

COURT OF APPEAL FOR ONTARIO

OSBORNE A.C.J.O., FINLAYSON and SHARPE JJ.A.

**BETWEEN:**

PETER KULCHYSKI, <u>IAN McLACHLAN</u> and <u>ANDREW WERNICK</u>	)	John B. Laskin and Frank Cesario, for the
	)	appellants
	)	
Applicants	)	
(Appellants)	)	
	)	
<b>- and -</b>	)	
	)	
TRENT UNIVERSITY	)	John C. Murray and Angus T. McKinnon,
	)	for the respondent
	)	
Respondent	)	
(Respondent in appeal)	)	
	)	
<b>- and -</b>	)	
	)	
ATTORNEY GENERAL FOR ONTARIO	)	Kim Twohig, for the intervener
	)	
	)	
Intervener	)	
	)	
	)	Heard: June 28, 2001

On appeal from the judgment of the Divisional Court (Justices O’Driscoll, Zuber and Czutrin) dated September 18, 2000, dismissing the application for judicial review.

FINLAYSON J.A.:

[1] This is an appeal, with leave of this court, from the judgment of the Divisional Court dismissing an application for judicial review of a resolution of the Board of Governors (the “Board”) of Trent University (the “University”). The resolution authorized the closure and sale of the premises of Peter Robinson College and Catharine Par Traill College, two of the University’s colleges located in downtown Peterborough.

I. Facts

[2] In the late 1950s, the Mayor of Peterborough and a number of community leaders began to promote the establishment of a university in the Peterborough area. In August, 1960, Trent College Limited was incorporated under *The Corporations Act, 1953*. Efforts commenced to raise money and locate a site for the university. At the time, there was a mounting demand for post-secondary education in Ontario. The Provincial Government actively encouraged the establishment of Trent University, as well as a number of other new universities.

[3] In 1962, approximately 100 acres of land on the outskirts of Peterborough were donated to Trent College Limited. Subsequently, Trent College Limited authorized the purchase of additional adjacent lands. This site was to become the University's main campus and was ultimately named the "Symons Campus". In October 1962, the Trent University Board of Directors announced the appointment of Thomas H.B. Symons as the President designate of Trent University, to assume office in July 1963.

[4] At that time, a committee was established to prepare the new university's charter. The charter which the committee proposed was enacted in April of 1963 as *An Act to Incorporate Trent University*, S.O. 1962-63, c.192 (cited as "*The Trent University Act, 1962-63*", hereinafter the "*Trent Act*"). The *Trent Act* formally established the University and set up a form of bicameral governance that divided governance of the University between a Board of Governors and a Senate (the "Senate"). The Board was given authority over, *inter alia*, the "government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs". (*Trent Act*, s. 10) The Senate was given authority, *inter alia*, to "control, regulate and determine" educational policy within the University. (*Trent Act*, s. 12)

[5] On the enactment of the *Trent Act* in April 1963, the University's lands were transferred from Trent College Limited to Trent University and, thereafter, maintenance of these lands became the responsibility of the Board. The University's Symons Campus was chosen as the "permanent" home of the University. However, development of the necessary facilities did not proceed as originally planned and when it became evident that the Symons Campus would not be ready for use by September 1964, arrangements were made to secure temporary facilities in downtown Peterborough. The City of Peterborough made an old high school available and additional buildings were purchased, including larger residential houses for use as temporary residential colleges. Peter Robinson House for men and Catharine Parr Traill House for women were opened in September 1964 in premises located in different areas of downtown Peterborough.

[6] In 1967, the first residential college opened on the Symons Campus. The second opened in 1968 and the third in 1973. At no time has the University been in a financial position to proceed with its plan for twelve residential colleges on the Symons Campus.

[7] Today, the University provides residential accommodation for some 1,100 of its 3,800 undergraduate students through its five residential colleges. Peter Robinson College houses 135 students and Catharine Parr Traill houses 193 students. They are located in different areas of downtown Peterborough approximately five to seven kilometres from the Symons Campus. The buildings consist of turn-of the century converted residential houses, a residence/office building constructed in 1966, a renovated apartment building and town houses.

## II. Events leading to the disputed resolution

[8] It appears from the material filed by the respondent University that the relationship between the academic side of the University (the Senate) and those responsible for the financing and maintenance of the facilities (the Board) has historically been far from harmonious. Over time, the University's bicameral governance system, which appears to have worked satisfactorily in other universities, created fractiousness in the Trent University community and led to numerous internal conflicts. The deterioration of the governance system was one of the matters addressed by an external review of the University's administration conducted in 1997 by H.W. Arthurs and Joyce Lorimer. Their report, *External Review of the Administration of Trent University*, stated in part at p. 4:

The fractiousness which has characterized the Trent community for over two decades, we suggest, reflects very real and unresolved internal conflicts. These conflicts are manifest in debates over governance structures. Trent's formal allocation of decision-making responsibility between the Board, senior administration, Senate, Faculty Council, departments and colleges and management resemble provisions elsewhere. However, in practice, Trent appears to have translated the informal habits of earlier and smaller days 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. **This system, described to us as a system of "multiple vetoes", is particularly problematic because of the difficulty of balancing the priorities of different constituency interests in a climate of economic stringency.** [Emphasis added.]

[9] Adding to the University's troubles, a financial crisis developed in the 1990s because of unprecedented cuts in government funding to Ontario universities. Trent University did not have the resources to continue its mandate and meet the increased demand by students for enrolment. It operated at substantial deficits for the years ending 1998 through 2000.

[10] The University's current President, Bonnie Patterson, was appointed on July 1, 1998. She was given a mandate by the Board to develop a plan to restore the University to financial viability and to design a plan to balance the operating budget. In addition to suffering from a substantial operating deficit and an ever-increasing cumulative debt, the University was also having difficulty meeting enrolment targets and its infrastructure was deteriorating. Many of the buildings had extraordinarily high current and deferred maintenance costs associated with them. Many buildings also had deteriorated below acceptable standards for a post-secondary institution. Many of the University's ancillary operations, including its residential colleges, had depleted their maintenance reserves and were accumulating operating deficits.

[11] Fortuitously, in response to similar problems confronting other universities, the Ontario Government announced in its May 1999 Budget the creation of a SuperBuild Growth Fund (the "Fund"). The Fund was aimed at renewing infrastructure and providing new facilities to accommodate anticipated enrolment increases at existing educational institutions. Accordingly, in May of 1999, President Patterson established a Task Force to review and evaluate the University's space planning and capital needs within the context of the provincial SuperBuild program. The eleven-person Task Force was composed of three faculty members, two students,

the University's Associate Vice-President and Registrar, its Director of Student Affairs, its Manager of Facility Services, its Co-ordinator of Institutional Research and Planning, its Science Facilities Manager, and a seconded Ontario Government Realty Analyst.

[12] On October 25, 1999, the University's Task Force delivered its unanimous report recommending increased student enrolment and the consolidation of the University's Peterborough operations on the Symons Campus. The Task Force did not recommend any alterations to Trent's existing educational policy. The Task Force Report noted the University's mission as an institution specializing primarily in liberal undergraduate education in the Humanities, Natural Sciences and Social Sciences. The Report acknowledged the University's commitment to "small scale personalized teaching and learning", to the encouragement of interdisciplinary studies and to the importance of the residential college system. The Task Force reviewed the University's economic position and analyzed its aging infrastructure and the deferred maintenance and operating costs associated with many of the University's buildings.

[13] The Task Force recommended a program of infrastructure renewal through the erection of new buildings, the renovation of certain buildings on the Symons Campus and the closure and sale of the University's downtown facilities. It proposed the construction of a new \$11.25 million facility on the Symons Campus to provide the Humanities disciplines with state of the art infrastructure.

[14] The University maintains that it consulted widely within the university community on the recommendations in this report. Additionally, President Patterson retained Educational Consulting Services ("ECS") to prepare a report on the University's current and projected infrastructure needs. The ECS report concluded that the downtown colleges had higher annual operating costs than those on the Symons Campus and noted that their closure would assist in reducing annual operating deficits, permit the University to retire outstanding mortgage debt and substantially reduce deferred maintenance costs.

[15] In early November of 1999, President Patterson proposed a Capital Development Strategy which was to form the basis of the University's SuperBuild application. The Capital Development Strategy addressed the need to eliminate deficits in the annual operating and ancillary budgets and to address deferred maintenance liabilities. It recommended increased enrolment targets. The principal elements of the strategy were:

1. Creation of a new residential college on the Symons campus. With spaces for 313 resident undergraduates, this college will house faculty and staff currently located at Peter Robinson and Catharine Parr Traill Colleges and will meet the needs identified for a First People's House of Learning and Humanities Centre;
2. An expanded, refurbished complex for the sciences including facilities for business-research partnerships and conferences;
3. Demolition of the current Otonabee College residence and construction of new accommodation designed for up to 327 resident undergraduate and graduate students. This facility would be used as conference accommodation in summer months;

4. Closure of Peter Robinson and Catharine Parr Traill Colleges and the sale of all Trent properties associated with these colleges; and
5. Establishment of an endowment fund from the proceeds of the sale of the town colleges for the maintenance of the new facilities.

[16] In what the University maintains was simply part of its normal consultative process, President Patterson sought the Senate's endorsement of the Capital Development Strategy. The Senate responded by adopting two motions. In one motion, the Senate supported the recommended pattern of enrolment growth. In the other, the Senate supported an application for SuperBuild funding but rejected the notion that the application could be based on a change of location or reduction of facilities at any downtown or Symons Campus college.

[17] On November 12, 1999, the Audit and Finance Committee of the Board recommended the Capital Development Strategy to the Board. The Board then met and passed a resolution approving the Capital Development Strategy and it authorized the President to submit an application under the SuperBuild Growth Fund consistent with the Capital Development Strategy.

[18] Following the passage of the Board's resolution, Ian McLachlan and Andrew Wernick, the two appellants who remain in these proceedings, commenced an application for judicial review of the Board's resolution. Professors McLachlan and Wernick are two of the University's two hundred and ten full-time teaching faculty members. Professor McLachlan is also a member of the Senate of Trent University and is the Chair of the Cultural Studies Program, which is based at Peter Robinson College. The appellants sought to challenge the Board's November 12, 1999 resolution which approved the Capital Development Strategy and its proposal to sell the buildings and facilities located in downtown Peterborough.

### **III. Relevant provisions of the *Trent University Act, S.O. 1962-63, c.192***

4. The University has power to establish and maintain such faculties, schools, institutes, departments, chairs and courses as the Senate deems necessary and as shall be approved with respect to finances and facilities by the Board.

10. Except as to such matters specifically assigned by this Act to the Senate or the councils of the faculties, as hereinafter referred to, **the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board**, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University, including, but without limiting the generality of the foregoing, power,

- (a) to appoint and remove the President and Vice-Chancellor;
- (b) to appoint, promote and remove the deans . . .

(c) to fix the number, duties and salaries and other emoluments of the officers, clerks, employees, agents and servants of the University;

(d) to appoint an executive committee . . .

(e) to make by-laws and regulations for the conduct of its affairs

12. The Senate is responsible for the educational policy of the University, and, with the approval of the Board in so far as the expenditure of funds and the establishment of faculties are concerned, may create such faculties, departments, schools or institutes or establish chairs as the Senate may determine, may enact by-laws and regulations for the conduct of its affairs and, without limiting the generality of the foregoing, has power,

...

(b) to control, regulate and determine the educational policy of the University...[Emphasis added.]

#### IV. Judgment of the Divisional Court

[19] A unanimous panel of the Divisional Court assumed without deciding that the appellants had status to bring the judicial review application and that judicial review was available on the facts of the case. The court stated that under s. 10 of the *Trent Act*, the Board is vested with plenary authority over the government, conduct, management and control of the University and over its property, revenues, business and affairs, subject only to such powers that are granted to Senate. It further stated, in paragraph 9(b) of its decision, that the *Trent Act* did not give the Senate jurisdiction over all matters of “policy” or all matters relating to education at Trent, but only over matters of “educational policy”. The Divisional Court concluded that the Board had jurisdiction under s. 10 of the *Trent Act* to pass the impugned resolution. In support of this conclusion, it expressed the following views:

We are of the view that while s. 4 of the *Trent Act* permits Senate to determine “what faculties, schools, institutes, departments, chairs and courses are necessary”, the same section specifically provides that Senate’s authority is limited in this regard by the Board’s authority “with respect to finances and facilities.” Senate’s jurisdiction in respect to matters pertaining to education is also limited by the specific grants of authority to the Board such as the authority over the hiring of Faculty.

We are of the view that a review of the specified powers allocated to Senate under the various subsections of s. 12 of the [*Trent Act*] demonstrate that each power is intimately linked to the delivery of the academic programme. These powers are clearly distinct from both the general governance power granted to the Board and the Board’s specific authority over property and expenditures. In both such areas, the Board’s authority is paramount.

We are of the view that the Board's specific and residuary powers grant it exclusive jurisdiction over the management and control of the University's property, revenues and expenditures including financial responsibility for provision of facilities.

[20] The Divisional Court also included a reference to *Re Cartwright Public School Trustees and Township of Cartwright* (1903), O.L.R. 699 (C.A.), which contains the proposition that there can be no *estoppel* or waiver of the public right.

[21] Finally, after dismissing the application for judicial review, the Divisional Court ordered costs fixed at \$20,000 payable by the applicants to the respondent. It did not provide reasons for awarding costs, although it did hear submissions on the issue.

[22] The appellants now appeal that decision of the Divisional Court. In arguing this appeal, the appellants have asserted that the Board exceeded its jurisdiction in passing the November 12, 1999 resolution, contending that the maintenance of the two downtown residential colleges at their current location is a matter of "educational policy" over which the University's Senate has jurisdiction. It is the appellants' position that a concurring motion from the Senate is required to authorize the consolidation of the University's operation on the main campus. Significantly, the Senate has not authorized or otherwise supported the appellants' court challenge to the Board's authority.

## **V. Issues as stated by the appellant**

[23] According to the appellant, the Divisional Court erred in:

1. concluding that Trent's Board had jurisdiction under the *Trent Act* to authorize the closure and sale of Peter Robinson College and Catharine Parr Traill College over the objection of Senate; and
2. awarding costs of \$20,000 against the appellants without hearing their submissions as to quantum and without any information from the respondent other than a bare statement as to the approximate amount of its costs.

## **VI. Analysis**

### **i. Appeal on the merits**

[24] In my opinion, the appellants' appeal on the merits should be dismissed. The appellants have attempted mightily to convert a financial management decision made in response to economic necessity into an educational policy issue that requires the assent of the Senate. I do not accept their submissions that the Board lacked the overriding jurisdiction to authorize the closure and sale of certain facilities despite the objection of the Senate.

[25] The basic facts are not in dispute. The only issue is how they are to be interpreted for governance purposes. While the Senate has taken no part in these proceedings, the appellants maintain that the Senate's refusal to endorse the Capital Development Strategy is fatal to its

implementation because that strategy involves a fundamental change in the educational policy of Trent University that must be approved of by the Senate.

[26] It is clear that the resolution passed by the Board was based on a recognition that the University desperately needed to restructure its administration in order to cut costs and put it in a position to take advantage of a Government initiative whereby scarce capital funds would be made available for capital improvements and renewal of the infrastructure. The Task Force set up by President Patterson recommended that the buildings in downtown Peterborough that had been the temporary base for two of the colleges should be sold, and that the faculty, administrative staff and student bodies should be moved to the main campus, where it was always intended that they should be.

[27] On the face of it, this restructuring program appears to be fully within the jurisdiction of the Board, which is charged under s. 10 of the *Trent Act* with the “government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs”. 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 kilometers away in new facilities on the main campus. However, as is often the case when a segment of an institution becomes isolated from its centre core, even to a small degree, it appears to take on an identity of its own. The orphan colleges in the downtown core of Peterborough fostered a special *esprit de corps* but that is no basis for resisting change. In supporting the members of the faculty and alumni who oppose the restructuring plan, the Senate lost sight of the broader interests of the university as a whole. While a variety of factors, including nostalgia, appear to support the appellants’ opposition to the Capital Development Strategy as implemented by the Board’s resolution, in my opinion they do not provide the legal foundation to support a court challenge.

[28] In this case, the appellant professors, and other like-minded individuals, argue that the University’s decentralized nature has always been one of its greatest academic strengths. According to the appellants, the decentralization has allowed individual members of the University to pursue teaching and learning within an environment not fenced in by narrow disciplinary boundaries. They further assert that the University has failed to acknowledge that the downtown colleges are integral to the educational policy of Trent University, and maintain that with their distinctive defining characteristics, these colleges counterbalanced the departmental concentration typical of many universities and permitted students and faculty to explore a wider range of intellectual options. It is the submission of the appellants that centralizing all of the University’s academic units in one location would endanger this diversity, strengthen administrative prerogatives and weaken the exploratory and experimental tendencies that keep the University vibrant.

[29] The appellants justify this somewhat extravagant language by referring the court to promotional brochures enticing student enrolment and to the University’s Academic Calendar. However, as the appellants’ counsel fairly conceded, the decentralization of the University only occurred as a result of a delay in the construction of the Symons Campus. When the University was forced to open its doors prematurely in 1964 and to make use of temporary downtown

accommodations, it chose to make the best out of unfortunate and unforeseen circumstances and extol the virtues of a necessity forced upon it. It promoted the rewards of what it then characterized as a unique educational experience. Unfortunately, the appellants now attempt to elevate this educational experience into settled educational policy.

[30] It is important to remember that the founders of the University contemplated the creation of one central campus, and not the dispersed campus that was forced upon them. In retrospect, the use of property in the downtown area might have created a unique campus at the University, but it is a stretch to say, as the appellants maintain, that spreading the University out in various locations was part of the academic mission of the University or that this decentralization constitutes an essential part of the educational policy of the University.

[31] In my view, all these opinions about the value of the present isolation of the two colleges and its effect on the delivery of the academic curriculum are of little assistance in determining the central issue under appeal which is whether the Board possesses the jurisdiction and authority to pass the resolution at issue without the concurrence of the Senate. Similarly, the extensive evidence about how unpopular the Board's decision is in some quarters is equally irrelevant. This is particularly true in the light of the appellants' oft-repeated assurance that the court should not be concerned about the merits of the Board's resolution.

[32] I support the conclusion of the Divisional Court that "the Board's specific and residuary powers grant it exclusive jurisdiction over the management and control of the University's property, revenues and expenditures including financial responsibility for provision of facilities". It follows, in my view that under the *Trent Act* the Board is the keeper of the University purse and has no obligation to indefinitely provide financial support to any policy, educational or otherwise that is draining the coffers of the University, even if that policy originally was agreed upon by both the Board and the Senate. In saying this, I do not accept that on the record before us, the decision to open the University in downtown Peterborough was ever a considered change in educational policy from that envisioned by the founders of Trent University. It was a pragmatic decision that was not beyond the reach of the Board had it sought to act alone. However, even if it was a decision involving educational policy, and even if it can be said that the Board acted under s. 12 of the *Trent Act* and approved the "expenditure of funds and the establishment of faculties" to implement such policy, it cannot be argued that by so doing, the Board divested itself of its powers and obligations under s. 10 covering "the government, conduct, management and control of the University and its property, revenues, expenditures, business and affairs".

[33] The language of s. 12 giving limited power to the Senate to initiate and control educational policy is always subject to the overriding provision that the Senate requires the approval of the Board "in so far as the expenditure of moneys is concerned". There is no language in the *Trent Act* to support the contention that once financial approval is given by the Board to a particular policy, such support can never be withdrawn by the Board no matter how deleterious the policy venture is to the financial well being of the University as a whole.

[34] Section 4 of the *Trent Act* gives the University the power to establish and maintain such faculties and departments "as the Senate deems necessary and as shall be approved with respect

to finances and facilities by the Board”. However, once again I suggest that the legislature could never have intended that the University’s bicameral governance system would be so inflexible that once a decision was jointly made, it could never be revoked or modified except by the joint agreement of both deliberative bodies. In this instance, the Board cannot be forced to continue to support the existence of the downtown colleges in the face of economic loss, financial necessities and concerns for the future of the entire University.

[35] I further believe that in bringing this application, the appellants have confused educational policy with the educational experience. Living in residence in a converted turn of the century house in downtown Peterborough may well provide a different experience than living in a building constructed as a residence on the main campus just outside the city. I accept that students from the downtown colleges may meet different people and be exposed to somewhat different environments than students from the main campus. Against this, I would observe that while elimination of the downtown colleges may affect certain students’ educational experiences, not every change to a student’s educational experience involves a shift in educational policy. There is nothing in this record to suggest that the consolidation of the University will prevent any of the relocated students from receiving academic and other courses of the same quality that was possible under the decentralized college system or that this change reflects a modification of the University’s educational goals and policy aspirations.

[36] As submitted by the respondent University, the implementation of the Capital Development Strategy and the Board’s resolution will not affect (a) the subject matter or organization of any of the academic courses or programs taught at the University (b) the availability of any academic courses or programs to any of the University’s students (c) the role of faculty in developing or teaching academic courses (d) the number of faculty employed at the University (e) the role of research and scholarship in the University (f) the University’s admission or academic standards (g) the importance of interdisciplinary study at the University (h) the University’s commitment to small teaching groups in appropriate fields or (i) the continued role of the residential college system at the University.

[37] On my analysis of the full record before the court, the restructuring of the University was necessitated by financial realities and changing economic conditions, not by a desire to alter the educational mission of the University. The Board, which acted in order to safeguard the survival of the University, is therefore correct in regarding the restructuring as a matter that does not fall under the category of educational policy.

[38] It is significant that the Attorney General of Ontario has intervened in this appeal in support of the position of the respondent University. The Ministry is understandably concerned that if Trent University goes bankrupt the undertaking will become the charge of the Government of Ontario. In support of the position taken before this court by the respondent University, the Attorney General of Ontario points out that the Board would be unable to discharge its statutory duties if the concurrence of the Senate was required for any decision deemed by the Senate to have an impact on educational policy. If the governance system was interpreted in this manner, the Attorney General submits that the result would be that the Senate would have an effective veto power over all Board decisions.

[39] Further, the Attorney General notes that while the *Trent Act* (unlike the legislation establishing most publicly funded universities in Ontario) does not require that the majority of members of its Board be external to the university or that a certain number of spaces on the Board be reserved for government appointees, in point of fact 16 of the 24 Board members are external to Trent University, in that they are not faculty, students, staff or alumni. According to the Attorney General, those constituting the majority of the Board are external to the University because they are responsible for governance decisions, including the expenditure of public funds, and must have a certain degree of objectivity regarding business practices and financial management in order to properly discharge their duties in the public interest. That is why, submits the Attorney General, all decisions regarding overall budget and strategic directions regarding the expenditure of funds require the approval of the Board, and this includes even those decisions that the Senate may consider to have an impact on educational policy.

[40] I conclude that the Board did have the jurisdiction under the *Trent Act* to act as it did and to pass the resolution relating to the Capital Development Strategy. While it would have been more helpful if the Senate had supported this initiative, the Senate's approval of such a resolution is not legally required. Accordingly, I would find that the Divisional Court did not err in reaching its decision on the central issue in appeal.

## **ii. Standing of the appellants to bring these proceedings**

[41] Although I have rejected the appellants' main ground of appeal, I believe that it is still important to address an additional issue raised by the respondent, with which the Divisional Court did not deal directly. The respondent contends that the appellants do not have standing to bring a judicial review application challenging the Board's resolution.

[42] According to the respondent, courts have consistently demonstrated a reluctance to intervene in the affairs of universities by means of discretionary writs, based on the recognition that universities are autonomous independent institutions which themselves may best ensure the fulfilment of their objectives. Further, those cases in which courts have intervened by way of discretionary writs generally involve circumstances in which the legal rights or privileges of the applicant are affected. On this point, the respondent cites: *Re Harelkin and University of Regina* (1979), 96 D.L.R. (3d) 14 S.C.C. at 56-57; *Wong v. University of Toronto* (1989), 45 Admin L.R. 113 (Ont. Div. Ct.) aff'd (1992), 4 Admin L.R. (2d) 95 (Ont. C.A.); and *Students' Union, University of Alberta v. University of Alberta* (1988), 53 D.L.R. (4<sup>th</sup>) 541 (Alta. Q.B.) at 545-546 aff'd (1990), 67 D.L.R. (4<sup>th</sup>) 593 (Alta. C.A.).

[43] I agree with the position of the respondent that the appellants have not adequately demonstrated that the Board's resolution has any effect on their legal rights or privileges. While the appellants may feel strongly about the Board's resolution and may be personally affected or inconvenienced by it, this does not establish a sufficient basis to justify granting the appellants standing to petition the court to interfere with university governance on this matter.

[44] The appellants assert that since the appellant McLachlan was a member of the Senate when it adopted the resolution that the Board purported to override, this, alone, supports granting the appellant McLachlan standing in the matter. I do not accept this submission. The notion that

a single member of a deliberative body can initiate a legal proceeding on behalf of the body itself is mischievous and destructive of the democratic process. The appellants are both in the same situation. They are members of the Trent University Faculty Association Union and their legal rights and privileges are governed by the collective agreement between their union and the University and by the *Labour Relations Act*, 1995, S.O. 1995, c.1. Any individual complaints about matters such as changes to their work environment should be brought through the appropriate union or statutory channels, rather than in the form of a *certiorari* application against their employer.

[45] The appellants further argue that both appellants had standing to challenge the Board's resolution on the basis of public interest. I do not believe that this is a case where the public interest justification can be invoked to grant standing to the appellants. At the risk of being repetitive, I note that the Senate is not a party to these proceedings and has not intervened as a body in order to present its own submissions. The fact that the body which the appellants assert would be most directly affected by the Board's resolution did not participate in the challenge to that resolution indicates that the issue which the appellants – two of the University's two hundred and ten full-time teaching faculty – seek to have judicially reviewed is not as critical to the public interest as suggested by the appellants.

[46] Further, while it is true that the bicameral governance model in place at Trent University remains in place at most other Ontario universities, it appears from the report of Arthurs and Lorimer that the dispute at issue is particular to Trent University. Certainly no other university has sought to intervene in this proceeding or to advance the position of the appellants and those they represent. Accordingly, I do not believe that this local controversy rises to the degree of justifying judicial intervention on public interest grounds.

[47] There is another aspect of the public interest that I believe the appellants are ignoring. The respondent University desperately needs the proposed re-organization in order to survive. The Board recognized the urgency of the University's situation and after careful consideration, authorized the restructuring as a means to ensure the University's continued existence as a quality educational institution. It hardly makes sense to delay this carefully thought out redevelopment program, designed to benefit the interests of the entire University and its student body, simply based on an application by two professors who have their own view of the mission of Trent University.

[48] This aspect of the public interest is not an *in terrorem* argument. The Attorney General has access to more information than is available to this court and in his factum, after strongly supporting the position of the respondent Board, he states that if the respondent University would become insolvent, the Board would likely appeal to the government for additional funding, and if the University were to become bankrupt its property would escheat to the Crown under the *Escheats Act*, R.S.O. 1990, c.E.20.

[49] For these reasons it is my opinion that the two appellants have no standing to bring this application or to pursue it on appeal. For this reason alone, I would dismiss the appeal.

### **iii. Appeal on the issue of costs**

[50] The appellants submit that the Divisional Court erred in ordering costs of \$20,000 against the appellants.

[51] After delivering its judgment orally from the bench, the Divisional Court asked counsel for submissions as to costs. The respondent argued that it should be awarded its costs and that its docketed costs for the proceedings were approximately \$45,000. The appellants submitted that in the circumstances, there should be no order for costs. Appellants' counsel did not make any submissions as to the proper amount of costs, did not request a separate hearing concerning costs and did not request an opportunity to review materials that supported the quantum of costs sought by the respondent. The Divisional Court then retired and made its costs order.

[52] The appellants submit that the Divisional Court acted improperly in awarding costs against them without giving reasons, and in fixing the quantum of the costs at \$20,000 without a hearing wherein the respondent would be required to provide information beyond a bare statement as to the approximate amount of its in-house billings and disbursements.

[53] It is my opinion that the Divisional Court acted within its discretion in deciding to award costs against the appellant. I am aware of no authority for the proposition that where a court orders that costs should follow the event it is obliged to give reasons. However, it appears to me that the appellants were caught off guard by the decision of the Divisional Court to award costs against them, let alone fix the quantum of costs on the spot. In these circumstances, and having regard to the principles that favour having costs assessed by an assessment officer or by the court after an appropriate hearing on the question of the amount to be fixed (*Polish National Union of Canada Inc-Mutual Benefit v. Palais Royale Ltd.*(1998), 163 D.L.R. (4<sup>th</sup>) 56 (Ont. C.A.)), I would be prepared to go along with the spirit of the respondent's suggestion and permit the appellants, at their option, to have the amount of the costs assessed on a party and party basis. Otherwise I would dismiss the appeal against costs.

## **VII. Disposition**

[54] For the reason set out above, I would dismiss the appeal on the merits with costs.

[55] As to the matter of the appeal against the costs awarded below, I would vary the order to direct, on the election of the appellant, that the party and party costs awarded against the appellants by the Divisional Court be referred for assessment to an assessment officer. There should be no costs on the costs appeal.

Released: August 10, 2001

“CAO”

(signed) “G. D. Finlayson”

(signed) “I agree C. A. Osborne A.C.J.O.”

## **SHARPE J.A. (dissenting)**

[56] I have had the advantage of reading the reasons for judgment of Finlayson J.A. I respectfully disagree with my colleague's reasoning and conclusions. For the reasons that follow, I would allow the appeal and grant the application for judicial review. I need not repeat the background facts that give rise to this appeal. I will proceed directly to my analysis of the legal issues, mentioning along the way any facts I consider pertinent that have not been dealt with by my colleague.

### **The Trent Act and Bicameral Governance**

[57] *The Trent University Act*, S.O. 1962-63, c. 192 (the "*Trent Act*") establishes a bicameral governance structure, allocating authority to the Board of Governors and to the Senate respectively. Each body is given certain enumerated powers. For the purposes of this appeal, as Finlayson J.A. has noted, the crucial powers are that of the Board with respect to "the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs" (s. 10) and that of the Senate "to control, regulate and determine the educational policy of the University". (s. 12).

[58] The allocation of powers as between the Board and the Senate represents an attempt to reflect and accommodate the interests and concerns that have to be taken into account in the governance of a modern university. Decisions relating to educational policy are assigned to the Senate, a body comprised primarily of members of the University's academic community. Decisions relating to management and finances are assigned to the Board, a body comprised primarily of lay members, who reflect the broader community interest in the sound and prudent management of an important publicly funded institution. The bicameral scheme of governance is designed to provide an institutional framework that will allow the University to identify and achieve its academic and educational goals in a manner consonant with the interests of the community and public at large.

[59] As I read the *Trent Act*, the powers of the Board and the Senate are both exclusive and overlapping. They are exclusive in the sense that where a matter is specifically assigned to one body, the other body lacks authority over that matter. For example, the Board has no authority to determine educational policy for the University. Similarly, the Senate has no authority to manage or control the property, revenues, and expenditures of the University. However, not all issues fall neatly into the categories of the matters assigned to the Board and the Senate respectively. As many issues confronting the University present more than one aspect, to that extent, the powers of the Board and Senate overlap. From one aspect, the issue will fall within a power assigned to the Board, while from another aspect, the same issue will fall within a power assigned to the Senate.

[60] The overlapping nature of the respective powers of the Board and the Senate where educational policy intersects with financial matters is evident from the terms of the *Trent Act*. Section 4 of the *Trent Act* provides as follows:

The University has power to establish and maintain such faculties, schools, institutes, departments, chairs and courses *as the Senate deems necessary and as shall be approved with respect to finances and facilities by the Board*. [emphasis added]

Similarly, s. 12 of the *Trent Act* provides that “[t]he Senate is responsible for the educational policy of the University”, and that it may create such faculties, departments, schools, institutes or chairs as it determines “with the approval of the Board *in so far as the expenditure of funds and the establishment of faculties are concerned*” (emphasis added).

[61] These provisions plainly envisage a power-sharing relationship between Senate and the Board. Decisions falling within these provisions give rise to issues of both financial management and educational policy and hence require the concurrence of both bodies. As the President of the University, Bonnie Patterson, conceded on cross-examination, where a matter has both educational policy and financial implications, the approval of both Senate and the Board is necessary.

[62] Quite apart from these specific provisions, it seems to me that a power-sharing relationship between the Board and the Senate is implicit in the bicameral scheme of governance created by the *Trent Act*. Where an issue gives rise to aspects falling within the powers of both the Board and the Senate, bicameralism requires the concurrence of both bodies. While each body has exclusive authority to decide that aspect of the decision that falls within its powers, neither body has exclusive or paramount authority over the entire question.

[63] Bicameralism was first introduced in Ontario following the *Report of the Royal Commission on the University of Toronto* (Toronto: Queen’s Printer, 1906). The Royal Commission concluded at p. xxi that the history of the University of Toronto had “demonstrated the disadvantage of direct political control.” It sought to establish a scheme that would provide the university with independent governance, reflecting both the public interest in sound management and respect for academic judgment on academic issues. The Royal Commission’s plan aimed “at dividing the administration of the University between the Governors, who will possess the general oversight and financial control now vested in the State, and the Senate, with the Faculty Councils, which will direct the academic work and policy.” (*Ibid.*)

[64] Bicameralism has both advantages and disadvantages. On the positive side, it provides a system of governance that distinguishes management issues from issues of educational policy and allocates responsibility for each to specialized governing bodies capable of reflecting the interests and concerns bearing upon the matters assigned. On the negative side, by dividing governing authority, bicameralism may complicate decision-making and, as the experience at Trent sadly shows, result in deadlock. Bicameralism was abandoned by the University of Toronto thirty years ago in favour of a unicameral Governing Council in which all estates are represented. Some other universities have retained the bicameral structure but have altered its operation by affording significant academic and student participation at the Board level. One could only gain an accurate appreciation of how bicameralism actually works at a particular university by careful study of that institution’s arrangements, practices, and traditions.

[65] I see nothing in the *Trent Act* that accords priority, paramountcy or “overriding jurisdiction” to the decision of the Board in the event of conflict between the Board and the Senate on an issue requiring the concurrence of both bodies. The *Trent Act* specifically excepts from the Board’s powers “such matters specifically assigned by this *Trent Act* to the Senate or the councils of the faculties...”. These words qualify all of the Board’s powers, including its general governance power and its specific authority over property and expenditures. I agree with the appellants’ submission that by enacting these words, the legislature provided its own solution to potential conflicts between the Board and the Senate. The legislature subtracted authority over educational policy from the Board’s powers and protected Senate’s power over educational policy from encroachment by any power of the Board. Neither the Board’s power of general governance nor its power of the purse allow it to usurp the role of the Senate to control, regulate, and determine the educational policy of the University. The *Trent Act* makes no provision for a “tie-break” mechanism to resolve a conflict between the Board and the Senate. The way out of deadlock is not unilateral action by the Board but debate, discussion, negotiation, and compromise, or all else failing, legislation.

[66] There are two governing bodies, each with its own area of expertise and concern to be brought to bear upon the educational issues confronting the University. The Board cannot decide where to spend the University’s resources without the Senate’s determination of educational policy. Similarly, the Senate cannot implement an educational policy without the Board’s determination to make available the required resources.

[67] The Board could, of course, require the University to change and curtail its academic program for valid financial reasons, but the role of the Senate, the body responsible for the University’s educational policy, in identifying the activities or programs to be eliminated or curtailed would have to be respected. The power of the Board to determine the resources available for the University’s program cannot be doubted, but neither should the Senate’s power to define and shape the institution’s educational policy with the resources that are available.

### **Characterization of the Decision to Close the Two Downtown Colleges**

[68] I turn from this assessment of the legislative scheme to the central issue to be resolved on this appeal, namely, is the decision to close Peter Robinson and Catharine Parr Traill Colleges properly classified as a matter of educational policy? If it is, the concurrence of the Senate is required and the application for judicial review succeeds. If it is not, the Board is free to proceed without the agreement of the Senate and the application for judicial review fails.

[69] I respectfully disagree with the proposition that the decision to close the two downtown colleges can be properly characterized as nothing more than a decision in relation to the “management and control of the University and its property”. For the reasons that follow, I have concluded that this decision has sufficiently significant implications for the educational policy of the University so as to require the approval of the Senate.

[70] In reaching this conclusion, I am mindful of the financial problems the University faces. It may well be that, viewed solely from the perspective of sound fiscal management, the decision to close the downtown colleges is in the best interests of the University. On that

question, I express no view. Nor do I think it appropriate for us to comment on the wisdom of or the motives for the Senate's refusal to approve the decision to close the two downtown colleges. It is not the task of this court to decide the legal issue before us on the basis of what might seem to us to be best in the broader interests of the University as a whole. The reconciliation of conflicting views on how best to govern the affairs of the University must be achieved in accordance with the scheme of governance mandated by the legislature. Our role is restricted to the legal interpretation of that legislation and to ensuring that those involved in the affairs of the University respect the legislative scheme.

[71] I would also offer the following caveat. The legal characterization of the decision at issue here must take into account the history, traditions, practices, and policies of Trent University and the specific situation posed by the facts of this case. While the *Trent Act* follows a pattern that is found in the statutes of most Ontario universities, the terms of the *Trent Act* are in certain respects distinctive. One must never lose sight of the specific context within which a decision is made. The courts must, of course, adopt a principled approach based on rules of general application, but in another case, involving a different institution with a different history and faced with a different problem, a different decision as to the respective powers of a Board and Senate may well obtain.

[72] I group under two headings the arguments that lead me to conclude that the decision to close the two colleges does implicate the University's educational policy. First, I consider the significance of the colleges within Trent's college-based system of education. Second, I will examine the University's past practice in relation to the issue of closure or change of status of the two downtown colleges.

**(a) Trent's College System**

[73] From the inception of the University, its educational policy has been based on a college system, inspired by the example offered by the highly decentralized models of Oxford and Cambridge Universities. In its report following a tour of six English universities in 1963, Trent's Academic Planning Committee observed:

We have no doubt that Oxford and Cambridge succeed as university communities largely because they are broken down for purposes of living, teaching and recreation into relatively small college communities, and because the normal activities of living occur in academic surroundings.

[74] The educational policy considerations that informed the decision to adopt the college system included the importance of integrating cultural and social life with academic life, the high value to be placed on small group teaching, and the educational value of colleges as interdisciplinary communities with their own identities and traditions. Among the central elements of Trent's college-based system are the recognition that the nature of a university's physical premises has a profound effect on the academic experience of students and the recognition that student involvement in social, artistic, and community events is an essential part of education.

[75] When announcing the establishment of Trent's first colleges in 1964, founding President Symons described the colleges as "the central academic units of the University ... around which the whole life of the University will be focussed." The colleges were to function as "communities within the University", which would reinforce "the essential purpose of the University as a place of learning". Each college was to develop a unique identity, providing a unique academic environment for the cultural and social life of Trent's students.

[76] The University has maintained and followed these policies to the present day. In its current Academic Calendar, the University states that the colleges "are central not only to the organizational structure of the University, but to the academic and social experience of Trent students." It confirms that "[o]ver the years, each of the colleges has developed its own unique character, creating for Trent students a variety of distinct intellectual and social communities." It recognizes that the colleges are "centres of learning and focal points of social and cultural activity." The University describes the Academic Calendar as its "most authoritative academic publication". The Calendar represents a formal statement of the University's educational policy and the statements it makes cannot be disregarded as mere promotional hype.

[77] While the University's original plan envisaged all colleges being located at what is known as the Symons Campus, that plan changed early on. In the announcement of the establishment of "the two city colleges" in 1964, President Symons stated that they would be "permanent parts of the University" helping to bridge "[t]he 'great divide' among university students ... between those who live at home and commute daily, and those who live in university residences and who can thus be full-time members of the university community." The uncontradicted evidence before us indicates that the downtown colleges have become more important than was originally conceived. They have evolved into vital centres of activity for the University and the local community, bridging the gap between "town and gown." Their significance to the present can be gauged from the fact that, throughout the 1990's, Trent's main priority for capital projects was the downtown colleges.

[78] The University has encouraged each of its colleges to develop a distinctive identity. The resulting diversity of the academic communities that comprise the University is regarded as a significant aspect of the educational experience offered by Trent. I do not accept my colleague's suggestion that there is a meaningful distinction to be drawn between educational policy on the one hand and educational experience on the other. It seems to me that the two are inextricably linked. The very purpose of an educational policy is to provide a certain kind of educational experience. The success or failure of an educational policy will be measured by the quality of the educational experience it provides. A change to the educational experience offered to students represents a change in educational policy.

[79] Trent is now comprised of five colleges: Peter Robinson College and Catharine Parr Traill College, the original two downtown colleges at issue in this appeal, and three colleges located at the Symons Campus, along the banks of the Otonabee River, some five kilometres from downtown. All Trent students must be affiliated with one of the five colleges. For the academic year 1999-2000, approximately one third of students in residence at Trent were located in the two downtown colleges (193 at Traill and 135 at Peter Robinson of a total of 1092). Similarly, approximately one third of all Trent students were affiliated with the downtown

colleges (674 at Traill and 554 at Peter Robinson of a total of 3,793). Most lectures and seminars for first year students are offered at the Symons campus. The University's science program is offered at the science buildings located at the Symons campus. Lectures, seminars, and tutorials for all other courses are offered at either the Symons or downtown campuses. The University administrative offices, main library, bookstore, sporting facilities, and other like amenities are located at the Symons campus.

[80] Peter Robinson College is located in converted heritage houses and new buildings in downtown Peterborough. These buildings incorporate both residences and areas for academic activities. Sadleir House, the focus of college life, is an historic home, redesigned to integrate modern additions with its original architecture. The University's undergraduate Cultural Studies Program is based in the college. The History Program was also based at Peter Robinson at the time that the Board's resolution was passed. The Frost Centre for Canadian Heritage and Development Studies, a graduate program and research centre, and the graduate program in Methodologies for the Study of Western Culture and its associated research centre are also located at the College.

[81] The University's Academic Calendar states that Peter Robinson's location and size make it "particularly appealing to those students who are interested in an intimate university milieu which is not isolated from the city community." The College has always emphasized the need for student involvement in wider social issues in the community and abroad. Students often use their experience with community organizations as a base for their course work in Cultural Studies, Philosophy, Politics, and Sociology. Many of the after-hours activities that form part of the Native Studies program take place at Peter Robinson.

[82] The Calendar also recognizes the College's active program of visiting scholars, artists, broadcasters, musicians, and cultural theorists, and the role that Sadleir House plays as the venue for a variety of cultural events. These cultural events are not only an important, but also in many cases a required, part of the educational experience for students in Cultural Studies.

[83] Named in honour of the noted author, botanist, and pioneer Peterborough settler, Catharine Parr Traill College comprises a number of architecturally and historically significant older houses together with a relatively modern building. In addition to residence space, it houses teaching offices, seminar rooms, a lecture hall, an academic skills centre, a library, a computer lab, and study rooms. The College serves as the base for Trent's Canadian Studies, Philosophy, English, and Classical Studies Departments.

[84] The Academic Calendar describes Traill as "an active centre for teaching and learning" as both "an integral part of the academic and social life of Trent University as a whole" and "a self-contained and active community". A thriving visitors' program supplements its intellectual life, giving members of the College an opportunity to meet informally with writers, artists, professionals, politicians, musicians, and scholars. As the Calendar again acknowledges, "[t]he college's proximity to downtown Peterborough has also permitted Traill students to be actively involved in community cultural organizations ... and in organizations working for social change".

[85] The evidence before us indicates that the presence of the downtown colleges has helped Peterborough to develop a unique and varied cultural, artistic, and theatrical community that provides a significant educational opportunity for students, particularly important for those in Cultural Studies.

[86] Another notable aspect of Peter Robinson College is that it serves as a focal point for the activities of native political and cultural groups. Students frequently participate in aboriginal spiritual and cultural events. The evidence suggests that these activities, as well as the proposal adopted in 1998 by the Senate and Board for a First Peoples' House of Learning and Humanities Centre at Peter Robinson College, would be severely threatened by closure of the College.

[87] There is also evidence that closure of the College would imperil the distinctive interdisciplinary programs that are facilitated by the downtown location of faculty, student, and community resources at Peter Robinson College.

[88] In my view, the distinctive educational opportunities offered by Peter Robinson and Catharine Parr Traill Colleges reflect Trent's college-centred, interdisciplinary educational policy. They are thriving academic institutions, anything but "orphan colleges".

[89] I would emphasize that the Board's decision is to close these Colleges, not to relocate them. The decision cannot, in my view, be characterized simply as selling one or more outdated buildings that are too costly to maintain, a matter that would fall within the Board's exclusive authority in relation to the management of the University's property. The decision is rather to terminate the existence of two of the five colleges that form the basis of a University that has as its educational policy a college-based system. I would also note that it is by no means clear that either or both of the two closed Colleges will be replaced by new colleges. We were advised during oral argument that no final decision has been taken on whether to create new colleges in their place at the Symons campus.

[90] In my view, the Board's decision would put an end to the distinctive educational experience offered by the two downtown colleges and, accordingly, would change the educational policy of the University.

**(b) Past University Practice**

[91] Administrative interpretation and practice may be used to assist in determining the meaning of legislation and can be an important factor in case of doubt about legislative meaning: R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at p. 471; *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175 at pp.195-196. As explained by Dickson J. in *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at p. 37: "Administrative policy and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation."

[92] The record before this court demonstrates that from an early stage in the history of the University to the present, it has been accepted that Board decisions regarding physical premises had to respect the Senate's role in establishing educational policy. This is hardly surprising. The

physical resources required by a university can only be determined in the light of the university's academic and educational mission.

[93] University buildings exist for no other purpose than to allow the university to achieve its academic and educational goals. A building that would well serve one educational policy might frustrate the realization of a different educational policy. A large research-oriented University would require significant investment in libraries and laboratories. A small University devoted to undergraduate education premised on the college system would require a very different physical plant. A primarily undergraduate university structured on the model of interdisciplinary, residential colleges will require different premises than a primarily undergraduate university structured around its various academic disciplines. It follows that decisions regarding physical premises in an academic setting cannot be made purely on the basis of financial or administrative criteria. Such decisions can only proceed on the basis of the institution's educational and academic policies and priorities. The close connection between educational policy and physical premises grows and matures over time and does not end once the initial planning has been done. An academic community develops its own distinctive character that is more subtle and profound than the list of courses it offers. That character, and the consequent academic and educational opportunities the academic institution offers, is strongly influenced and shaped by the institution's physical premises and geographic surroundings.

[94] Trent's founders recognized that academic considerations had to precede any decisions about planning of the University buildings and campus. The premise of Trent's original planning process was that the physical layout of the University, its architecture, and matters of financial planning had to follow the educational policy of the University. At the first meeting of the Campus Planning Committee in September 1962, President Symons stated that it was "fundamental to the kind of university Trent is to be that planning of this sort should originate from the responsible academic staff."

[95] The record indicates that this approach has been followed in subsequent years, and that the Senate has played a significant role in planning the University's physical plant. In 1986-1987, the then President, with the approval of the Board, commissioned a comprehensive space study. The process included a Senate-Board consultative committee. The administration undertook to report to Senate as to how the space planning report would "relate to the academic policy of the University, as controlled by Senate". Senate was to approve the report before it went to the Board. The resulting space plan was indeed brought before Senate, where it received unanimous approval, before it was presented to the Board.

[96] At present, the Senate has a standing "Site Development and Space Utilization Committee". Its terms of reference include the following:

To receive, and to offer commentary, advice and recommendations on all proposals for:

- (a) major reallocation of space between academic, academic support and administrative functions;
- (b) development of new space;

(c) exterior alterations of or additions to University buildings and surrounding areas.

The Committee may itself initiate proposals on the above matters. Commentary, advice and recommendations may be directed routinely to the appropriate administrative officers of the University, and to Senate as appropriate.

[97] The current debate about the future of the downtown colleges is anything but new. As the University's Task Force on the SuperBuild Growth Fund observed, "the 'campus consolidation' [debate] has taken place many times over the years. When this has occurred, strongly diverging views have emerged regarding the relative merits of maintaining multi-campus structure vs consolidating the University to a single campus location." Until the events that led to this proceeding, the Board seems to have recognized and accepted Senate's active role in planning. In particular, it appears to have been more or less accepted that the Senate had to approve any initiatives to relocate or close the downtown colleges.

[98] In April 1967, there was a suggestion that Peter Robinson College should move to the Symons (then Nassau) Campus. It was accepted that the proposal was subject to Senate approval.

[99] In February 1974, Senate adopted a by-law that any motion "altering the status or creating any new college or academic department" amounts to a statutory amendment that requires a specially conducted Senate vote. That bylaw remains in effect. There is no indication that the jurisdiction to enact this by-law has been questioned in the ensuing 27 years, during which the status of the downtown colleges has been a matter of on-going debate and concern.

[100] There can be no doubt that within the present Trent community, there is a strong perception that the decision to close the two downtown colleges implicates in a significant way the University's educational policy. While these perceptions are not determinative of the legal issue before the court, neither should they be ignored, particularly as even those proposing closure of the downtown colleges couched their arguments in terms of educational policy.

[101] The Report of the Task Force that recommended the closure of the two downtown colleges expressly weighed from the perspective of educational policy the benefits and shortcomings of maintaining the downtown colleges. The Task Force noted the benefits resulting from the flourishing of a distinctive, college-based ethos, the wide diversity in the attributes that the University can offer to its constituents, and the perception of a meaningful link to the Peterborough community. On the negative side, the Task Force mentioned counterproductive internal rivalry, logistical difficulties, and the blurring of Trent's image in a way that impedes effective marketing. It concluded that closing Peter Robinson and Traill Colleges and consolidating the University at the Symons campus "would bring the greatest benefits of an integrated, inter-disciplinary academic community". The Task Force's recommendations plainly did not rest on purely financial grounds but reflected, at least in part, a judgment on educational policy.

[102] The Senate's November 9, 1999 resolution that preceded its consideration of the President's request for "endorsement" of the Capital Development Strategy stated that "the

college system, *including the two downtown colleges*, forms an integral part of Trent's educational policy" (emphasis added).

[103] The Trent Central Students Association passed a resolution on November 11, 1999 supporting an application to the SuperBuild program but with the following important reservation:

The current interdisciplinary college system including the two downtown colleges, in their present location, form an integral part of Trent University. We encourage the Board of Governors to endorse the Senate resolution opposing a change of location or a net reduction of facilities at any downtown or Symons campus college.

[104] As I have already noted, the current President acknowledged the need for approval of both the Senate and the Board where matters have both educational policy and financial implications. Indeed, the President followed this established practice by taking the Board's decision to close the two downtown colleges to the Senate for its "endorsement".

[105] In her letter to the University community, dated November 11, 1999, justifying the closure of the two downtown colleges after the plan was rejected by the Senate, President Patterson specifically invoked educational policy considerations, suggesting that campus consolidation would foster interdisciplinary relationships between scientists and humanists, relationships that had been frustrated by a divided campus. She acknowledged the "traditions, vitality and contributions that Peter Robinson and Catharine Parr Traill Colleges have given Trent" but stated her belief that

...consolidating our Peterborough operations on the Symons Campus will, eventually, allow the institution to strengthen its cohesiveness, morale and culture. I look forward to the day when we walk the talk of interdisciplinarity - when scientists and humanists work in sufficient proximity that they can achieve the goal of minds meeting across disciplinary fences that is the heart of Trent's founding principles.

[106] Following the Board's unilateral decision, four core members of Trent's original planning group – S.G. Denis Smith (Trent's first Vice-President), Richard Sadleir (founding Master of Peter Robinson College), Marion Fry (founding Principal of Traill College) and Thomas Symons (founding University President) – wrote a letter to the Board stating their "firm belief that adoption of the report's recommendations would destroy the character and special qualities that distinguish Trent University".

[107] In my view, taken as a whole, this represents a substantial body of evidence leading to the conclusion that within Trent University, from its earliest days forward, the debate concerning the status and continued existence of the two downtown colleges has been perceived as engaging the Senate's authority in relation to educational policy. While I do not suggest this to be determinative of the legal issue before the court, it does assist in resolving any doubt about the application of the legislative scheme. As I have already indicated, the legislation mandates a sharing of powers as between the Board and Senate with respect to decisions implicating both

financial management and educational policy. The evidence relating to past practice supports the conclusion that the concurrence of both bodies was required on the facts of this case.

### **Standing and Justiciability**

[108] I respectfully disagree with the submission the appellants lack standing to bring a judicial review application challenging the legality of the Board's decision to close Peter Robinson and Catharine Parr Traill Colleges.

[109] The criteria laid down by the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at pp. 630-634 for public interest standing are: (1) the application raises a serious justiciable issue; (2) the applicant is either directly affected by the impugned decision or has a genuine issue as a citizen in its legal validity; and (3) there is no other reasonable or effective manner to bring the issue before the court.

[110] It is apparent from the earlier portion of my reasons that I find that the appellants' application for judicial review raises a serious justiciable issue. It is well established that as statutory bodies, universities are amenable to judicial review where the exercise of a statutory power is challenged: *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (C.A.); *Page v. Hull University Visitor*, [1993] 1 All E.R. 97 (H.L.). This is not a case that raises concerns about judicial interference with internal University matters that are best left to be resolved by the University's own institutional means. The decision at issue does not concern matters of judgment on academic standards and, as I have already observed, there is nothing in the University's internal scheme of governance that is capable of resolving this dispute.

[111] The appellants are both directly affected by the decision. One appellant is a member of the Senate and both head programs at a downtown college. In any event, they clearly have a genuine interest as citizens in the validity of the administrative decision being challenged.

[112] Nor am I persuaded that there is another reasonable or effective manner to bring the issue before the court. It is not at all clear to me that the application could be brought in the name of the Senate, an unincorporated body that may well lack capacity to bring legal proceedings. Standing has been recognized in favour of individual members of a university community to challenge the legality of similar Board decisions on the basis that statutory powers have been exceeded: *Jeffrey v. Université de Moncton (No.1)* (1985), 62 N.B.R. (2d) 413 (N.B. Q.B.). The appellants can hardly be characterized as "busy-bodies", bringing an unnecessary meddling type proceeding. If there is one thing on which the record is clear, it is that the legality of the Board's actions is a matter of pressing concern that has divided the Trent community. Whatever view one might take of the rights or wrongs of the Board's decision, it seems to me to be imperative that its legality be determined once and for all so that the University can get on with its important academic work. This case is analogous to *Energy Probe v. Canada (A.G.)* (1989), 68 O.R. (2d) 449 (C.A.) at p. 469 where this court accorded standing to "serious individuals ... presenting concerns that are of fundamental significance" in a proceeding that "is not an abuse of the public interest exception, but rather [one that] tends to serve it very well."

[113] For these reasons, I conclude that the appellants satisfy the requirements for public interest standing and the court should exercise its discretion in favour of entertaining the application.

### **Conclusion**

[114] The Board's decision to close two of Trent's five residential colleges and eliminate the University's presence in downtown Peterborough would destroy two of its five constituent distinct intellectual and social communities and would eliminate two of its five centres of learning and focal points of social and cultural activity. I conclude that the decision to close two of Trent's five colleges engages an important issue of educational policy for the University that, pursuant to s. 12 of the *Trent Act*, requires the approval of the Senate.

[115] I am also of the view that the appellants satisfy the requirements for standing to bring these proceedings.

[116] Accordingly, I would allow the appeal, set aside the judgment of the Divisional Court, and substitute an order quashing the resolution of the Board of Governors of Trent University dated November 12, 1999, insofar as it purports to authorize the closure of Peter Robinson College and Catharine Parr Traill College. I would allow the appellants their costs, both here and below.

(signed) "Robert J. Sharpe J.A."