 *Paine* above, note 72.
75 *Bennett v. Wilfred Laurier University* (1983), 15 Admin. L.R. 42, 1983 CarswellOnt 781, 150 D.L.R. (3d) 738 (Ont. Div. Ct.) at para. 9, affirmed (1984), 15 Admin. L.R. 49, 1984 CarswellOnt 778, 12 D.L.R. (4th) 765 (Ont. C.A.)
76 *Ibid.* at para. 8.
77 *Polten* above, note 65.
78 Brown and Evans above, note 55 at 1-6.
79 *Aylward* above, note 54 at para 27.
80 Brown and Evans above, note 55 at 1-63.

divorced from the facts and these facts must not be hypothetical.[81] *Operation Dismantle* is an example of the latter. The Supreme Court refused to review a decision regarding Cruise missile testing because it required prognosticating its future consequences.[82] A declaration may also be denied if there is an alternate remedy available.[83]

5. THE DECISIONS

The Divisional Court delivered its decision on September 18, 2000.[84] Writing for the Court, O'Driscoll J. resolved the issue in a mere fourteen paragraphs. The Court assumed that the applicants had status to bring the application and that judicial review was available for such an application without analysing these matters in order to provide a ruling on them. Based on its interpretation of *The Trent University Act, 1962-63*, the Court found that the Board was an independent, autonomous party with plenary power over the government of the university and its property, revenue, expenditures, business, and affairs and residual power over all matters within the University not assigned to some other body. It narrowly construed the power of the Senate as being exactly what was granted it in the *Act*. Specifically, the Senate's authority was limited to educational policy and the delivery of the University's academic programme and even this authority was limited by the powers granted to the Board, which were paramount.[85] Thus, true power was concentrated in the hands of the body that controlled the purse strings; without money educational policy is often meaningless.

The applicants decided to appeal with the support of the Canadian Association of University Teachers, which was gravely concerned about the Divisional Court decision's implications for university teachers, who, it should be noted, constitute a significant constituency in most university senates. The Ontario Court of Appeal heard the appeal on June 28, 2001 and issued its decision on August 10th. This much more detailed decision

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81 *Ibid*. at 1-68 – 1-70.

82 *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, 1985 CarswellNat 151, 1985 CarswellNat 664, 18 D.L.R. (4th) 481 (S.C.C.).

83 Brown and Evans above, note 55 at 1-71.

84 2000 CarswellOnt 3474.

85 *Kulchyski v. Trent University* (2000), 138 O.A.C. 332, 2000 CarswellOnt 3474 (Ont. Div. Ct.), affirmed (2001), 2001 CarswellOnt 2759, 204 D.L.R. (4th) 364 (Ont. C.A.), additional reasons at (2001), 2001 CarswellOnt 3637, 204 D.L.R. (4th) 364 at 399 (Ont. C.A.), leave to appeal refused (2002), 2002 CarswellOnt 825, 2002 CarswellOnt 826 (S.C.C.) at para. 9.

ran to 116 paragraphs but came to much the same conclusion. However, it was a split decision. Finlayson J.A. wrote for himself and Osborne A.C.J.O. while the minority decision was written by Sharpe J.A. The decision of the majority had several fatal flaws: it incorrectly applied the law as it relates to standing, it left open questions as to the duty of fairness criteria and, perhaps most fundamentally, it simply posited the wrong question. The majority focused on the economic expediency of the Board's decision rather than determining a method to deal with the overlapping jurisdiction of both bodies.

(a) Standing

The respondent University argued that the applicants had no standing. Senate had not authorised the action nor did it participate corporately. No evidence was provided that the applicants' own rights or interests were affected nor did they argue that their rights as faculty members were impacted. The majority found that the appellants had not shown that the Board's decision affected their legal rights or privileges. There was no public interest justification and the majority was concerned that the Senate itself had not taken action to support the applicants. The Court suggested that a single member of a deliberative body taking such action was "mischievous and destructive to the democratic process."[86] The dispute was also particular to the system of governance at Trent University and its unharmonious relations and, regardless, the public interest was supported by the closure of the colleges to prevent bankruptcy and was a matter of financial urgency. The "two professors" should not be allowed to delay it.[87]

Of course, it was not just "two professors" some busybodies attempting to disrupt the democratic process. In fact, it was quite the opposite. Many people, indeed thousands of people, felt that the actions of these "two professors" served to stop the Board, which they saw as an undemocratic institution. It is true that the Senate was not a participant but, at the same time, it is disingenuous to suggest that the two professors were acting alone. Moreover, other courts have indicated that individuals can, and indeed should, bring actions of this kind before a court:

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86 *Kulchyski v. Trent University*, 2001 CarswellOnt 2759, [2001] O.J. No. 3237 (Ont. C.A.) at para. 44. This is a particularly ironic claim since, of the two governing bodies, only the Senate is democratically elected from the various constituencies in the University. Only student members of the Board are elected and, technically, these student elections serve only as a recommendation to the Board.

87 *Ibid.* at para 47.

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated rules of locus standi from bringing the matter to the attention of the court to indicate the rule of law and get the unlawful conduct stopped.[88]

The same logic should be applied here; these two professors should have been allowed to challenge the legality of the Board's actions. Senators, student governments, members of the student body, faculty members, alumni and alumnae, and members of the Peterborough community were all keenly interested in the outcome of the case and the applicants were, not in a legal sense but certainly in a moral sense, their proxy. It would seem that the majority failed to understand how deep and widespread the opposition to the Board ran.

Unincorporated bodies, such as the Senate, suffer a handicap when it comes to pursuing litigation as they lack the status of a legal "person" but one or more members of that body may take action on its behalf so long as it is a clearly identifiable group with the same issues of law and fact and with an entitlement to common remedies.[89] This is not novel; there are many rules or laws that allow people to take action on behalf of others.[90] Furthermore, the court does have discretion to grant public interest standing to challenge administrative and legislative authority. The test for public interest standing in Canadian courts was established by the Supreme Court in *Canadian Council of Churches v. R.*:

> First, is there a serious issue raised as to the invalidity of the legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable or effective way to bring the issue before the court?[91]

Based on this test, it would seem that the applicants did have standing. The third step is the easiest to resolve because the lack of alternatives, short of legislation, helped drive the issue to court in the first place. Obviously, there was a serious question as to the validity of the Board's resolution because it had acrimoniously divided the university and cast a shadow over the future divestment of the properties. Professor McLachlan was a member of the Senate so the Board's decision directly affected him

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88 Lord Diplock, quoted in *Reese v. Alberta* (1992), 87 D.L.R. (4th) 1, 1992 CarswellAlta 223 (Alta. Q.B.) at para. 11, additional reasons at (1992), 1992 CarswellAlta 138 (Alta. Q.B.).

89 Brown and Evans above, note 55 at 4-1.

90 See, for instance, the *Rules of Civil Procedure,* R.R.O. 1990*,* Reg. 194, rules 7-10.

91 [1992] 1 S.C.R. 236, 1992 CarswellNat 25, 1992 CarswellNat 650, 88 D.L.R. (4th) 193 (S.C.C.) at para. 37.

as a senator but, regardless, anyone at the university would have a genuine interest in finding out if the resolution was, indeed, valid. The university could not function if the Board and Senate simply did whatever they wanted regardless of any lawful authority. This is echoed in the minority judgment of Sharpe J.A. who did find public interest standing on behalf of the appellants because the university's system of government was incapable of overcoming the impasse between the two bodies. It was critical to the majority that the Senate had not itself been directly involved in the application, but Sharpe J.A. pointed out that the Senate may well lack legal capacity to do so and, in any event, it would not be the first time that an individual had challenged the decision of a Board.[92]

(b) The Duty Of Fairness

Quite frankly, this dispute fits uneasily within the administrative law rubric and most of the common law that has evolved over the years has little use. This is not a case of professional discipline. Nor is it a case of bias or a question of inappropriate delegation. It is only, broadly speaking, an issue of fairness because, whether rightly or wrongly, the will of the Senate was ignored and it is the courts' duty to ensure that decision-makers act within the scope of their authority. There are many factors that illuminate the duty of fairness and most are not relevant here.[93] In this case, legislative decisions,[94] as this debate could be characterised, and other activities such as emergencies[95] or investigations and non-disposi-

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92 *Jeffrey v. Université de Moncton (No. 2)* (1985), 62 N.B.R. (2d) 413, 1985 CarswellNB 142 (N.B. Q.B.). Similarly, a Student Union at the University of Alberta may have been given standing to represent potential students who were not even yet members of the organization: *Students' Union, University of Alberta v. University of Alberta*, [1984] A.J. No. 505 (Alta. Q.B.) at para. 3.

93 The choice of procedure, level of participation such as notice requirements or the right to an oral hearing, and any decision regarding the giving of reasons made by the decision-maker are all relevant for determining the duty of fairness. Also, questions of bias must be examined as well as any misuse of discretion: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 174 D.L.R. (4th) 193 (S.C.C.) at para. 27, 45-46 and 52 [hereinafter *Baker*].

94 See *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011, 1980 CarswellOnt 508, 1980 CarswellOnt 650, 116 D.L.R. (3d) 1 (S.C.C.) and *Canada (Attorney-General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 1980 CarswellNat 633, 1980 CarswellNat 633F, 115 D.L.R. (3d) 1 (S.C.C.). There is no duty of fairness regarding legislative decisions because they are broad policy affecting everyone. No individual is targeted.

95 See *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, 1985 CarswellBC 402, 24 D.L.R. (4th) 44 (S.C.C.). In an emergency or urgent situation no duty of prior notice is required nor is it required that the person have an opportunity to be heard before the decision is made in such situations.

tive decisions,[96] have a lower duty of fairness than those decisions that are closer to judicial processes.[97] Perhaps the majority's disinclination to intervene can be explained by the general reluctance of courts to interfere in the decisions of assemblies: "...public bodies exercising legislative functions may not be amenable to judicial supervision"[98] because the rights of identifiable persons are not generally affected by legislative action.[99] For instance, quotas have been held to be legislative and not subject to review.[100] In the university context, it has been held that "[t]he function of the Board of Governors is not judicial or quasi-judicial and it is purely administrative in nature ... the rights, interests or privileges of the applicant can [not] be said to be affected in the sense in which the law requires so that *certiorari* is available."[101] This discussion is, however, predicated on the assumption that, in fact, the decisions of bicameral bodies within an organisation constitute legislative decisions in the same way that federal cabinet decisions or municipal decisions do. It might be more accurate to characterise the subject-matter as a domestic dispute between parties in a voluntary private association governed by contract, tort, and only tangentially by administrative law principles.

Greater procedural protections should also be inferred where the statute is silent on the matter[102] or where it has great significance to the individual.[103] Perhaps most significant for this debate, however, is the reasonable expectation that a procedure be followed in a certain way in

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96 *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, 1987 CarswellNat 816, 1987 CarswellNat 903, 41 D.L.R. (4th) 429 (S.C.C.). There is no duty of fairness because no harm has been done. Adverse ramifications will not arise until the matter becomes dispositive.

97 *Baker* above, note 93 at para 23.

98 *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602, 1979 CarswellNat 626, 1979 CarswellNat 2, 1979 CarswellNat 3, 106 D.L.R. (3d) 385 (S.C.C.) at 608 (S.C.R.).

99 See *Cardinal* above, note 95. However, legislation that does affect a particular person or body may still be subject to *certiorari*: *Homex Realty* above, note 94.

100 *Carpenter Fishing Corp. v. Canada* (1997), 155 D.L.R. (4th) 572, 1997 CarswellNat 2509, 1997 CarswellNat 2823 (Fed. C.A.), leave to appeal refused [1998] 2 S.C.R. vi (S.C.C.), reconsideration refused (November 19, 1998), Doc. 26484 (S.C.C.), leave to appeal refused (1999), [1999] S.C.C.A. No. 349 (S.C.C.).

101 *Students' Union* above, note 92 at para 2.

102 *Baker* above, note 93 at para 24.

103 *Ibid.* at para 25. See, for instance, *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1981] 1 S.C.R. 92, 1981 CarswellOnt 1088, 1981 CarswellOnt 601, 117 D.L.R. (3d) 750 (S.C.C.); *Indian Head School Division No. 19 v. Knight*, [1990] 1 S.C.R. 653, 1990 CarswellSask 146, 1990 CarswellSask 408, 69 D.L.R. (4th) 489 (S.C.C.); and *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 1980 CarswellBC 1, 1980 CarswellBC 599, 110 D.L.R. (3d) 311 (S.C.C.).

the past or where a person is proffered a promise that creates an expectation.[104] While a clear practice of consulting or an express promise may give rise to the doctrine of legitimate expectation, the doctrine does not apply to legislative functions or public policy decisions.[105] As mentioned earlier, the President of the University testified that, in the past, decisions affecting both educational policy and fiscal matters involved both the Senate and the Board of Governors. Senators may well have had a reasonable expectation that, here again, they would be involved in any decision to close the two colleges.

(c) The Wrong Question

The majority was clearly puzzled by the dispute. Reading between the lines it seems almost that they felt it should never have come before the Court. In fact, they appeared surprised by the opposition, which, in their view, was motivated by nostalgia:

> One would have thought that the academic side of the University, as represented by the Senate, would have welcomed a necessary cost-cutting move that would upgrade the facilities of the two colleges without any loss of faculty or staff, and that would re-locate the two colleges a few kilometres away in new facilities on the main campus.[106]

These two judges, following the arguments advanced by the University, conceptualised the issue simply as a matter of closing some old buildings in order to cut costs while taking advantage of the government's offer of financial assistance through the SuperBuild programme to build something new. The Board was responsible to the community and to the Crown and it would have been reckless to allow the University to become bankrupt. Their decision amounted to the discharge of their public duty.

The majority also rejected the appellants' argument that the colleges themselves constituted an integral part of the University's educational policy, thus making the decision of the Senate *ultra vires* and irrelevant. The applicants asserted that the downtown colleges provided a wider range of intellectual options, encouraged diversity and the exploratory and experimental tendencies of the University. The majority found that the applicants had confused "educational policy with the educational experience"[107] and noted that the value of the two colleges was irrelevant

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104 *Baker*, above note 102 at para. 26.

105 See *Council of Civil Service Unions v. Minister for Civil Service*, [1984] 3 All E.R. 935 (U.K. H.L.).

106 *Kulchysk*i above, note 85 at para. 27.

107 *Ibid.* at para. 35.

to the issues before the Court. The uniqueness of each college was not a matter of policy but merely created different educational experiences for students. In other words, bricks and mortar do not an educational policy make, which, to a certain extent, is right. The particular buildings that constituted the Traill and Robinson colleges are not within the jurisdiction of the Senate, but the colleges and what those colleges represent are and the President and Board were not relocating them; the two colleges will cease to exist when sold.[108] From the very beginning, the colleges were to be unique with their own cultures, traditions, and idiosyncrasies and these traits were aided by location. The University consciously decided, as a matter of educational policy, to foster these differences and the removal of the colleges, part of a drive for centralization over the past decade or so by the University's executive, threatens the college system. Members of the Trent community were well aware of these centralising pressures and many saw the President's move and the court case as just another battle in the war over the future of the college system.

This battle was not so much about bricks and mortar as it was about the very philosophical underpinnings of Trent University. At stake was power; whoever won the battle would have the power to impose their vision for the University. The majority's analysis missed the point: who had the power to decide? Broad powers were granted to each, which were meant to be as definitive and conclusive as possible but, like Canada's own federal-provincial division of powers, conclusiveness was not possible. New and unforeseen challenges emerge and must be accommodated within the existing constitutional rubric; this is rarely an easy fit. The incorporating statute contained no process to resolve the dispute and no University Visitor[109] existed to resolve it. Perhaps then, given this dispute, it is logical, and even obvious, to look to the work of Canadian courts in interpreting the jurisdictional tug of war between the federal government

108 The University is currently constructing a new college on the Symons campus, which will be named Gzowski College in honour of the late Peter Gzowski. See "Trent University names new college after former chancellor, beloved broadcaster", Trent University homepage <http://www.trentu.ca/news/pressreleases/030521 gzowskicollege.html> (date accessed: 9 January 2004).

109 An ancient office, originating in Middle Ages, that oversees a particular university and has exclusive and final appellate capacity in disputes arising out of the university. Courts refuse jurisdiction to intervene where a University Visitor exists. See Lawrence M. Bezeau, "The University Visitor: Medieval Anachronism or Modern Adjudicator" (1992-1993) 4 *E.L.J.* 243. The New Brunswick Court of the Queens Bench held that the court would not interfere in the University of New Brunswick's internal affairs because it was the jurisdiction of the University's Visitor: *Forestell v. University of New Brunswick* (1987), 84 N.B.R. (2d) 181, 1987 CarswellNB 177 (N.B.Q.B.).

and the provinces. Like the statute in this dispute, constitutions cover subject areas — not facts, persons or activities. No matter how well the Constitution is crafted, it is inevitable that overlap will occur between the legislative agenda of the two levels of government and the courts have been forced to determine which use is more valid than the other. There is no generally accepted view of the proper allocation of powers in the federal system. After all, most areas of legislative concern do not conveniently fit into the constitutional box.

Constitutional theory regarding classification of a law has evolved from an attempt to create exclusive heads of power which allowed no overlap in order to preserve provincial autonomy into a system that envisions interplay between the power of the two levels of government.[110] Each modifies the other to avoid overlapping responsibilities. Exclusivity has become weaker. Now, courts look to the dominant characteristics or "pith and substance"[111] of a law to determine its classification. There is no fixed test to determine the pith and substance of a matter. Wide latitude is given to the courts to find an equitable solution. This is determined by examining the statutory context and the purpose and effect of the legislation. The Courts may also apply the "double aspect" doctrine,[112] which allows competing statutes if they have different purposes and each purpose falls within the respective power of the enacting level of government. Courts will determine if legislation predominately deals with a subject area that is *intra vires* of the government in question and accept any natural spillover.[113] However, laws that may appear, *prima facie,* to be acceptable may, on closer examination really be *ultra vires.*[114]

The statute of incorporation does appear to grant residual power to the Board by restricting the power of the Senate to those powers specifically assigned to it. The government, conduct, management, and control of the University and its property, revenues, expenditures, business and

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110 Dickson C.J. wrote that a "fair amount of interplay and indeed overlap between federal and provincial powers..." was acceptable in *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R 2, 1987 CarswellOnt 945, 1987 CarswellOnt 968, 41 D.L.R. (4th) 1 (S.C.C.) at 18 (S.C.R.).

111 *Union Colliery Co. of British Columbia v. Bryden,* [1899] A.C. 580 (B.C. P.C.) at 587, per Lord Watson.

112 *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.) at 130.

113 Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" in *Canadian Constitutional Law,* ed. P. Macklem *et al.* (Toronto: Emond Montgomery, 1997) at 181-182.

114 *Reference re Alberta Legislation*, [1939] A.C. 117, 1938 CarswellAlta 92, [1938] 4 D.L.R. 433 (P.C.) and *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 1993 CarswellNS 19, 1993 CarswellNS 272, 107 D.L.R. (4th) 537 (S.C.C.).

affairs are vested in the Board. It also has all powers necessary to carry out these duties.[115] However, section 4 of *The Trent University Act, 1962-63* authorizes the Senate to establish faculties, schools, institutes, departments, chairs, and courses but requires the approval of the Board with respect to finances and facilities.[116] This seems to establish a concurrent power and effectively requires the two bodies to approve the establishment, and therefore the dissolution of faculties or schools. A later clause declares that the Senate is responsible for the educational policy of the University and may create faculties, departments, schools or institutes, or establish chairs subject to the Board's approval regarding the expenditure of funds and the establishment of such bodies.[117] The majority in the Court of Appeal noted that educational policy is subject to the overriding requirement of Board approval regarding expenditures, but surely the power works both ways. Expenditures are subject to the educational policy of the Senate.[118] Otherwise, the power given to the Senate is almost meaningless in its insignificance. The majority also placed great weight on the financial expediency of the decision to close colleges but this is an odd claim. The threat of bankruptcy does not justify an *ultra vires* action. Such a position would make the division of powers in the *Act* purposeless.

Sharpe J.A.[119] recognised the overlapping jurisdiction of the Senate and the Board: "not all issues fall neatly into the categories of the matters assigned to the Board and Senate respectively."[120] This requires power sharing, which he argued is implicit in a bicameral university polity.[121] There was nothing that gave paramountcy to either the Board or the Senate and no way in the legislation to overcome an impasse requiring agreement of both sides. The solution was negotiation or legislation not unilateral action by the Board.[122] For the majority, it was "clear."[123] They largely adopted the Divisional Court's jurisdictional analysis and construed the power of the Senate narrowly. Yet, even a superficial understanding of the matter makes it obvious that this is anything but clear. *The Trent University Act, 1962-63* is not an example of watertight compartments. Educational policy and financial decisions are fundamentally interwoven

115 *The Trent University Act, 1962-63* above, note 5 at s. 10.
116 *Ibid.* at s. 4.
117 *Ibid.* at s. 12.
118 *Kulchinsky* above, note 85 at para. 33.
119 Prior to his appointment to the Bench, Justice Sharpe was Dean of Law at the University of Toronto. He had taught there since 1976.
120 *Kulchinsky* above, note 85 at para. 59.
121 *Ibid.* at para. 63.
122 *Ibid.* at para. 65-66.
123 *Ibid.* at para. 26.

and any attempt to create Board paramountcy makes the Senate's power meaningless. Short of adopting a new polity, consensus must be the route taken.

This dispute was not about financial sustainability or nostalgia. It was not even about closing colleges. It was about decision making. It was about people who represent the community of scholars having some say in the future of their university. Board members fulfil a valuable role in representing the broader community and the Crown but so do Senators in representing scholars and students. Each has a part to play but this decision means that Senate power is subordinate to the Board. The Board gets to set the agenda and the Senate tags along funding on the scraps of jurisdiction given to it. One professor went even farther: "Trent's bicameral system of governance was effectively nullified."[124] Scholars at Trent, and elsewhere in Canada, have a diminished role to play in their university as a result of this decision. The applicants' only hope was yet another appeal but the Supreme Court of Canada denied leave to appeal on March 14, 2002.[125]

6. CONCLUSION

Peter Gzowski identified the problem with Trent University: "It's not that no one here likes Trent. It's that everyone here — or so it sometimes seems — loves it too much."[126] The debate over this issue was loud and even nasty but, for all sides, it was certainly passionate. It drew in many other issues and became a fulcrum for simmering antagonism and factional feuds. And, in the end, a group of judges imposed a solution. Yet, the Court managed to avoid solving the underlying problem. How *does* one solve jurisdictional disputes between senates and boards of governors? This case does not really provide any insight regarding this question unless the courts really did mean to gut the power of university senates. While Trent's governors were pleased, the applicants and their supporters believe that the decision was an ill omen. Andrew Wernick, one of the applicants, declared: "I thought it was in a way a sad day for all universities in Canada. The implications are very disturbing."[127] The Canadian As-

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124 Alison Hearn, "Corporate U. Thrives on Alienated Scholars" *CAUT Bullitin ACPPU* (June 2002) A14.

125 *Kulchyski* v. *Trent University*, 2002 CarswellOnt 825, [2001] S.C.C.A. No. 516 (S.C.C.).

126 Gzowski above, note 10.

127 Rose Spencer, "Prof loses appeal affecting students" Arthur Newspaper Homepage <http://www.trentu.ca/arthur/archive/35/092100news.shtml> (date accessed: 11 December 2002).

sociation of University Teachers, which funded the appeal, spoke through its Executive Director, Jim Turk, who was even more fearful: "It was a very dark day for Canadian universities when the court made this decision. ... This makes senates virtually powerless in a university."[128]

Alison Hearn, a professor at Trent at the time of the litigation, identified a risk even greater than weak senates: "the corporate/market has replaced traditional forms of university governance in the U.S. and Canada [which] is indisputable and alarming." Part of the blame fell to professors:

> Caught inside the discourse of the corporate university, its academic 'star system,' its technophilic drive towards the virtual classroom, its incessant calls for strategic alliances with the private sector, members of the professoriate risk losing even the option to discuss academic freedom. We must renew, with vigour and commitment, debate about the nature and relevance of the university as a cultural site in the age of transnational corporate dominance.[129]

So the story ends where it began by positing questions regarding the nature of the university. Will it be a community of scholars represented by the Senate or a market-driven institution represented by the non-academic Board? Self-government, in the idealised form represented by the idea of the community of scholars, is likely little more than a pipe-dream: dependence on public money means that the universities of today are constantly buffeted by the changing political and cultural changes taking place around them. Like so much else, it is balance that is needed. Senates and boards of governors each have their own purview and expertise. They need to work together or, when compromise is impossible, there need to be effective dispute resolution procedures in whatever form is appropriate for the university in question. And those procedures must not include one side's trumping the other. As Duff and Berdahl noted almost forty years ago, "constitutional reform may improve a system of university government to a point but, in the last analysis, its successful functioning will depend more on the goodwill and mutual trust of the participants."[130]

The broad implications of this decision may echo for many years but the narrower implications for Trent are just as significant. There are layers of irony to this story just as there are layers of meaning and significance. Universities are supposed to be places of vigorous debate and intellectual challenge and eventual compromise or even consensus; yet, in this dispute

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128 *Ibid.*
129 Hearn above, note 124.
130 Duff and Berdahl above, note 2 at 86.

the debate sank into acrimony and recrimination. Each side stopped listening, particularly after the arrest of the eight occupiers, and pointed the finger at each other. Compromise became impossible and, of course, the court case did nothing to address this entrenchment. Yet another layer of irony is the future of the colleges. Peter Robinson College was slated for immediate closure and sale. When the dust had finally settled, the University discovered, after selling Peter Robinson College, that it needed the space and is now leasing it back. Furthermore, the University is expanding its downtown presence in order to deal with the double cohort by leasing a former Pentecostal seminary within sight of Peter Robinson College.[131] This suggests that the impending financial crisis that was to result if the two colleges were not closed was overblown. The final irony? Litigation did nothing to solve the underlying disputes over the future of Trent's college system, its governance model or even the deep wounds that divided this community of scholars out in the wilderness. Only time can solve the latter. It is, after all, a place of the mind.

131 "Trent Alumni Purchase Properties at Peter Robinson College" Trent University Homepage<Trent University http://www.trentu.ca/news/pressreleases/prcsale.html> (date accessed: 20 March 2003). See also "Timely Agreement between Trent University and Master's College and Seminary for Temporary Space" Trent University Homepage <http://www.trentu.ca/news/pressreleases/030212lease.html> (date accessed: 20 March 2003).