

ONTARIO  
SUPERIOR COURT OF JUSTICE

**B E T W E E N:** )  
)  
AMANDA HASSUM and DANIEL ROFFEY ) *M. Eizenga, M. Peerless, F. Kristjanson, for*  
) *the Defendants/Moving Parties*  
)  
)  
Plaintiffs )  
)  
- and - )  
)  
)  
THE CONTESTOGA COLLEGE ) *R.D. Elliott, D. McKay, for the*  
INSTITUTE OF TECHNOLOGY AND ) *Plaintiffs/Responding Parties*  
ADVANCED LEARNING and THE )  
GEORGE BROWN COLLEGE OF )  
APPLIED ARTS AND TECHNOLOGY )  
)  
Defendants )  
)  
)  
) **HEARD:** January 8, 2008

**LAX J.**

[1] This is a pleadings motion within a proposed class proceeding. The plaintiffs are students. They allege they were charged tuition-related ancillary fees contrary to a Binding Policy Directive issued by the Minister of Training, Colleges and Universities that prohibited the levying of these fees. They propose to certify a defendants' class and have named The Conestoga College Institute of Technology and Advanced Learning and The George Brown College of Applied Arts and Technology as representative defendants for the 24 Colleges of Applied Arts and Technology in the Province of Ontario (the "Colleges"). They have framed their claim in (a) unjust enrichment; (b) breach of contract; (c) negligence; (d) negligent misrepresentation; (e)

constructive trust; and, (f) monies paid under mistake of fact. The defendants move under Rule 21.01(1)(b) of the *Rules of Civil Procedure* to strike the pleading on the ground that it discloses no reasonable cause of action.

### The Test on this Motion

[2] The test on a motion to strike under Rule 21.01(1)(b) sets a very high bar. The principles to be applied are well-established and were developed in the decision of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*<sup>1</sup>. It must be plain and obvious on the basis of the facts pleaded (which are to be taken as proven, unless patently ridiculous or incapable of proof) that the action cannot possibly succeed. No evidence is admissible. Where the law is unsettled, developing or novel, the motion should be dismissed: *Nash v. Ontario*<sup>2</sup>. The court will not strike a pleading under this Rule unless it concludes on the basis of the facts pleaded that the action is “doomed to failure”.

[3] The plaintiffs plead that they and other students of the Colleges were compelled to pay one or more compulsory tuition-related ancillary fees. Among the allegations of facts that must be accepted for the purposes of this motion are that during the class period, each of the Colleges imposed one or more of the fees and that the plaintiffs and other students of the Colleges were compelled to pay one or more of the compulsory tuition-related ancillary fees, despite being bound by ministerial directive not to levy these fees.

### The Pleading

[4] The allegations in the plaintiffs’ Amended Statement of Claim are as follows:

(a) Breach of contract – there is an express or implied term of “legality” in the contracts between students and the Colleges “to the effect that all fees charged to students were “legal or otherwise permissible” (para. 34), and the Colleges breached the express or implied term of “legality” and “permissibility” by “collecting tuition-related ancillary fees from Class Members in breach of the Binding Policy Directive” (para. 35);

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<sup>1</sup> [1990] 2 S.C.R. 959.

<sup>2</sup> (1995), 27 O.R. (3d) 1 (C.A.).

- (b) Negligence – the defendants owed a duty of care not to charge “illegal or otherwise proscribed and impermissible fees” (para. 37);
- (c) Negligent misrepresentation and omission – the Colleges “impliedly represented” in invoicing the students that the fees were “legal or otherwise permissible” (para. 43);
- (d) Unjust enrichment of the Colleges in the amount of the ancillary fees with no juristic reason, since the fees are “*ultra vires* and illegal or otherwise proscribed and impermissible” (paras. 28-29);
- (e) Constructive Trust – the Colleges hold the proceeds of all tuition-related ancillary fees in trust for the students (para. 31); and,
- (f) Recovery of monies paid under mistake of fact – the students paid the fees out of an “honest but mistaken belief that the fees were legitimately leviable by the Ontario Colleges” (para. 47).

#### Summary Position of the Parties

[5] The plaintiffs’ primary submission is that the prohibition on tuition-related ancillary fees is marked by sufficient indicia of the force of law to withstand the “plain and obvious” test under Rule 21.01(1)(b). They dispute that the claims depend entirely on a determination that the policy directive has the force of law. They submit that even if the fees are not “illegal” in a technical sense, the policy directive constitutes a justiciable intermediary between law and administrative direction that creates “quasi-legal” obligations and the plaintiffs’ causes of action are made out on the basis that the fees are proscribed or otherwise impermissible.

[6] The defendants submit that the policy directive is not “law” and that this is fatal to all of the plaintiffs’ claims that rely on illegality. They contend that, in the absence of illegality, the statutory scheme does not afford the plaintiffs any rights, or impose any duties on the Colleges upon which the plaintiffs may construct their causes of action. In response to the plaintiffs’ argument that the policy directive may constitute “quasi-law” and have “quasi-legal force”, they submit that this does not assist the plaintiffs in the causes of action pleaded and therefore the plea of “proscribed or otherwise impermissible” is meaningless. In the alternative, the defendants

submit that if the policy directive is considered to be “law”, the plaintiffs’ pleading discloses no reasonable cause of action and should in any event, be struck.

[7] The issues to be determined are whether some or all of the claims can possibly succeed if the policy directive is not “law” and whether it is arguable that the causes of action can succeed on the alternative basis that the policy directive constitutes “quasi-law”. Against these competing positions, I turn first to the legislative scheme.

### Legislation

[8] The Ontario Colleges are established pursuant to s. 2(1) of the *Ontario Colleges of Applied Arts and Technology Act, 2002* (“OCAAT Act”)<sup>3</sup> and s. 2(1) of the associated regulations (“OCAAT Regulations”)<sup>4</sup>. Pursuant to ss. 2(1.1) and (4) of the OCAAT Act, each Ontario College is a corporation without share capital consisting of its board of governors, and pursuant to section 2(1), each is an agency of the Crown. The objects of the Colleges are to offer comprehensive programs of career-oriented, post-secondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment and to support the economic and social development of their local and diverse communities.

[9] Pursuant to ss. 4(1) and (2) of the OCAAT Act, the Minister of Training, Colleges and Universities (the “Minister”) is authorized to issue policy directives to the Colleges and such policy directives are binding on the Colleges. The relevant sections provide:

### **Policy directives**

4. (1) The Minister may issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs.

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<sup>3</sup> S.O. 2002 c.8, Sch. F.

<sup>4</sup> O. Reg. 34/03, amended to O. Reg. 354/05.

## **Binding**

(2) The policy directives are binding upon the colleges and the colleges to which they apply shall carry out their objects and conduct their affairs in accordance with the policy directives.

## **General or Particular**

(3) A policy directive of the Minister may be general or particular in its application.

[10] Section 5(1) of the *OCAAT* Act gives the Minister discretion to intervene into the affairs of a college if the Minister is of the opinion that, *inter alia*, the college fails to follow a policy directive under section 4. The relevant sections read as follows:

## **Intervention**

5. (1) The Minister may intervene into the affairs of a college or a subsidiary of a college in such a manner and under such conditions as may be prescribed, if the Minister is of the opinion that,

- (a) the college is not providing services in accordance with this Act or the regulations or with any other Act that applies to the college;
- (b) the college fails to follow a policy directive under section 4; or
- (c) it is in the public interest to do so.

[11] Section 8(1) of the *OCAAT* Act states in part, that the Lieutenant Governor in Council may make regulations,

- (e) in respect of an intervention under section 5,
  - (i) prescribing under what conditions an intervention may be taken,
  - (ii) prescribing the types of intervention that may be taken, including replacing any or all members of a board,
  - (iii) delegating to the Minister or an agent of the Minister any powers necessary to carry out the intervention,
  - (iv) governing procedures that apply in respect of an intervention and requiring colleges to comply with those procedures.

[12] The scope of Ministerial intervention into the affairs of a college is defined in the Regulation. Section 15(1)(a) reads as follows:

**Minister's Intervention**

15. (1) Where the Minister is of the opinion that an intervention into the affairs of a college under section 5 of the Act is necessary, the Minister may,

- (a) appoint a person to investigate the activities of the college and to advise the Minister whether, in his or her opinion, the appointment of an administrator is in the public interest and is needed to ensure that the college continues to provide service in accordance with applicable Acts and the regulations made under them and policy directives.

...

[13] The Regulation lists other ways in which the Minister may intervene in the affairs of a college under section 5 of the *OCAAT* Act. Section 15(10) of the Regulation states:

15(10) The Minister has exclusive jurisdiction over all matters arising under this section or out of the exercise by any person of the powers conferred under this section and the Minister's actions are determinative and are not subject to review by a court.

The Policy Directive

[14] On or about April 1, 2003, the Minister implemented a tuition freeze for the 2004-2005 and 2005-2006 academic years. Following the announcement of the tuition freeze, the Minister issued the Minister's Binding Policy Directive within the context of a Policy Framework entitled "Tuition and Ancillary Fees" for application to the 2003-2004 academic year. The Binding Policy Directive was revised in September 2004. A second document entitled "Tuition and Ancillary Fees Reporting – Operating Procedure" (hereinafter and collectively, the "policy directive") forms part of the Ministry issued Policy Framework and provides further details on establishing tuition and ancillary fees based on the policy directive, issued pursuant to the *OCAAT* Act. The operating procedure document was also issued in April 2003 and was revised in September 2004 and again in September 2006.

[15] The policy directive “outlines parameters for establishing tuition fees and related requirements for activity eligible and reported for funding through the college general purpose operating grant”. It addresses ancillary fees, tuition fee refunds, accountability and reporting requirements. It states that non-compliance with the directive could result in a deduction from the college’s allocation within the general purposes operating grant. Where a college charges students fees that do not conform with the policy directive, the Ministry is to initiate corrective action, which may include withholding an amount from the general purpose operating grant. In addition, the Ministry is said to be responsible for “working with the colleges to facilitate corrective action in the cases of non-compliance”.

[16] The policy directive sets out guidelines for ancillary fees, distinguishing between ineligible and eligible categories of fees, as well as compulsory fees. Ancillary fees are “fees for items not covered by the tuition fees established for a course of instruction that students may be required to pay upon enrolment”. Compulsory ancillary fees are defined as “ancillary fees that a student is required to pay in order to enrol in, or successfully complete, any course or program of instruction eligible for general operating grant support”. Compulsory ancillary fees are governed by a particular protocol for introducing and increasing fees, which protocol must be agreed to by representatives of the colleges’ administration and student government representatives and approved by college board of governors. The policy directive states that “ancillary fees are not covered by the tuition freeze” and that the “protocol process for introducing new or increasing current ancillary fees will continue throughout the duration of the tuition freeze”. Where a college does not comply with the ancillary fee policy and, in the case of fees governed by the protocol for introducing or increasing compulsory ancillary fees, the policy directive provides that if no resolution can be achieved through discussions among signatories to the protocol, the college’s operating grant will be reduced by an amount corresponding to the revenue raised by the fee or fee increase.

[17] In or about July 2006, the Ministry produced and publicly circulated a document entitled “Overview of Ancillary Fees”. Based on an annual ancillary fee survey, all twenty-four colleges

were charging certain compulsory ancillary fees, considered by the Ministry to be ineligible under the policy directive. Some colleges were charging other ineligible fees.

[18] I turn then to consider how the policy directive should be understood. Does it have the force of law or is it merely an internal ministerial guideline intended to control the Colleges as agents of the Crown?

Is the Policy Directive “law”?

[19] The test for whether policy directives, guidelines, circulars, or other instruments authorized under a statute create subordinate legislation with the force of law is set out in *Friends of the Oldman River Society v. Canada (Minister of Transport)*<sup>5</sup>. In *Oldman River*, the court had to consider an application brought by a third party seeking an order for *certiorari* and *mandamus* to require the Minister of Transport and the Minister of Fisheries and Oceans to conduct an environmental assessment in accordance with the federal Environmental Assessment and Review Process Guidelines Order (the “Guidelines”) for a dam being constructed on the Oldman River in Alberta.

[20] In determining whether the Guidelines were in fact subordinate legislation, the Supreme Court formulated a two-step analysis. First, the statutory scheme is scrutinized to determine whether the enabling statute is capable of supporting a power to create subordinate legislation. Second, the guideline or other instrument is scrutinized to determine if it is mandatory.

[21] Whether or not the statute supports the creation of subordinate legislation is a question of legislative intent. Regard must be had to the wording of the authorizing provision as a whole. The use of the terms “directives” or “guidelines” alone is not determinative.<sup>6</sup> Guidelines issued in a legislative capacity or through a quasi-legislative process will generally support the argument that the legislature intended to allow for the creation of subordinate legislation.<sup>7</sup>

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<sup>5</sup> [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1.

<sup>6</sup> *Oldman River*, at paras. 35, 37.

<sup>7</sup> *Oldman River*, at para. 36; *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884, 2003 CarswellNat 2427 at para. 36.

Directives, like regulations that are of general application, will be more likely to be viewed as law.<sup>8</sup>

[22] In *Oldman River*, the court concluded that s. 6 of the *Department of the Environment Act* could sustain the enactment of mandatory guidelines and that the Guidelines as framed were mandatory in nature. In reaching the conclusion that the *Act* could sustain the enactment of mandatory guidelines, the court discussed whether the Guidelines were merely a form of administrative directive or whether Parliament had elected to adopt a regulatory scheme that is "law" and thus amenable to enforcement through prerogative relief. This turned on whether the directive was one that required formal enactment. The court stated at para. 45:

Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority. To my mind this is a vital distinction. Its effect is thus described by R. Dussault and L. Borgeat in *Administrative Law* (2nd ed. 1985), vol. 1, at pp. 338-39:

When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

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<sup>8</sup> *Bell Canada*, at para. 36

[23] Subsequent cases have followed *Oldman River* in recognizing the “vital distinction” between internal ministerial guidelines and those that have the force of a regulation by placing primary emphasis on the degree of similarity between the provision authorizing the creation of policy guidelines and the procedures that would apply to the creation of regulations in order to determine whether the directive or guideline is “law”.<sup>9</sup>

[24] In Ontario, the *Legislation Act, 2006* (which replaced the *Regulations Act* and the *Interpretation Act*) and the *Regulations Act* (in force until July 25, 2007)<sup>10</sup> establish the framework for the publication, citation and interpretation of Ontario law. The *Legislation Act, 2006* defines “legislation” to mean “Acts and regulations.” Subject to certain exemptions not relevant here, both *Acts* define a “regulation” as follows:

“regulation” means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, ...

[25] Both *Acts* require that every regulation be filed with the Registrar and published. The *Regulations Act* required publication in the *Ontario Gazette*. The *Legislation Act, 2006* requires publication in the *Ontario Gazette* as well as on the e-Laws website. A regulation that is not filed has no effect, and an unpublished regulation is generally not effective against a person unless that person has had actual notice of the regulation.<sup>11</sup>

[26] The power to make subordinate legislation must be found within the four corners of the enabling statute. In this case, the policy directive is merely authorized by statute. It is not

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<sup>9</sup> *Bell Canada* at para. 36; *Peet v. Canada (Attorney General)*, [1994] 3 F.C. 128, [1994] F.C.J. No. 559 (T.D.) at para. 6; *Hewko (Guardian ad litem of) v. British Columbia (Attorney General)*, 2006 BCSC 1638, 2006 CarswellBC 2703 at paras. 314, 318; *Turner-Lienaux v. Nova Scotia (Attorney General)* (1993), 122 N.S.R. (2d) 119, 1993 CarswellNS 229 at paras. 17-20 (C.A.); *Thamotharem v. Canada (Minister of Citizenship & Immigration)* (2007), 60 Admin. L.R. (4th) 247, 2007 CarswellNat 1391 at para. 68 (F.C.A.); See also, *Martineau v. Matsqui Institute Inmate Disciplinary Board*, [1978] 1 S.C.R. 118 at 129, where the majority of the court concluded that as the directives in issue were not of a legislative nature, they were not subject to judicial review.

<sup>10</sup> *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F.; *Regulations Act*, R.S.O., 1990, R..21, s. 1 as rep. by *Legislation Act, 2006*.

<sup>11</sup> *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F. ss. 18(1), 22(1), 23(2), 25(1); *Regulations Act*, R.S.O. 1990, c. R. 21, ss. 2(1), 4, 5(1), 5(3), as rep. by *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F., ss. 134, 143(1).

required to be formally enacted or to follow any other procedures that the Supreme Court of Canada has determined to be indicative of a legislative intent to create subordinate legislation. The policy directive is not “legislation” because it is not an Act, and it is not a “regulation, rule, order or by-law of a legislative nature” as it has not been filed with the Registrar or published on e-Laws or in the *Ontario Gazette*. Furthermore, other statutes which use the term “policy directive,” either require publication similar to that required in the case of a regulation, or if the policy directive in question is required to be published other than in the *Ontario Gazette*, the statute expressly indicates that the policy directive is not a regulation.<sup>12</sup>

[27] The plaintiffs submit that subsequent to *Oldman River*, Canadian courts have determined that directives or policy guidelines without the indicia of regulation can have the force of law. They rely on three authorities in support of this proposition: *DGH Construction Ltd. v. Newfoundland (Workers’ Compensation Commission)*<sup>13</sup>, *Whelan v. Newfoundland (Workplace Health, Safety and Compensation Commission)*<sup>14</sup>, and *Peet v. Canada (Attorney General)*, a decision of Reed J. in the Federal Court (Trial Division). Each of the three decisions arises in an administrative law context and is concerned with judicial review of an administrative decision affecting the personal rights of the applicant. They address procedural fairness, natural justice and the scope of discretionary decision-making. None go so far as to stand for the proposition that policy guidelines, even those considered to be “law”, are capable of supporting an action for damages in cases of non-compliance. None implicate third parties, nor give rise to substantive rights such as are claimed in this action.

[28] The issue in *Whelan* was not whether the policies had the force of law, but the scope of the Commission’s discretion in applying its policy to an individual case. The issue in *DGH* was whether the review commissioner had properly exercised his jurisdiction which was to determine if the Commission “acted in accordance with the *Act*, regulations and policy”. The commissioner was required to demonstrate that he had addressed whether the Commission’s decision was in accordance with the statute and properly adopted Commission policy, which he failed to do in

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<sup>12</sup> See, for example, *University Foundations Act, 1992*, S.O. 1992, c. 22 s. 6(6); *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 Sch. B., s. 27; *Private Career Colleges Act, 2005*, S.O. 2005, c. 28, Sch. L, s. 53(5).

<sup>13</sup> [1997] N.J. No. 53 (Nfld. S.C. (T.D.)).

<sup>14</sup> [1999] N.J. No. 266 (Nfld. S.C. (T.D.)).

that case. Neither *DGH* nor *Whelan* embark on the analysis mandated by *Oldman River*. *DGH* does not consider *Oldman River* at all.

[29] While the court in *Whelan* considered *Oldman River* for the narrow proposition that an Act of Parliament prevails over inconsistent or conflicting subordinate legislation, it did not assess the policies at issue in that case on the basis of the *Oldman River* test or discuss whether the policies had the indicia of a regulation. To the extent that the policies under discussion in both cases were thought to have “statutory force”, the courts reached this conclusion without regard to the *Oldman River* analysis. Consequently, *DGH* and *Whelan* cannot be considered to be reliable authorities on the question of whether indicia of regulation are required to determine if a directive or policy is “law”.

[30] *Peet* deserves closer analysis. In *Peet*, the appellant sought to quash the decision of the Deputy Minister of Forestry who found the appellant to have breached the *Conflict of Interest and Post-Employment Code for the Public Service* issued by the Treasury Board pursuant to its authority under statute. The Code was not formally enacted. The administrative decision at issue was held to be reviewable on the basis of the common law duty of fairness and not because the Code was determined to be “law”. This is evident from the authorities cited by Reed J. at para. 19. They include *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*<sup>15</sup> and *Innuit Tapirisat of Canada v. The Right Honourable Jules Léger*<sup>16</sup> where the following statement of Le Dain J.A. (as he then was) is quoted:

What is really in issue is what it is appropriate to require of a particular authority in the way of procedure, given the nature of the authority, the nature of the power exercised by it, and the consequences of the power for the individuals affected. The requirements of fairness must be balanced by the needs of the administrative process in question.

[31] That the scope of *Peet* is limited to the administrative law context is supported by two aspects of the decision. First, the court relied on *Nguyen v. Canada (Minister of Employment and Immigration)*<sup>17</sup> in which an administrative manual was found to give rise to implied public law

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<sup>15</sup> [1979] 1 S.C.R. 311.

<sup>16</sup> [1979] 1 F.C. 710 (C.A.).

<sup>17</sup> [1994] 1 F.C. 232 (C.A.).

duties and an order of *mandamus* issued. Second, in considering *Oldman River*, the court stated at para. 13: "I agree that the Code does not have the same status as the EARP Guidelines. The Code was not promulgated by order in council." The same point is made later where Reed J. distinguishes the Code from the directives at issue in *Threader v. Canada (Treasury Board)*<sup>18</sup> which were argued to be analogous:

I am not sure that this [comparison] assists the applicant to any great extent. While those directives had the same legal status as the present Code, in that they were issued pursuant to section 7 of the *Financial Administration Act*, their content mirrored the provisions of the then existing conflict of interest Guidelines which, having been promulgated by order in council, did have the force of law. [para. 14]

[32] In rejecting the respondent's argument that the directives were purely administrative, Reed J. stated at paras. 11 and 12:

I have not been persuaded by the respondent's arguments, in so far as they rely on the Dussault and Borgeat text or on the *Martineau* decision ... [*Martineau et al. v. Matsqui Institution Inmate Disciplinary Board*] ...

In so far as the *Martineau* case is concerned, while the Supreme Court held that the decision in question was not reviewable by the Federal Court of Appeal, because it had not been made pursuant to directives which had the force of law, the subsequent decision *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, held that the decision in question was reviewable by the Trial Division, pursuant to section 18 of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10], as an administrative decision which must be made fairly.

[33] It is with this preface that Reed J. then acknowledged that the Code did not have the same force as the Guidelines in *Oldman River*, but held, at para. 19:

I do not think I have to determine the dividing line, in an abstract sense, between the types of decisions concerning civil servants which are reviewable pursuant to section 18 [as am. *idem*, s. 4] of the *Federal Court Act* and those which are not. It is sufficient to say that the decision which is sought to be reviewed in this case carries very serious consequences for the applicant: the loss of his job or the divestiture or closing down of his business. *Decisions having these kinds of consequences have traditionally been subject to judicial review...* (my emphasis added).

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<sup>18</sup> (1986), [1987] 1 F.C. 41 (C.A.).

[34] While *Peet* may create a justiciable “quasi-law” obligation sufficient to give rise to public law duties, on the authority of *Oldman River*, a directive, guideline or other instrument requires the indicia of regulation to be “law”. Only then is it arguably capable of being judicially enforced by third parties. Otherwise, the essence of administrative guidelines and policy directives is that they are not enforceable against decision-makers except by the administrative authority itself. From the perspective of a third party, the guideline has no effect other than affording an expectation it will be followed. As La Forest J. said in *Oldman River*:

There is little doubt that ordinarily a minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558, 44 N.R. 354 [Fed.]. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law. [para. 44]

[35] The policy directive in this case has no indicia of regulation. It is properly understood to have an administrative and not a legislative nature. It falls within the category of internal ministerial policy guidelines intended for the control of public servants, or in this case the Minister’s statutory agents, the Colleges. As such, it fails to pass the first step in the *Oldman River* analysis.

[36] In *Oldman River*, the court scrutinized the text of the Guidelines themselves for language of a mandatory nature such as “shall” or “must” and concluded that the repeated use of the word “shall” indicated the clear legislative intention that the Guidelines bind all those to whom they are addressed, including the Minister of the Environment. This is explicitly addressed in *Bell Canada* at para. 38 and in *Thamotharem* at para. 65 where it was held that guidelines that have the indicia of regulation are a form of law and must be applied. They cannot be considered to fetter discretion. Although the policy directive is binding on the Colleges, unlike the Guidelines in *Oldman River*, it does not bind the Minister or the civil servants in the Ministry. Under the statute, the Minister is given a broad discretion. He or she *may* intervene in the affairs of a college in such a manner and under such conditions as may be prescribed, *if the Minister* is of the opinion that the college fails to follow a policy directive. The relevant portions of the policy directive do not use mandatory language. Rather, it explicitly contemplates the possibility that

the Colleges will exercise discretion in a manner that does not conform to the expectations of the Minister. In that event, the Ministry is to initiate “corrective action, which *may* include withholding an amount from the general purpose operating grant”. It also gives the Ministry the responsibility for “monitoring the activities of the colleges to confirm the system is in compliance with legislation and government policies, and working with colleges *to facilitate* corrective action in cases of non-compliance”. (emphasis added). The policy directive does not pass the second step in the analysis.

[37] I conclude that the policy directive is not “law”.

“Quasi-law”

[38] The plaintiffs’ argument is essentially one of novelty. They submit that “quasi-law” is an evolving doctrine (as illustrated by the three decisions they rely on, particularly, *Peet*) and as such, can withstand the high test on a motion under Rule 21.01(1)(b). They submit that directives may be located “on the borderline between the normative and decision-making, between the legislative and the administrative spheres” such that they are not quite law, in the fullest technical sense, but neither are they merely administrative. On this analysis, the plaintiffs submit that, in appropriate circumstances such directives should be understood as “quasi-law” and as having “quasi-legal” force such that their breach, although not technically “illegal”, is nevertheless deemed proscribed and impermissible in a justiciable sense.

[39] Both parties rely on passages from the Dussault and Borgeat text to illustrate the dimensions of “quasi-law”. The plaintiffs rely on a passage cited in *Peet* where Justice Reed, after referring to the passage cited in *Oldman River*, went on to attempt to place this in context by quoting the following passage from the text at pp. 339-340:

Courts have contributed much to date to the understanding of this concept. Certain principles, however, appear to be still somewhat fragile and should eventually be clarified. Courts must be careful when examining the characteristics of directives, firstly because they are so varied, but also because to categorize them too quickly or too simply might paralyze [sic] the Administration's activity or infringe the rights of citizens.

This is a new phenomenon which still eludes rigorous analysis; it must not be sandwiched too quickly into rigid categories within existing law. The definition of directives raises obvious conceptual difficulties. Nevertheless, these difficulties should not prevent the evolution of a very useful concept, which exists on the borderline between the normative and decision-making, between the legislative and the administrative spheres. Therefore, we must avoid going astray, as D. Mockle considers English authors to have done in their approach to directives: "Rather than struggling to assign directives to an original category, they seek to treat them as regulations, perceiving them to be just another form of delegated legislation." [Tr.]

This has been a very brief summary of the major aspects of regulation-making power in Canada in Quebec. Although subordinate legislation comes in different names, this variety in terminology has no legal consequences, since all these measures have the same legal effect, as C.K. Allen remarks: "In any case, the distinction is one of name rather than of substance, since there is no difference in actual legal validity between these variously named sublaws ..." "Therefore, in order to avoid a multiplicity of terms which would be completely pointless, we will now speak of "regulation", in the broad sense, to refer to the entire category of true, delegated legislation." [Footnotes omitted; underlining added.]<sup>19</sup>

[40] Following her reference to these passages, Justice Reed discusses *Nguyen* and concludes that the Code in *Peet* is closer to being "implied" or "quasi-legislation" than was the immigration manual in that case. The plaintiffs submit that Justice Reed's reliance on the above passage from the Dussault and Borgeat text at para. 11 of her decision supports their position that "quasi-law" has been recognized in Canadian law and, although novel in this context, one cannot conclude that the plaintiffs' claims have no chance of success.

[41] The defendants submit that the Dussault and Borgeat text does not support the plaintiffs' argument and they refer me to other passages which they contend contradict the plaintiffs' reading of the text. For example, under the subheading "*Instruments Which Are Not Legislative in Nature: Directives*" the Dussault and Borgeat text states that "[w]hatever kind of administrative action directives are aimed at, infringing them only has administrative and non-judicial consequences. Without doubt, this is their chief characteristic." This point is explained

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<sup>19</sup> The underlining appears in the decision reported at [1994] 3 F.C. 128.

more fully in the two paragraphs that immediately precede the passage cited in *Peet*, which I reproduce below:

Nevertheless, surely one must not conclude that this situation leaves public servants to whom directives apply free to decide whether or not to obey them. Of course, such is the case when they are drafted in indicative terms as in the *Maple Lodge* case. However, if they are worded in an imperative manner, there is no doubt that they must be obeyed. For example, it seems to us that the directives issued by the Commissioner of Penitentiaries, which were considered in the *Martineau* case, are obligatory for the public servants involved. Any official who disobeys them is subject to administrative sanctions which his or her superior may impose, without courts of law going so far as to grant them the force of law as regards third parties. The administrative importance of directives must be distinguished from their effect at law. In this respect, the case law must be clearly understood. In preventing third parties from utilizing directives or suffering any harm from their application, courts have not held that they were to be without any administrative sanction: this question of internal control is of no concern to them.

Although they are not subject to any legal sanction, the importance of the Administration's directives must not be ignored. They are already in general use and their number should grow even further. They represent a method by which the Administration may clarify the rules governing its actions and the public may better anticipate the acts of the Administration. As Professors G. Pépin and Y. Ouellette point out, "these directives are both the brake and the motor of administrative action" [Tr.].

[42] Based on the above passages, it would seem plain and obvious that if the policy directive is properly understood as an administrative directive as I believe it is, non-compliance with the directive has only administrative consequences. The passages relied on by the plaintiffs go no further than suggesting that some administrative decisions may have a degree of "quasi-legal" force. If the policy directive is understood as "quasi-law" and as having "quasi-legal force", the question still remains as to how this assists the plaintiffs in the causes of action they allege.

[43] It must be kept in mind that the authors are explaining the state of the case law at the time of the text's writing in 1985. In the passages relied on in *Peet*, the authors' admonishment that the court should be open to the status of directives and cautious about their characterization, must be understood in this context and in the context of a text on administrative law. However, *Peet* goes no further than permitting a judicial review remedy by a party without other recourse and

directly affected by an administrative decision on the basis of long-standing principles of procedural fairness and natural justice. Alternatively, *Peet* may be understood as giving recognition to implied public law duties on the basis that the Code in that case, although it lacked the formal indicia of a regulation, was “quasi-legislation” in that it lay on the borderline between the administrative and the legislative and was therefore amenable to enforcement through prerogative relief. There are other authorities that at least implicitly draw on “quasi-law” to provide a remedy, but in no case does this extend beyond judicial review.<sup>20</sup> Apart from the extracts from the Dussault and Borgeat text relied on in *Peet*, the plaintiffs do not provide any other authority or analysis to support their argument that “quasi-law” can support private law duties.

[44] On the most generous reading of the Dussault and Borgeat text and of the authorities, “quasi-law” is confined to the administrative law context and does not convert directives lacking the necessary indicia into “law” so as to be judicially enforceable by way of private law remedies. I conclude that even if the policy directive can be characterized as “quasi-law”, it is plain and obvious that any remedy this affords is by way of judicial review.

[45] On this analysis, I would conclude that the causes of action are doomed to failure and should be struck. However, the plaintiffs submit that even if the policy directive does not have the force of law, “quasi-law” can “inform and support” the cause of action pleaded. This submission is elaborated in paragraph 47 of the plaintiffs’ factum and is reproduced below:

[47] As a justiciable intermediary between the legal and the administrative, the Plaintiffs submit that the Binding Policy Directive’s prohibition on tuition-related ancillary fees informs and supports the Plaintiffs’ causes of action in the following manner:

- (a) by depriving the Defendants of any juristic reason justifying their retention of fees which they were expressly prohibited from charging; (Unjust Enrichment);

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<sup>20</sup> *Newfoundland (Workers’ Compensation Commission) v. Jesso* (2001), 206 Nfld. & P.E.I.R. 276, 2001 NFCA 49; *Lutes v. Commissioner of the Royal Canadian Mounted Police*, [1985] 2 F.C. 326, 1985 CarswellNat 47 (C.A.); *Macon v. Alberta (Workers’ Compensation Board)* (1993), 7 Alta. L.R. (3d) 201, 1993 CarswellAlta 258 (C.A.).

(b) by furnishing express or implied contractual terms as to the permissibility of ancillary fees levied and collected by the Defendants, and/or by evidencing what would have been the reasonable expectations of students had the colleges disclosed to them the prohibition on tuition-related ancillary fees (Breach of Contract); and

(c) by giving rise to special knowledge on the part of the Defendants as to what was and was not chargeable to the Plaintiffs and other proposed class members as ancillary fees, and giving rise to reasonable foreseeability on the part of the Defendant that the Plaintiffs and other proposed class members would rely on any expressed or implied representation of the Defendants as to same, and/or reasonable foreseeability of the likely detrimental consequences of omitting to advise the Plaintiffs and other proposed class members of same (Duty of Care – Negligence, Negligent Misrepresentation and Omission; Payment of Monies under Mistake of Fact).

[46] I confess that this submission eludes me. However, I will go further in the analysis and examine each cause of action in turn in order to decide whether the claims as pleaded disclose a reasonable cause of action on any basis and can go forward.

### **Negligence and Negligent Misrepresentation**

[47] The claims in negligence and negligent misrepresentation both require that the plaintiffs establish that they were owed a duty of care. The appropriate test for determining whether the Colleges, as agents of the Crown, owe a private law duty of care to the students is set out in what has come to be known as the *Anns/Kamloops* test.<sup>21</sup> If a *prima facie* duty of care is owed, the second part of the test requires consideration of whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. The Supreme Court has recognized that policy is relevant at both the “proximity” stage and the “residual policy concerns” stage of the *Anns/Kamloops* test and that some blending of policy considerations may occur: *Cooper*, at para. 27.

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<sup>21</sup> The test is sometimes also referred to as the *Cooper/Anns* test. *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492, [1978] A.C. 728 (H.L.); *Neilson v. Kamloops (City of)* (1984), 10 D.L.R. (4<sup>th</sup>) 641, 1984 CarswellOnt 476 (S.C.C.); *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 CarswellBC 2502 .

[48] The plaintiffs remind me that the Court of Appeal has urged caution in embarking on a policy analysis at this preliminary stage of the action in the absence of a factual record: *Sauer v. Canada (Attorney General)*<sup>22</sup>. Subsequently, the Supreme Court of Canada released its decision in *Syl Apps Secure Treatment Centre v. B.D.*<sup>23</sup>, where, Abella J. said at para. 19:

Both the majority and dissenting reasons acknowledged that imposing such a duty of care would represent a novel duty at law. The benefit of making a determination on a Rule 21 motion about whether such a duty should be recognized, is obvious. If there is no legally recognized duty of care to the family owed by the defendants, there is no legal justification for a protracted and expensive trial. If, on the other hand, such a duty is accepted, a trial is necessary to determine whether, on the facts of this case, that duty has been breached.

[49] I must take my direction from the Supreme Court of Canada. Moreover in *Cooper, Odhavji and Edwards*<sup>24</sup>, the Supreme Court of Canada was prepared to find, on the basis of the facts pleaded, that it was plain and obvious that even if a *prima facie* duty of care had arisen under the first stage of the *Anns/Kamloops* test, the duty would have been negated at the second stage by the existence of overriding policy considerations.

[50] As well, in *L.(A.) v. Ontario*<sup>25</sup>, Sharpe J.A. expressly disagreed with the Divisional Court that a trial was required to decide whether the impugned actions of the Minister rested on a policy or operational decision. In *Eliopoulos v. Ontario*<sup>26</sup>, Sharpe J.A. addressed the nature of the decision in issue (whether operational or policy) and went on to consider if there were residual policy concerns under the second stage of the *Anns/Kamloops* test. In doing so, he implicitly rejected the determination of the motions judge that it was preferable to address policy concerns that would negative a duty of care at trial. While there may be cases in which a factual record is required, these appellate authorities provide strong direction that a duty of care analysis that engages policy issues is appropriate on a Rule 21 motion.

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<sup>22</sup> [2007] O.J. No. 2443 (C.A.) at para. 45.

<sup>23</sup> 2007 SCC 38, [2007] S.C.J. No. 38.

<sup>24</sup> *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 CarswellOnt 4851; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 CarswellOnt 3962 S.C.C.

<sup>25</sup> *L.(A.) v. Ontario (Minister of Community and Social Services)* (2006), 274 D.L.R. (4<sup>th</sup>) 431, 218 O.A.C. 150 (C.A.), leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 36.

<sup>26</sup> *Eliopoulos v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4<sup>th</sup>) 411, 217 O.A.C. 69 (C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 514.

[51] The duty of care analysis involves first determining whether there is a *prima facie* duty of care by examining the factors of reasonable foreseeability and proximity. The now three-part test requires the court to answer: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) was there a relationship of sufficient proximity between plaintiff and defendant to justify imposing a duty of care? If this leads to the *prima facie* conclusion that there should be a duty of care imposed, it remains to be determined whether there are, (3) additional policy reasons for not imposing the duty: *Anns; Kamloops; Cooper; Odhavji*.

[52] The plaintiffs plead for both negligence and negligent misrepresentation that the Colleges owed a duty of care to the plaintiffs as students not to charge illegal or otherwise proscribed and impermissible fees. They submit that a duty of care must necessarily be inferred from the relationship between the defendants *qua* fee charging educational institutions and the plaintiffs *qua* fee paying students at these institutions. They rely on several cases where courts have refused to strike pleadings or have recognized a cause of action that is premised on a duty of care owed by the educational institutions to their students.<sup>27</sup>

[53] These cases do not support the proposition that in every situation involving a student and an educational institution, a *prima facie* duty of care will arise. The negligence duty of care analysis is highly contextual. For example, in *Young v. Bella*, a duty of care was imposed because the university failed to take care when it disseminated unsubstantiated allegations of child abuse without notifying the plaintiff or affording her an opportunity to respond. It was required to take care "to get [the] facts straight before taking a potentially career-ending action in relation to a student" [para. 34]. The court found that the contractual relationship afforded sufficient proximity to give rise to the duty to take care not to harm the plaintiff in these circumstances and this gave rise to concurrent duties in contract and tort on the basis of *Central Trust Co. v. Rafuse*<sup>28</sup>. The court did not purport to find proximity on the basis of established

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<sup>27</sup>*Mohl v. University of British Columbia*, [2006] B.C.J. No. 335 (C.A.), at paras. 37 to 40; *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.), at paras. 41 to 47; *Smart v. The College of the Rockies*, [2002] B.C.J. No. 3119 (S.C.) at paras. 12 to 19; *McKay v. CDI Career Development Institutes Ltd.*, [1999] B.C.J. No. 561 (B.C. S.C.) at paras. 15 to 19; *Young v. Bella* (2006), 261 D.L.R. (4th) 516 (S.C.C.) at paras. 31-32.

<sup>28</sup> [1986] 2 S.C.R. 147.

categories of relationships, examples of which can be found in *Cooper*, at para. 36. It did not find that a duty of care could be inferred from the relationship between the defendants *qua fee* charging educational institutions and the plaintiffs *qua fee* paying students at these institutions.

[54] The plaintiffs dispute that the duty of care in this case arises from the interpretation and implementation of the policy directive, but there are no material facts pleaded to establish a duty of care apart from the identities of the parties as educational institution and student. At common law, the Colleges are free to offer educational services for any fees they may choose. It is inescapable that the essence of the plaintiffs' pleading is that the policy directive creates the requisite duty. To put this another way, it is implicit in the pleading that the plaintiffs are claiming that the Colleges owed a duty to the students to charge fees that complied with the policy directive, and in failing to do this, the Colleges necessarily acted in breach of the *OCAAT Act* or in an otherwise "impermissible" manner. As the policy directive is, in my view, the only possible source for a duty of care, it is necessary to examine it in its legislative context with a view to determining whether the powers and duties it prescribes create a relationship of proximity between the Colleges as Crown agents and the students sufficient to ground a private law duty of care.

[55] The most recent case to consider the duty of care owed by statutory agents is *Syl Apps*. There, the plaintiffs were family members of a child who was apprehended by the Children's Aid Society and found to be in need of protection. The child was sent to the Syl Apps Centre. The plaintiffs alleged that the Centre and the child's social worker breached their duty of care by treating the child as if she had been physically and sexually abused by the family, thereby depriving them of a relationship with her. In that case, reasonable foreseeability was not disputed, but the analysis stalled at the proximity stage. The deciding factor was the potential for conflicting duties. In discussing this, the Supreme Court said at paras. 27 and 28:

When the relationship occurs in the context of a statutory scheme, the governing statute is a relevant context for assessing the sufficiency of the proximity between the parties (*Cooper*, at para. 43; *Edwards*, at para. 9 ). As this Court said in *Edwards*: "Factors giving rise to proximity must be grounded in the governing statute when there is one" (para. 9).

Where an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity (*Cooper*, at para. 44; *Edwards*, at para. 6). Such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties... In both cases, the serious negative policy consequences of these conflicting duties were found to justify denying a finding of proximity.

[56] Thus, while not determinative, a conflict with a governing statute will be a strong reason for negating proximity.

[57] Section 2(2) of the *OCAAT* Act provides:

2(2) The objects of the Colleges are to offer a comprehensive program of career-oriented, post-secondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment and to support the economic and social development of their local and diverse communities.

[58] The legislative scheme as outlined and discussed earlier in these reasons indicates an intention that the Colleges are to have considerable autonomy in deciding which programs to offer to students and how to fund them. This intention was expressed by the Minister of Training, Colleges and Universities, the Honourable Dianne Cunningham, upon introduction to the Ontario Legislative Assembly of the Bill that included the *OCAAT* Act. Such evidence is generally admissible on a question of statutory interpretation as a matter of law. The Minister stated that,

This legislation is also about meeting the diverse needs of our students. Until now, our legislation has treated all our colleges as though they are exactly the same and fulfill the same needs in their communities. This is far from the reality. We want colleges to be better able to respond to the different circumstances of their communities, their student bodies, their local economies or their unique areas of specialization.

The intent of this legislation is to help colleges do this by giving them more autonomy to make decisions at the local level and pursue entrepreneurial activities. They would, of course, still be accountable for public dollars. If passed, this legislation would modernize the accountability relationship between college boards of governors and students, the public they serve and the government, and place increased emphasis on the achievement of results.

We want colleges to improve on the already excellent job they do to give students and employers programs that will provide the skills needed in today's and tomorrow's economy. We propose increasing the opportunities for local self-determination through the removal of outdated requirements and restrictions. Boards of governors would define the unique role that each college plays in its local, regional, national and/or international communities. College boards would also have increased responsibility for managing real estate transactions, approving programs of instruction and establishing some subsidiary corporations.<sup>29</sup>

[59] Although the policy directive is binding on the Colleges in order to establish rights and duties as between the Colleges as statutory agents, and the Ministry, the legislative regime provides a flexible approach to the manner in which the Colleges may set fees and government remedies in the case of non-compliance. This flexibility is essential to the overall scheme whereby the government sets the funding envelope for the Colleges, and is appropriate to the public law context of education that affords the Minister discretionary remedial options in cases of non-compliance and shields his or her decisions from review. In particular:

(a) Subsection 5(1) of the *OCAAT Act* affords the Minister the discretion to intervene in the affairs of a college if the Minister is of the opinion, *inter alia*, that a college fails to follow a policy directive, or that it is in the public interest to do so.

(b) Section 15 of the Regulation provides the Minister with a range of remedial options, including the appointment of an investigator, issuing a requirement to comply with a policy directive, removal of board members, and the appointment of an administrator to exercise the powers of the college.

(c) Subsection 15(10) of the Regulation provides a strong privative clause with respect to the Minister's exercise of these remedial powers. Furthermore, subsections (11) and (12) and section 16 of the Regulation afford statutory immunities to the Minister, the Crown and any administrator with respect to certain actions taken under section 15; and,

(d) The policy directive itself provides for a protocol for introducing and increasing compulsory ancillary fees that contemplates discussion with student representatives and for a remedy of withholding future funding in cases of non-compliance. The Ministry is responsible for monitoring the activities of the Colleges to confirm that the system is in compliance with legislation and government policies.

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<sup>29</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, no.12 (30 May 2002) at 511 (Hon. Dianne Cunningham), online: Legislative Assembly of Ontario, <[http://www.ontla.on.ca/web/house-proceedings/house\\_current.do?locale=en](http://www.ontla.on.ca/web/house-proceedings/house_current.do?locale=en)>; *Red Rock First Nation v. Canada (Attorney General)*, [2005] 3 C.N.L.R. 317, 2005 CarswellOnt 2315 at paras. 28-33 (S.C.J.).

[60] Decisions with respect to fees require the Colleges to balance the interests of the students with the funding requirements of the Colleges, as determined in cooperation with the Ministry, and involve discretionary decisions for the allocation of fees. In its summary of the Colleges' responsibilities, the policy directive states that the colleges are responsible for:

Ensuring that information is made available to the college community, including students and potential students, regarding tuition and ancillary fees, tuition and ancillary fee refund policy, the use of revenues from tuition and ancillary fee increases, and *other aspects of policy related to tuition and ancillary fees* [emphasis added].

[61] This language reinforces that the decisions of the Colleges in setting fees in accordance with the policy directive are in pith and substance policy decisions that require the Colleges to determine how best to carry out the objectives of the policy directive in accordance with the Colleges' mandated objects in section 2(2) of the *OCAAT* Act. Determining the appropriate leviable fees pursuant to the policy directive is an interpretative exercise left to the Colleges under the supervision of the Ministry. The policy directive was issued within a Policy Framework and is a result of the policy-making function of the Ontario government. Interpreting and implementing the policy directive in accordance with ministerial guidelines is both an administrative and policy function of the Colleges. The Colleges are not simply carrying out a pre-determined government policy, but deciding, as agents of the executive branch of government, how to give effect to it. As such, neither the Ministry, nor the Colleges as the Minister's agents, owe private law duties to the plaintiffs with respect to, or arising out of the Colleges' interpretation and implementation of the policy directive. In matters of policy, no duty of care exists between individuals and governmental actors: *Brown v. British Columbia (Minister of Transportation & Highways)*<sup>30</sup>.

[62] In *L. (A.) v. Ontario*, the court held that the defendant Minister owed the plaintiff parents of disabled children no duty to enter into agreements to provide services for the children's special needs. While the statutory scheme presented the parents with hope that the Minister might enter into a special needs agreement, their hope did not amount to a legal duty of care that

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<sup>30</sup> [1993] 1 S.C.R. 420, 1994 CarswellBC 128 at para. 34 (S.C.C.).

would ground an action for damages in negligence. Here, the students can similarly hope that the Colleges will levy fees that comport with the policy directive but, the exercise, or lack of exercise of discretion by a Crown agent does not give rise to enforcement rights by students dissatisfied with the Colleges' interpretation and implementation of the policy directive, or with the Minister's decision to not intervene into the affairs of the Colleges. To afford the students the right to sue the Colleges as Crown agents for failing to follow the policy directive, they are, in effect, bringing action against the Minister to compel him or her to enforce it. This is contrary to the legislative scheme which explicitly gives this discretion to the Minister. As the court stated in *L.(A.) v. Ontario*, at paras. 24 and 25:

Decisions by the Minister "require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties": *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 at para. 14. The imposition of a duty of care would contradict and undercut the nature of the legal relationship contemplated by the statute and would be contrary to the public nature of any duty that is created by s. 30.

... since any duties or obligations contemplated by the statute are public in nature, they are not capable of giving rise to a private tort law duty of care or an action in negligence for damages.

[63] To some degree, the provisions of the *OCAAT* Act serve to protect the interests of students, just as the provisions of the *Mortgage Brokers' Act* in *Cooper* to some degree served to protect the interest of investors and the provisions of the *Law Society Act* in *Edwards* to some degree served to protect the interests of the clients of lawyers. Nonetheless, the obligations owed by the Colleges to the Minister are overwhelmingly public in nature and the remedial flexibility afforded to the Minister is appropriate in the polycentric, public law context of applied education. Recognizing a duty to students as it relates to the setting of fees would directly conflict with this legislative scheme. Accordingly, even if the Colleges might reasonably have foreseen the resulting harm to students if they failed to follow the policy directive, the statutory scheme cannot be construed in a manner that would avoid a potential conflict between the proposed duties owed to the students and those duties the Colleges owe to the Minister and to the public at large.

[64] In *Syl Apps*, the existence of statutory immunity provisions provided further support to the court's conclusion that there was no proximity in the relationship between the family of a child in care and those directed by a court to protect that child's best interests. This factor is also present in this case.

[65] For the above reasons, I conclude that there is an insufficient relationship of proximity to give rise to a private law duty of care in negligence.

[66] The claim in negligent misrepresentation must fail for similar reasons. To allege, as the plaintiffs do, that by invoicing the students for fees, the Colleges impliedly represented that the fees would comply with the policy directive is no different than asserting that the policy directive creates a duty owed by the Colleges to the students to comply with it. While *Queen v. Cognos Inc.*<sup>31</sup> established that an implied representation can ground an action in negligent misrepresentation in appropriate circumstances, the pleadings disclose no basis upon which to find that the Colleges made any representation to the students that the fees would comply with the policy directive or that the students may rely on such representation. As a matter of pleading, this cause of action is not made out.

[67] I have concluded that on the facts as pleaded, there is no proximity sufficient to give rise to a *prima facie* duty of care and that such a duty cannot be inferred. If I am wrong in this conclusion, I would find that the policy concerns I have already addressed make it plain and obvious that any *prima facie* duty of care that may arise is negated at the second stage of the *Anns/Kamloops* test. Recognizing such a duty would compromise and undermine the legislative scheme and be in direct conflict with it. It would create the spectre of unlimited liability in any circumstance where a person was dissatisfied with the implementation of a policy directive issued by the Minister to the Colleges. It would be inconsistent with the autonomy given to the Colleges under the legislation and with the Minister's role and responsibilities to supervise the activities of the Colleges and to intervene if appropriate.

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<sup>31</sup> [1993] 1 S.C.R. 87, 1993 CarswellOnt 801.

[68] Having found no proximity sufficient to found a *prima facie* duty of care, it is unnecessary to proceed to the second branch of the *Anns/Kamloops* test and consider additional policy considerations that would negative a *prima facie* duty of care, but I will address this very briefly.

[69] In *L.(A.) v. Ontario*, the Court of Appeal determined that two residual policy considerations were sufficient to negative any *prima facie* duty of care that might arise at the first stage of the duty analysis. These were the availability of more appropriate remedies and the disutility of private suits in a public law context. As to the first, the court found in *L. (A.)* that the allegation that the Minister acted improperly by terminating s. 30 agreements or by failing to provide adequate criteria or guidelines for their use could be addressed by way of an application for judicial review or declaratory action. This was the proper remedy given that the nature of the complaint related to statutory discretion and to duties owed to the public at large. As to the second, the recognition of a duty of care would expose the government to substantial liability and represent an unwarranted and undesirable intrusion that could interfere with the sound administration of the *Child and Family Services Act*. These two factors are also present with respect to the plaintiffs' action against the Colleges. It is plain and obvious that the claims in negligence and negligent misrepresentation cannot possibly succeed.

### **Breach of Contract**

[70] The plaintiffs allege that the contract between the parties arose when the Colleges offered admission to a class member student that was accepted and /or, upon the Colleges invoicing the students for fees that were paid. They plead that each of the contracts contain an express or implied term to the effect that all fees charged to the students are legal or otherwise permissible and that by collecting fees in breach of the policy directive, the Colleges breached the express or implied term of "legality" or "permissibility". Alternatively, they allege that the contracts must be understood to contain an implied term that the fees charged were *intra vires* their statutorily granted powers.

[71] The plaintiffs cannot rely on the *ultra vires* doctrine as it does not apply to natural persons. The Colleges are corporations and by virtue of the *Corporations Act*, each has the

capacity of a natural person.<sup>32</sup> In argument, the plaintiffs conceded that the contract contains no express term as to “legality” or “permissibility”. Accordingly, the contract claim turns on whether it is arguable that a term may be implied that the fees charged were legal or otherwise permissible.

[72] The plaintiffs submit that courts will regularly imply terms into contracts where such implication is necessary in order to avoid unfairness to the parties, provided that such unfairness is not simply a result of “bad bargaining”. They rely on three decisions for this proposition: *Sanderson v. National Frontier Insurance Co.*<sup>33</sup>; *Cadillac Fairview Corp. v. Canstar*<sup>34</sup> and *Maple Engineering & Construction Canada Ltd. v. 1373988 Ontario Inc.*<sup>35</sup>

[73] *Sanderson* is a decision of Weekes J. and concerned the interpretation of a standard mortgage clause. He relied on a series of American cases and in particular a 1934 decision of the Maryland Court of Appeal for the proposition that it was “the unfairness of the situation that caused the court to imply a term that was not written in the contract”. He said that “the average person would not expect that result”.<sup>36</sup> With respect, this is wrong.

[74] The Supreme Court of Canada has determined that a court may imply a term into a contract in three circumstances: (1) based on custom and usage; (2) based on the presumed intention of the parties to give business efficacy to a contract [terms implied in fact] by applying the “officious bystander” test, and (3) as a legal incident of a particular type of contract where this is necessary.<sup>37</sup> In dealing with terms implied in fact, the focus is on the presumed intentions of the *actual* parties:

... A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of *reasonable* parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is

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<sup>32</sup> R.S.O. 1990, c. C.38, s. 274.

<sup>33</sup> [1994] O.J. No. 502 (Gen. Div.).

<sup>34</sup> [1991] O.J. No. 1560 (Gen. Div.).

<sup>35</sup> [2004] O.J. No. 5025 (S.C.J.).

<sup>36</sup> *Sanderson*, at para. 20.

<sup>37</sup> *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, 1987 CarswellOnt 760 (S.C.C.); *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, 1999 CarswellAlta 301 S.C.C.

evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis ...<sup>38</sup>

[75] *Maple Engineering*, another of the cases relied on by the plaintiffs, is a tendering case. Kruzick J. found that it was appropriate to imply a term based on the presumed intention of the parties because the “officious bystander” test was met. In *Cadillac Fairview*, the third of the cases relied on by the plaintiffs, Sutherland J. explicitly rejects the proposition that a court may imply terms based on a reasonableness standard and held that the task of the court was to give effect to the agreement.<sup>39</sup> *Cadillac Fairview* is a case where both parties had equal bargaining power, but the contractual term in issue gave Cadillac broad discretion to withhold its consent to an option in favour of Canstar. The court found that the presumed intention of the parties was that Cadillac would not capriciously or colourably withhold its approval. Thus, *Maple Engineering* and *Cadillac Fairview* are instances where implication in fact was appropriate on the basis of presumed intention.

[76] Here, there are no material facts pleaded with respect to any of the circumstances identified by the Supreme Court of Canada for implication of terms. In argument, the plaintiffs submitted that it would be open to a court to imply a term that the Colleges were not entitled to charge prohibited fees in order to give business efficacy to the contract. The creation of contractual rights in this circumstance depends on the presumed intention of the parties. The plaintiffs have not pleaded any material facts that would support the implication of a term that the parties intended that the fees charged would be in compliance with the policy directive, failing which the fee contracts would be vitiated. In order to imply such a term, a court would need to find that the parties intended that the Colleges would have no discretion to set fees. To put this another way, could a court find that the presumed intention of the parties was that if the policy directive was not followed, the Colleges would be exposed to an action in damages at the instance of the students? The answer must be no.

[77] More fundamentally, for reasons I have already discussed, the policy directive is not “law” and does not make any fee contracts that contravene it “illegal”, so as to found an action

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<sup>38</sup> *M.J. B. Enterprises Ltd.*, at para.29.

<sup>39</sup> *Cadillac Fairview*, at 11-12.

for breach of contract. As “quasi-law” does not give rise to substantive rights, this does not assist the plaintiffs. I conclude that this cause of action cannot possibly succeed.

### **Unjust Enrichment**

[78] The plaintiffs submit that the fees charged under the contracts are illegal or are otherwise proscribed and impermissible, and as such, cannot constitute a juristic reason for the enrichment of the Colleges.

[79] In *Garland v. Consumer's Gas Co.*<sup>40</sup>, the Supreme Court of Canada established that the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis. The *prima facie* case is rebuttable at the second stage of the analysis. Here there is a de facto burden on the defendant to show the reason the enrichment should be retained.<sup>41</sup>

[80] A contract is an established category and constitutes a juristic reason for enrichment. The essence of the plaintiffs' primary submission is that the policy directive makes any contracts that contravene it illegal. The plaintiffs' claim in unjust enrichment therefore requires as a precondition to success that the Colleges' contractual rights to the fees paid by the students be extinguished as these contractual rights would otherwise provide a juristic reason for the Colleges' enrichment. In order to extinguish the Colleges' contractual rights necessarily requires that a court find that the policy directive has the force of law. As the policy directive does not have the force of law, it cannot be judicially enforced to deny the Colleges the fees paid under the contracts.

[81] The plaintiffs' alternative submission that contracts containing proscribed and impermissible fees cannot constitute a juristic reason, must also fail. First, there is no authority for this proposition. Second, to extinguish a substantive right requires something more than

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<sup>40</sup> [2004] 1 S.C.R. 629, 2004 CarswellOnt 1588 (S.C.C.).

<sup>41</sup> *Garland*, at paras. 44-46.

“quasi-law”. Judicial enforcement of the policy directive on the basis that it has “quasi-legal force” relies on it being law that the courts can enforce. This is nothing less than affording the proscription of the policy directive the full force of law.

[82] As the plaintiffs have not made out a *prima facie* case that there is no juristic reason for the enrichment, I find it unnecessary to consider the second part of the *Garland* analysis.

### **Constructive Trust**

[83] The Supreme Court of Canada has recognized that there will be no need for a constructive trust where an award of monetary damages is a sufficient remedy.<sup>42</sup> This claim was abandoned in oral argument.

### **Mistake of Fact**

[84] The plaintiffs cannot rely on unilateral mistake to rescind or rectify the contract as it is well-established that this is not available unless the Colleges engaged in fraud or some other unconscionable conduct.<sup>43</sup> There are no facts pleaded to support this cause of action. To the extent that the pleading seeks a restitutionary remedy, it relies on the allegation that the fees were “legitimately leviable” and in compliance with the policy directive. For reasons already discussed, the plaintiffs cannot possibly succeed as the policy directive is not “law” and accordingly, the fee contracts are not rendered invalid by monies paid by a mistaken belief as to their legality.

### **Conclusion**

[85] It is plain and obvious that each of the plaintiffs’ substantive claims is founded on the proposition that a contravention of the policy directive is illegal or otherwise impermissible and justiciable and capable of enforcement by the courts. The policy directive is an administrative directive and does not have the force of law. Even if the directive can be viewed as having

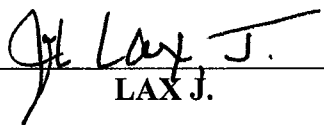
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<sup>42</sup> *Peter v. Beblow*, [1993] 1 S.C.R. 980, 1993 CarswellBC 44 at para. 29 (S.C.C.); *International Corona Resources Ltd. v. Lac Minerals*, [1989] 2 S.C.R. 574, CarswellOnt 126 at para. 78 (S.C.C.).

<sup>43</sup> *Toronto Transit Commission v. Gottardo Construction Ltd.* (2005), 257 D.L.R. (4<sup>th</sup>) 539, CarswellOnt 4019 at para. 30 (C.A.).

“quasi-legal” status, “quasi-law” can only support a remedy of judicial review, consistent with fundamental values of procedural fairness and natural justice. Although the policy directive binds the Colleges and establishes rights and duties between them and the Minister, its contravention cannot be used to extinguish or create substantive rights at the instance of third parties. The pleading does not disclose any reasonable cause of action and the plaintiffs will be unable to meet the requirement of section 5(1)(a) of the *Class Proceedings Act, 1992*. As the claims have no chance of success, it is appropriate to dismiss them on a motion under Rule 21.01(1)(b). This will obviate the need for an expensive certification motion.

[86] Costs of the motion and of the action may be addressed by written submissions within 60 days, in accordance with a schedule agreed to by the parties.

  
LAX J.

**Released:** March 28, 2008

**COURT FILE NO.:** 07-CV-334131CP

**DATE:** 20080328

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

AMANDA HASSUM and DANIEL ROFFEY

Plaintiffs

**- and -**

THE CONTESTOGA COLLEGE INSTITUTE OF  
TECHNOLOGY AND ADVANCED LEARNING  
and THE GEORGE BROWN COLLEGE OF  
APPLIED ARTS AND TECHNOLOGY

Defendants

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REASONS FOR JUDGMENT

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LAX J.

Released: March 28, 2008