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Professor Daniel R. Woolf
Principal and Vice-Chancellor
Queen's University
Richardson Hall, Room 351
Kingston, Ontario K7L 3N6

Dear Principal Woolf:

Re: The Senate's role in Queen's University governance

You have asked for my legal opinion in response to the following questions.

1. In general, what is the authority and responsibility of the Senate of Queen's University with respect to decisions that are intrinsically academic in nature or that have significant academic impacts?

2. Is the Senate legally required to consider and approve any decision:

   (a) that will result in the closure of an academic program?

   (b) that may result in the closure of an academic program, including a suspension of enrolment?

   (c) to merge academic units, or that will result in the merger of an academic program with an academic unit?

I understand that a motion was passed by the Senate of Queen's University on February 28, 2012, directing the seeking of this opinion. The motion arose at a time of renewed debate within Queen's about the authority of a Dean to suspend admissions to a degree program without seeking input or approval of the Senate. However, I understand that the questions set out in the Senate motion were intentionally framed in broader terms, and that my opinion is not being sought regarding past events. Thus, although I have reviewed background materials that you provided to me (as listed below) relating to decisions taken by the Dean of Arts and Sciences in 2009 and 2011 to suspend admissions to certain degree programs, I must emphasize that this opinion is not directly about those decisions.

Normally I would have prepared a brief summary of my opinion and included it here, but I have not done so because, as you will see, there are many factors and nuances at play such that a summary may be misleading.

Documents reviewed

In connection with the preparation of my legal opinion, I reviewed the following documents:

- Consolidated Royal Charter of Queen's University (October 2011)
- Discussion Paper by Professor David Mullan dated November 5, 2009 prepared for Queen's University Faculty Association on "Responsibility for Academic Programs"
- Legal memoranda by Queen's University legal counsel Diane Kelly to Principal Tom Williams (April 24, 2009) and to Principal Daniel Woolf (March 8,2010) regarding the jurisdiction of the Senate and the Board of Trustees of Queen's University
- Document titled "Bachelor of Fine Art Program: Suspension of Admissions for Fall 2012", prepared by the Queen's University Provost by way of background information in connection with this opinion
- Queen's Governance: The Case for Legal Advice for Senate (Senator Mark Jones, February 28, 2012)
- Motion for Senate, February 28, 2012 (to obtain legal advice on the questions addressed in this letter)
- "Purpose and Functions of Senate" (approved by Senate April 28, 2011)
- "Functions of the Senate" (November 1982)
- Terms of Reference of the Senate Committee on Academic Development (SCAD)
- "The Governance of Queen's University" by Professors W.R. Lederman and R.L. Watts (April 1991)
- Report of the Joint Committee on University Government (Queen's, 1968)
- Second Report of the Committee on Structure of the Senate (Queen's, 1968)
- "The Queen's University Senate – Evolution of Composition and Function 1842 - 1995" by Margaret Hooey (March 1996)

I have also conducted legal research into relevant case law and other pertinent legal authorities, which are referenced in the text and footnotes below.

In connection with Question #2, I have used the definitions of "academic unit" and "academic program" that I understand are commonly employed at Queen's, namely: (a) an academic unit means a non-departmentalized faculty or school headed by a Dean, or a department or school within a departmentalized faculty; and (b) an academic program means a related set of academic activities, normally leading to a degree, either within one academic unit or supported by more than one academic unit.

Preliminary comments and overview

In answering the questions that have been posed, it is relevant to consider that the Senate's authority and responsibility may be understood from two perspectives.

The first is the formal legal perspective, and involves considering the legally enforceable powers of the Senate – that is, considering what types of decisions a court would conclude cannot be taken at Queen's in the absence of Senate consultation or approval. This approach involves reviewing the authoritative sources of law relating to the Queen's Senate and determining the Senate's powers as set out in those sources.

The second perspective involves looking at historical conventions and established practices at Queen's with respect to the role played by the Senate in university governance. As I address below, these conventions and practices are unlikely to be legally enforceable in a court of law. Nonetheless, they form part of the normative order of the university, such that conduct that is viewed as inconsistent with these conventions and practices may arouse controversy within the university community.

I have been asked to provide a legal opinion, and accordingly my focus is upon the first perspective. My answers to the questions posed thus describe the result that I believe a court would most likely come to, if asked the same questions that I have been asked. This legal perspective is inherently narrower and more circumscribed than an approach that considers both the formal and informal rules and norms within the university.

The formal legal answers to the questions posed may not be viewed by all as producing desirable outcomes. Ordinarily the ideal result, within a university, is achieved through cooperation and compromise among various constituencies. However, knowing the law may be helpful to parties in deciding how they wish to proceed in connection with a particular point of controversy.

My analysis in response to Question #1 is structured as follows. It begins with a review of the sources of legal authority relating to the Queen's Senate that a court would consider in ruling on the scope of the Senate's authority. I then summarize the general principles of legislative interpretation that in my view a court would likely apply in construing the relevant legislative sources. Two key principles are that legislation should be construed in a contextual way, and that legislation should be construed so as to achieve its core purposes. The opinion therefore reviews two basic aspects of the context within which the Senate's powers operate – that is, the bicameral model of university governance that prevails at Queen's, and the delegation of powers by the Senate to other bodies and officers within the university – and the core purposes of the *Royal Charter* and the bicameral model. I then set out my conclusions regarding the Senate's general authority over academic matters.

My analysis in response to Question #2 examines the following issues: (a) whether the Senate's constating documents explicitly require the types of decisions listed in the question to be made by the Senate; (b) if not, whether it is inherent in the Senate's power over academic matters that these types of decisions must be made by the Senate; and (c) whether the Board's powers are paramount over those of the Senate in cases where a decision involves both financial and academic considerations.

Question #1 – Authority and responsibility of Queen's Senate

In general, what is the authority and responsibility of the Senate of Queen's University with respect to decisions that are intrinsically academic in nature or that have significant academic impacts?

A. Sources of law relating to Queen's Senate

A court called upon to determine the legal authority and responsibility of the Senate at Queen's would consider the following authoritative sources of law.

I. *The Royal Charter of 1841*

The Queen's *Royal Charter* of 1841 is the starting point for any legal consideration of the role of the Senate. As amended from time to time by the federal Parliament in Canada, the *Royal Charter* is the highest legal authority with respect to matters of university governance at Queen's.

The *Royal Charter* sets out the powers of the Board of Trustees and of Senate, which include both legislative powers (namely, the power to make subordinate enactments), and administrative powers of decision-making and oversight.

II. *Federal legislation*

The *Royal Charter* has been amended several times by statutes of the Parliament of Canada. The *Royal Charter* is subject to amendment by federal rather than provincial legislation because the scope of the original *Royal Charter* encompassed the United Province of Canada, consisting of what today form parts of Quebec and Ontario. The amendment of such laws governing the pre-Confederation United Province of Canada falls within federal jurisdiction.[1]

References in this opinion to the *Royal Charter* are to the *Royal Charter* as amended to date by federal legislation. For ease of reference, I refer to the section numbering of the Consolidated *Royal Charter* dated October 2011 that Queen's has prepared and made publicly available, containing those parts of the original *Royal Charter* and subsequent legislative amendments that have continuing legal force.

III. *Subordinate enactments*

The *Royal Charter* grants authority to both the Board of Trustees and the Senate to pass subordinate enactments on specified matters. Those enactments, assuming they are validly passed, are also authoritative sources of law for matters internal to Queen's. I summarize here the powers to enact subordinate legislation that are specifically identified in the *Royal Charter* and that are relevant to the powers of the Senate. As noted, these legislative powers are in addition to the powers of decision-making and oversight also set out in the *Royal Charter*.

(a) Legislative powers of the Board of Trustees

The Board of Trustees has the broad power and authority under Section 20 of the *Royal Charter* to "frame and make Statutes, Rules and Ordinances" concerning "any matter or thing which to them shall seem necessary for the well being and advancement of" the university. Section 20

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[1] *Reference re: British North America Act, 1867, s. 129 (Can.)* (1882), 7 App.Cas. 136 (P.C.)

contains a non-exhaustive list of subjects on which the Board of Trustees may legislate, which includes: the good governance of the university, and various academic, financial, and administrative matters.

Section 21 of the *Royal Charter* clarifies that the Board's broad power to legislate within the university does not authorize it to enact any subordinate legislation that is inconsistent with the *Royal Charter* itself or with applicable laws and statutes.

The Board also has the specific power, under Section 29 of the *Royal Charter*, after consultation with the Senate, to pass any enactments in regard to the Senate as the Board thinks proper.

The most pertinent enactment made by the Board under Section 29 and currently in force is the document titled *Purpose and Functions of Senate*, which was approved by the Senate on April 28, 2011. The document states in Section 1 that, under the *Royal Charter*, the Senate's central function is to determine all matters of an academic character that "affect the University as a whole", and to be concerned with all matters that "affect the general welfare of the University and its constituents". The document then lists a number of specific Senate functions, all of which involve relatively high-level consultation and decision making on matters of major academic and, in some cases, non-academic significance, such as:

- participating in strategic planning for the University, including the budgetary process (Section 2);
- approving the establishment or closure of any academic unit, centre or institute, subject to ratification by the Board (Section 5);
- approving the establishment or closure, on the recommendation of Faculty Boards and Schools, of all programs of study leading to a degree, diploma, or certificate, and reviewing all such programs cyclically (Section 7);
- approving university-level policies relating to admissions and annual enrolment planning (Section 8);
- approving policies and procedures regarding student academic and non-academic matters (Section 10); and
- approving the Academic Plan and the Strategic Research Plan (Section 11).

(b) Legislative powers of the Senate

The Senate's formal legislative powers under the *Royal Charter* are set out in Section 28, which identifies the Senate's power to pass by-laws touching on any matter or thing pertaining to the conditions on which degrees may be conferred, whether honorary or earned. Section 28 provides that any such Senate by-law must be reported to the Board of Trustees and shall cease to be in force if disapproved of by the Board.

IV. *Case law*

Under our governing common law legal system, judicial decisions have the force of law unless overruled or successfully appealed. There is very little case law in Canada that has ruled on the powers of a university senate, and none that directly rules on the powers of the Senate under the

Queen's *Royal Charter*. Some guidance regarding the manner in which the relevant legislation at Queen's would likely be interpreted by a court can be gleaned from the few existing cases that have ruled on senate power, as discussed below.

B. Historical conventions and practices

As at any university with a long history, there will be historical conventions and established practices at Queen's with respect to the role played by the Senate in university governance. Some of these conventions and practices may have no formal legal basis, in the sense that they do not derive from a governing legislative enactment or judicial decision. Yet they may be sufficiently entrenched that it would be viewed within parts of the university community as improper if a convention or practice were not followed.

As noted, these conventions and practices are unlikely to be legally enforceable in a court of law, because they are not law. An analogy may be drawn to Canadian constitutional conventions. As Peter Hogg explains in *Constitutional Law of Canada*, conventions are non-legal "rules" of the constitution that are not enforced by the law courts. They have rule-like status in regulating the working of the constitution, because they are respected and systematically followed in practice. But failure to follow a constitutional convention is not illegal. Professor Hogg gives the example of the legislative role of the Governor General of Canada, who has the power under Section 55 of the *Constitution Act, 1867* to withhold royal assent from a bill that has been enacted by the two houses of Parliament. A constitutional convention stipulates that royal assent shall not be withheld. But if the Governor General did withhold consent, the courts would be bound to deny force of law to the bill, and the courts could not grant a remedy against the Governor General for failing to give royal assent. The Governor General's actions might spark a political crisis, but they would not be illegal.[2] The same is true for conventions and practices at a university that do not find their basis in a binding legal authority. They are almost always followed, but they are not legally enforceable.

Having said that, I do not wish to imply that, from a normative standpoint, these established conventions and practices are not important or should not be followed, but only that departure from them is a decision for the Queen's community to make, not outsiders, since the community is best placed to consider all the ramifications that should be taken into account in deciding whether to deviate from them on an exceptional basis.

I have not, therefore, in preparing this opinion, treated any specific historical convention or established practice relating to the Queen's Senate as legally authoritative in determining the scope of the Senate's power.

C. Applicable principles of legislative interpretation

There is a substantial and well-developed body of case law and statutory law in Canada regarding the principles of legislative construction that are to be applied in interpreting the meaning and effect of enactments like the *Royal Charter*. These principles are an important source of guidance in determining the authority of the Queen's Senate. Although the *Royal Charter* as originally granted was not a statute, it has been substantially legislatively modified by Parliament over time, and may properly be considered and interpreted today as a statute.

The Supreme Court of Canada has adopted what is described as the modern principle of statutory interpretation, which requires that the words of a legislative enactment be read in their

[2] Hogg, *Constitutional Law of Canada*, 5th ed. supplemented, s. 1.10

entire context, in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislature. Statutory provisions must be interpreted in a textual, contextual and purposive way, and all sections of a related group of provisions should be given coherent meaning if possible.[3]

Integral to the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. A first dimension is textual meaning – the meaning of words as ordinarily understood. A second dimension is legislative intent, or the purpose of the legislation. A third dimension is established legal norms, which include a number of interpretive presumptions. The second and third dimensions form part of the "entire context" in which the words of the statute must be read.[4]

The contextual nature of statutory interpretation means that it is legal error for a court to look at the words of a specific statutory provision in isolation to determine the provision's meaning. An approach to statutory interpretation that focuses only on the literal meaning of the words does not apply in Canada. Rather, the court must consider the overall scheme of the statute, its purpose, and the context in which the language is used.[5]

This contextual and purposive approach to statutory interpretation is consistent with, and mandated by, Section 12 of the federal *Interpretation Act*,[6] which directs that every legislative enactment receive the interpretation that best ensures the attainment of its objects. Section 12 states:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

It is noteworthy that the *Royal Charter* contains its own interpretive clause, which is to similar effect. Section 34 of the *Royal Charter* directs that the document shall be "effectual in the Law, according to the true intent and meaning of the same and shall be taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of our said College, as well in our Courts of Record as elsewhere".

D. Context: The bicameral model of governance at Queen's

Like most universities in Canada, Queen's has a bicameral model of university governance, with authority over governance divided between the Board of Trustees and the Senate.

The Queen's model of bicameralism has some distinctive features, set out in the *Royal Charter*. From a legal perspective, in assessing the authority of the Senate, I consider six predominant features of bicameralism at Queen's to be relevant.

1. Separation of powers: The *Royal Charter* contemplates a separation of powers between the Board of Trustees and the Senate. Although technically the initial Board had a discretion

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[3] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21; *Redeemer Foundation v. Canada (National Revenue)*, [2008] S.C.J. No. 47 at para. 15. See R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008) at p. 1

[4] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008) at pp. 1-2

[5] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paras. 20-23

[6] R.S.C. 1985, c. I-21

whether or not to create the Senate in the first place (see Section 23 of the *Royal Charter*), the Board did create the Senate, the Senate has since been formally continued by federal statute (see Section 29), and the *Royal Charter* provides that the Principal and all professors at Queen's "shall for ever constitute the College Senate" (see Section 24). It is reasonable to infer that the *Royal Charter* contemplates that the Board and the Senate will co-exist within the university "for ever". Section 24 of the *Royal Charter* also provides that members of the Board of Trustees shall not be members of the Senate – demonstrating an intention that the Board and Senate be institutionally separate, arguably connected through the office of the Principal who is required to be a member of both bodies.

2. The Senate's basic jurisdiction over academic matters is entrenched: The *Royal Charter* gives the Senate broad authority and responsibility over academic matters. Section 23 states that the Senate shall exercise "Academical superintendence and discipline over the Students, and all other persons resident within" the university. The Senate has the power and authority to confer academic degrees (see Section 26), and, as noted, has the power to pass by-laws "touching on any matter or thing pertaining to the conditions on which degrees...may be conferred", whether the degrees are honorary or earned – subject to the Board's power of disallowance (see Section 28). Although the Board may pass any enactments in regard to the Senate that it thinks proper, after consultation with the Senate (see Section 29), the Board may not pass an enactment regarding the Senate that is inconsistent with the *Royal Charter* itself (see Section 21). Thus the Board cannot lawfully derogate from the Senate's basic jurisdiction over academic matters as provided for in the *Royal Charter*.[7]

3. The Senate's jurisdiction over academic matters is not exclusive: The Board of Trustees at Queen's shares jurisdiction over academic matters with the Senate, at least formally. Section 20 of the *Royal Charter* gives the Board the power and authority to pass "Statutes, Rules and Ordinances" regarding, among other things: (a) "the Studies, Lectures, Exercises and all matters regarding the same", (b) the duties of professors, and (c) any other matter or thing relating to the well being and advancement of the university. As noted, Section 29 of the *Royal Charter* also directly authorizes the Board to pass enactments in regard to the Senate. Such enactments would be by their nature academic, given the Senate's academic role.

4. The Board appears in some respects to be dominant over the Senate: Some features of the *Royal Charter* give the appearance of dominance by the Board over the Senate. Among other things: (a) the Board shares authority over academic matters with the Senate (see Section 20), but the Senate does not share authority with the Board over non-academic matters; (b) the Board has the authority to pass any enactments in regard to the Senate that the Board thinks proper, provided there is first consultation with the Senate (see Section 29); (c) if the Senate passes a by-law pertaining to the conditions on which degrees may be conferred, it must immediately report the by-law to the Board, and the Board has the power to disallow it (see Section 28); and (d) although the Senate is given broad authority over "academical superintendence and discipline", its powers to maintain order and enforce obedience to the statutes, rules and ordinances of the University are limited to those that the Board considers "meet [meaning suitable, fit, proper] and necessary" (see Section 23).

5. The Board does not have a power to veto Senate decisions: Despite the arguable appearance of Board dominance as described, the *Royal Charter* does not confer on the Board either a general power of disallowance of Senate decisions, or the power of final decision on matters of jurisdictional dispute between the Board and the Senate. There are many decisions the Senate makes that may have financial or administrative consequences that the Board may disagree

[7] Except, as noted, through the exercise of the Board's power to disallow Senate by-laws under Section 28.

with. It is significant that the Board is not expressly granted the power to overrule such decisions. It is also notable that, although the Board and Senate share power over academic matters, there is no mechanism prescribed in the *Royal Charter* for resolving disagreements over academic matters.

6. The Senate has specific identified functions: While the *Royal Charter* prescribes a broad general authority for the Senate over "academical superintendence and discipline", the Board has, with the approval of the Senate, identified specific Senate functions – in the document titled *Purpose and Functions of Senate*. It is unlikely that this document has the legal effect of derogating from the Senate's formal legal authority as prescribed by the *Royal Charter* because, as noted above, Section 21 of the *Royal Charter* prevents the Board from passing an enactment that is contrary to the *Royal Charter*. Rather, the *Purpose and Functions of Senate* appears to reflect an agreement between the Board and Senate as to the Senate's current role in the governance of Queen's. The Senate has the power and authority to exercise the functions described in *Purpose and Functions of Senate*, while retaining any other power and authority it has under the *Royal Charter*.

E. Context: Delegation of academic powers

A distinction must be drawn between the *existence* of authority within the Senate, and the *exercise* of that authority by the Senate. Based upon the materials that you have provided to me, it appears that, consistent with the experience at many other Canadian universities, authority to exercise much of the Senate's power has over time been delegated to other bodies and officers within the University, such as, among others, the Deans and the Faculty Boards.

One historical account of that process of delegation is provided in "The Queen's University Senate – Evolution of Composition and Function 1842 -1995" prepared by Margaret Hooey in 1996, which states:

> During its first 20 years, the Queen's University Senate directly managed all of the academic planning and academic housekeeping tasks for the University. The Senate decided on all matters relating to curriculum and course content. It dealt with applications for admission, dealt with special cases such as applications for exemptions and deferrals, awarded bursaries and prizes (after the candidates had presented themselves), arranged for examinations, conducted oral examinations, and meted out sanctions for disciplinary infractions....
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> The first comprehensive set of procedures governing the government and management of the University...was framed by the Board of Trustees in 1862. One of the most notable features of the 1862 by-laws was formal provision for Faculty Boards to administer the affairs of each faculty. ... This provision probably represents the first major step toward delegation of some aspects of the "academical superintendence" given to the Senate by the Royal Charter. ...
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> From 1913 to the mid 1960's, the minutes of the Senate reveal an increasing degree of delegation of academic responsibilities to the Faculty Boards. The Senate itself was focussing more on its role of shaping the academic direction of the University itself while at the same time continuing to manage a variety of administrative chores....
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> Discussions in the mid '60's led to the first major changes in the structure of the Senate since 1913. ... It was the intention that, while the reorganized Senate

> would exercise a review function and maintain the power to ensure the consistency of policies of Faculties and Schools with the overall interests of the University, the Senate would be mainly concerned with defining "the principal objectives of the University, to establish priorities for the attainment of these objectives and to translate these objectives and priorities into University policy."[8]

The nature and extent of the decentralization of power within Queen's is also described in the 1991 Principal's Discussion Paper titled *The Governance of Queen's University*, by Professors W.R. Lederman and R.L. Watts:

> The internal structure of governance as it has evolved [at Queen's] has been marked by complex interlocking relationships between its various constituent elements and by decision-making processes involving both extensive decentralization and consultation among these elements. ...
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> By comparison to most universities, the processes are...marked by a relatively high degree of decentralization. This pattern ensures that those who are most affected are involved formally or informally before policy decisions are reached. On the other hand, the very complexity of these processes may mean that it is not always clear, for those who are not directly involved, where the responsibility and accountability for particular decisions has rested. ...
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> [T]he processes of internal governance at Queen's...are not based on a clear and simple hierarchical structure, but on the dispersion of decision-making among multiple internal bodies at various levels and upon complex and interlocking interrelationships between these bodies which involve the whole range of constituent communities within the University. But while the processes of governance at Queen's are not simple, they avoid the rigidities of a precise hierarchical structure. They provide a variety of pragmatic and flexible decision-making processes which facilitate the extensive participation of different constituencies within the University in these processes and the achievement on most issues of a broadly based consensus.[9]

The Senate's current focus on matters of university-wide significance and upon higher-level academic issues is reflected in the 2011 policy on the *Purpose and Functions of Senate*, as noted above.

I have assumed, in preparing this opinion, that delegation of the Senate's powers has in fact occurred, as referenced in the above reports and other source materials relating to the governance at Queen's. I have not performed a review of the Senate minutes and other original source materials to confirm the precise nature and scope of the delegation. To the extent that the existence of Senate delegation may be uncertain or controversial in any given situation, the details of that delegation would need to be confirmed through a review of these source materials.

The Senate's delegation of the exercise of its authority to others within the University does not, as a matter of law, derogate from the Senate's authority over academic matters as set out in the *Royal Charter*. The Senate retains the legal authority to require that any decision falling within

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[8] M. Hooey, "The Queen's University Senate – Evolution of Composition and Function 1842 -1995" (March 1996)

[9] W.R. Lederman and R.L. Watts, *The Governance of Queen's University* (1991), pp. 2, 16

the Senate's jurisdiction be brought back to the Senate for consideration and approval. At the same time, however, it is not unlawful for a body or person (such as a Faculty Board or Dean), that has received delegated decision-making authority from the Senate, to exercise that authority without seeking the approval of the Senate.

F. Purpose: The rationale for the bicameral model of university governance

The purpose of a university charter or governing statute like the *Royal Charter* is to create a governance model that will achieve the principal academic goals of the institution under the stewardship of a prudent and effective financial manager. Bicameralism is designed to achieve this purpose.

The goals of bicameralism within a university have been the subject of judicial commentary, in the leading Canadian decision regarding the powers of a university Board and Senate: the 2001 decision of the Ontario Court of Appeal in *Kulchyski v. Trent University*.[10] The case involved a direct confrontation between Trent University's Board of Governors and its Senate over university governance. I will return to the significance of the *Kulchyski* decision below in discussing the relative authority of the Board and Senate at Queen's in matters involving both academic and financial aspects. For present purposes, what is relevant is the discussion by Sharpe J.A. of the purpose of bicameralism within a university. Although Sharpe J.A. was writing in dissent, his comments on the purpose of bicameralism were not the subject of disagreement with the majority, and would likely be endorsed by a court called upon to consider the purpose of bicameralism today.

Sharpe J.A. explained the purpose of bicameralism in a university in the following terms:

> [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. ...
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> [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.)

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[10] *Kulchyski v. Trent University*, [2001] O.J. No. 3237 (C.A.)

> [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.[11]

G. The Senate's general authority over academic decisions

Taking into account the purpose of university bicameralism, the structure of bicameralism at Queen's as set out in the *Royal Charter*, the Senate's delegation of power over academic matters, and the agreed role of the Senate as set out in *Purpose and Functions of Senate*, the following general conclusions may be drawn regarding the legal authority of the Queen's Senate over academic decisions:

1. Subject to what follows, the Queen's Senate has broad legal authority to make decisions on academic matters (which would include decisions that are intrinsically academic in nature or that have significant academic impacts, as referenced in Question #1).

2. That authority is entrenched by the *Royal Charter*, would be enforced by a court, and cannot be derogated from by the Board or by an officer of the University.

3. The Senate does not have legal authority to make decisions on matters falling outside of its jurisdiction as prescribed by the *Royal Charter*, such as the management of the revenues and property of the University; legal authority to make these decisions lies exclusively with the Board or the Board's delegates.

4. The opposite is not true. The Senate's authority over academic matters is not exclusive as a matter of law; formally, the Board shares authority over at least some academic matters, by virtue of Sections 20, 23, 28 and 29 of the *Royal Charter*.

5. There is no explicit mechanism provided for in the *Royal Charter* for resolving individual jurisdictional disputes between the Board (or its delegates) and the Senate (or its delegates), except insofar as the Board may disallow a Senate by-law dealing with the conditions for the granting of degrees.

6. The Board and Senate have agreed on the primary purpose and functions of the Queen's Senate; as reflected in *Purpose and Functions of Senate*, the Senate's primary role is to advise upon or approve high-level decisions with academic impact that either affect the University as a whole or are sufficiently important that they merit Senate attention.

7. This agreement on Senate's current role does not diminish the Senate's broad entrenched power and authority over academic matters, but reflects the reality that much of the Senate's broad power and authority is no longer exercised directly by the Senate because decision-making authority has been delegated.

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[11] *Kulchyski v. Trent University*, [2001] O.J. No. 3237 at paras. 58, 64-65 (C.A.)

Notably, these legal conclusions do not answer some of the more difficult questions. It is relatively easy to determine as a matter of law that the Senate has broad authority to make decisions on academic matters. It is more difficult to determine, for example, whether the Senate has the authority to block a Board decision made for financial reasons but that has academic consequences. Or the authority to require that the Board consult with the Senate prior to making such a decision. Or, in line with recent events, the authority to require that a Dean obtain the approval of the Senate before making a decision that has both financial and academic effects.

These types of questions are difficult to answer because the *Royal Charter* does not provide an explicit answer to them. There is very limited case law regarding the power of a university senate, or regarding the proper legal remedy in the event of institutional deadlock. Moreover, as discussed below, there are reasonable arguments to be made both for and against Senate authority to make decisions that have both financial and academic effects. The governing principles of legislative interpretation can likewise be applied in support of conclusions both for and against Senate authority.

Generally speaking, within a university, if a decision will have both significant academic effects and significant financial consequences, the ideal is for the Board and Senate, or their delegates, to cooperate in arriving at a mutually acceptable outcome. One reason there is limited decided case law on the powers of a university senate is presumably because this type of compromise is usually reached. A legal analysis of whose authority should prevail is primarily relevant where cooperation has failed.

It is to a consideration of these more difficult issues that I now turn in Question #2.

Question #2 – Senate consideration and approval of certain decisions

> *Is the Senate legally required to consider and approve any decision:*
>
> *(a) that will result in the closure of an academic program?*
>
> *(b) that may result in the closure of an academic program, including a suspension of enrolment?*
>
> *(c) to merge academic units, or that will result in the merger of an academic program with an academic unit?*

This question concerns the authority of the Senate over the types of decisions listed, and by implication the corresponding lack of authority in others. It asks whether it is legally forbidden for another body or person within the University to make these types of decisions without Senate consultation and approval. Or, to put it another way, the question is whether a decision of one of the types listed is legally ineffective, if the Senate does not approve it.

The question may be broken down into three parts for further analysis.

First, it must be determined whether the Senate's constating documents explicitly require the types of decisions listed in the question to be made by the Senate or with the Senate's participation.

Second, if there is no such explicit requirement, one must consider whether, as a matter of law,

it is inherent in the Senate's broad power over academic matters that these types of decisions must be made by the Senate; in other words, is this an implied power of the Senate. This part of the analysis brings into play the issue of Senate delegation.

Finally, it is necessary to consider what would happen in the event of a conflict between the Senate and the Board (or a delegate of the Board) over one of these types of decisions – in particular, whether the Board (or its delegate) has ultimate decision-making power.

I. *The Senate's constating documents*

The *Royal Charter* is framed in broadly worded language, and does not specifically state whether Senate approval is required for the three types of decisions listed in Question #2.

A more directly instructive legal authority is the *Purpose and Functions of Senate*, which identifies with specificity certain functions that the Board and Senate have agreed fall within the Senate's broad jurisdiction over academic matters and may be exercised by the Senate. The document states in Section 5 that the Senate has the authority to approve the establishment or closure of any academic unit, subject to ratification by the Board. Section 7 states that the Senate has the authority to approve the establishment or closure, on the recommendation of Faculty Boards and Schools, of all programs of study leading to a degree, diploma or certificate.

It is notable that both of these sections of *Purpose and Functions of Senate* use the language of "authority" rather than "requirement". The Senate is described as having the legal authority to approve certain decisions, but not a legal requirement to do so. The implication appears to be that the Senate may exercise that authority if it wishes to do so, but that it may also delegate that authority. However, in the absence of delegation, authority resides in the Senate and the decisions would require Senate approval.

Based upon Section 7 of *Purpose and Functions of Senate*, it is apparent that decisions that will result in the closure of an academic program (see Question #2(a)) require Senate approval.

Based upon Sections 5 and 7, in my view, it is more likely than not that any decision to merge academic units, or to merge an academic program with an academic unit (see Question #2(c)), requires Senate approval. Although Sections 5 and 7 speak of Senate authority over the "establishment" or "closure" of academic units and programs, it is reasonable to infer that mergers of the types described in Question #2(c) involve elements of both establishment and closure.

It is less clear whether the type of decision listed in Question #2(b) (a decision that "may" result in closure of an academic program) falls within the scope of Section 7 of *Purpose and Functions of Senate*. Section 7 speaks of the Senate approving the recommended closure of a program, not a possible closure. Presumably an actual program closure could not occur without a formal recommendation and Senate approval, in light of the requirement under Section 7 for Senate to approve such closures. In my view, therefore, Section 7 of *Purpose and Functions of Senate* does not speak directly to the Senate's authority over a decision that may result in closure of an academic program, in the absence of a recommendation for closure. That does not mean that Senate lacks authority entirely over a decision of this type, but only that the Senate's constating documents do not speak directly to this authority.

II. *The Senate's broad power over academic matters*

As noted, the *Purpose and Functions of Senate* does not restrict the Senate's broad power over

academic matters as prescribed in the *Royal Charter*. Rather, the document reflects the current understanding between the Board and Senate as to the role of the Senate in University governance, and the types of decisions that should be made at the level of the Senate rather than by a delegate of the Senate such as a Faculty Board or a Dean.

One question that arises is whether there are some types of decisions, that are not specifically listed in *Purpose and Functions of Senate*, that nonetheless by their very nature require Senate approval because of their high degree of academic importance. The type of decision listed in Question #2(b) might be an example – that is, a decision, such as a suspension of enrolment, that may in future lead to a recommendation to Senate to close an academic program.

I am aware from the materials provided to me that there are different views on this issue within Queen's. One viewpoint holds that some academic decisions (such as a decision to suspend admissions to an academic program) do require Senate approval even though not listed in *Purpose and Functions of Senate*, on the basis of their significant academic impact and the absence of any compelling urgency in the decision-making process that might warrant a decision being made before the matter could be placed before Senate. Another view is that the power to make most academic decisions has been delegated by Senate to other bodies and individuals within the University, and that in the absence of a specific directive from the Senate requiring that a matter be returned to it for decision, there is no requirement for Senate approval.

From a legal perspective, there are aspects of both viewpoints that are relevant. The Senate does have the authority to continue to require that decisions falling within its broad power over academic matters be brought before the Senate. That power has not been lost. At the same time, the extensive delegation and decentralization of academic decision-making at Queen's, and the formalization of the Senate's limited current role in *Purpose and Functions of Senate*, mean that it is likely lawful for the Senate's academic delegates to make decisions on matters that the Senate has not expressly reserved to itself. This raises the question of whether there are academic issues on which the Senate intends to retain its role as ultimate decision-maker, but with respect to which the Senate has not clearly articulated that intention, whether through the *Purpose and Functions of Senate*, or otherwise.

Returning to Question #2(b), in my opinion it is likely that a court, in the absence of a specific direction from the Senate that decisions involving the suspension of enrolment into an academic program must be made by the Senate, would not find it to be unlawful for an authorized delegate of the Senate to make such a decision.

III. *Conflicts between the Senate and the Board*

There is a further dimension to this analysis, which involves the question of whether the Board has the authority to decide unilaterally, through its own delegate, to suspend admission into an academic program for financial reasons. This brings into play the question of whether the Board's powers are paramount to those of the Senate.

The bicameral model of university governance contemplates cooperation between the Board and Senate and their delegates in order to ensure that the university's academic goals and financial needs can both be met. At the same time, bicameralism creates the potential for deadlock. The separation of powers between the academic Senate and the financially-focused Board can create conflict when a decision has both significant academic and significant financial effects, and thus falls within the jurisdiction of both the Senate and the Board. The decisions to suspend admissions to certain academic programs at Queen's in 2009 and 2011 were perceived as raising

this issue – decisions that were made by a Dean, who acts as delegate of both the Senate and the Board.

There are differing views about the manner in which such conflicts should be resolved. One view (the "paramountcy model") is that, where a decision involves significant financial matters, the Board's authority to make the decision trumps the Senate's authority over academic matters, on the basis that the financial viability of the university must take priority over academic planning. Another view (the "partnership model") is that neither the Board's authority nor the Senate's is paramount, and that decisions involving both financial and academic matters must be jointly made, even at the risk of deadlock.

Those who favour the paramountcy model argue that the alternative would be to allow the Senate to exercise financial control over the university, at the risk, in extreme cases, of causing the institution's insolvency. The concern is that the Senate could refuse consent to an important financial initiative on the basis of academic objections.

Those who favour the partnership model have exactly the opposite concern. The perception is that, since so many university decisions have both financial and academic aspects, giving primacy to the Board would be effectively to remove most of the Senate's authority over academic matters.

From a legal perspective, the resolution of this issue at Queen's requires an analysis of the relevant legal authorities and applicable interpretive principles. Looking first at the *Royal Charter*, there are features of this document that favour both models.

In favour of the paramountcy model, the *Royal Charter* appears to create an institutional priority of the Board over the Senate, as described above, through such mechanisms as the disallowance power, and the power to make enactments relating to the Senate. The Board is also given concurrent jurisdiction over academic matters with the Senate, while the Senate is not given concurrent jurisdiction with the Board over financial matters. These structural features suggest an intention for the Board to be dominant over the Senate.

There are also, however, structural features of the *Royal Charter* that favour the partnership model. For example, the absence of a broad disallowance power for the Board (permitting it to disallow any Senate decision) is significant, since the *Royal Charter* specifically grants a power of disallowance for the Board over Senate by-laws relating to the conferring of degrees. The choice to give a more limited disallowance power suggests that the broader disallowance power was intentionally withheld. Other important features include the absence of a power in the Board to decide jurisdictional disputes between the Board and other institutions of governance within Queen's, and the prohibition against the Board making an enactment relating to the Senate that modifies the *Royal Charter* itself.

The terms of the *Royal Charter* do not on their face provide an answer to the question of how conflicts between decisions of the Senate and the Board are to be resolved. Nor does a purposive analysis of the rationale for the *Royal Charter* provide strong guidance. It is reasonably arguable that its purpose was equally to promote the academic goals of the University and to secure its financial needs.

From a legal perspective, the best available guidance on the result that a court would likely come to, if required to decide the issue, is the limited existing case law on the relative powers of the Senate and Board of a university. Relevant here are the *Kulchyski v. Trent University* decision, referenced above, and a more recent decision of the British Columbia Court of Appeal.

Kulchyski involved a direct confrontation between Trent University's Board of Governors and its Senate. The Board voted to close the university's downtown campus, for financial reasons. There was a genuine concern about the financial viability of the university if the decision was not made. The Senate voted against closure, for academic reasons – there was a view that the entire academic culture of the institution would be changed by eliminating one of the campuses. The issue before the Court was whether the Senate had the power to block the Board's decision, on the basis that the decision trenched upon the Senate's authority over academic matters.

The Court of Appeal issued a split decision. The majority judgment concluded that the decision to close the downtown campus fell within the Board's exclusive jurisdiction over the management and control of university property, revenues and expenditures. The majority weighed the relative significance of the financial and academic aspects of the decision, and concluded that the financial aspects sufficiently outweighed the academic aspects that the decision fell exclusively within the Board's jurisdiction. The majority relied upon features of the *Trent University Act* that indicated that the Senate's decisions were subject to Board approval "in so far as the expenditure of moneys is concerned". The majority also concluded that it was the legislature's intention that there be paramountcy of the Board over the Senate, stating: "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."[12]

Mr. Justice Sharpe, in dissent, held that the decision to close the downtown campus involved both academic and financial aspects, and required the approval of both the Board and the Senate. He concluded that the Board and the Senate had overlapping powers, which entailed a power-sharing relationship between equals, with decisions requiring the concurrence of both bodies. As he stated, "where a matter has both educational policy and financial implications, the approval of both Senate and the Board is necessary." Notably, unlike the majority, Sharpe J.A. concluded that the requirement for joint decision making was "implicit in the bicameral scheme of governance". In the absence of any specific feature within the *Trent University Act* giving an override power to the Board, Sharpe J.A. concluded that there was no such power, and that any resulting deadlock would need to be resolved through "debate, discussion, negotiation, and compromise, or all else failing, legislation."[13]

I pause here to say that, whatever one thinks of Sharpe J.A.'s view, it does emphasize the importance of the collegial or partnership relationship between Senate and Board. After all, the Senate and Board have to live and work together in the best interests of the University, and do their best to avoid adversarial show downs. The "debate, discussion, negotiation and compromise" that Sharpe J.A. describes should occur regardless of which formal model of ultimate conflict resolution one concludes is applicable.

The *Kulchyski* decision, in its two divergent judgments, illustrates both of the viewpoints identified above, with each judgment considering the result that it reached to be an implied feature of the bicameral model of university governance. This divergence of views even among members of Ontario's highest court shows the difficulty inherent in deciding on the scope of jurisdiction of a university Senate, as a matter of law. At the same time, as far as Ontario law is concerned, the majority ruling governs, insofar as the principles articulated in connection with

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[12] *Kulchyski v. Trent University*, [2001] O.J. No. 3237 at paras. 24-40 (C.A.)

[13] *Kulchyski v. Trent University*, [2001] O.J. No. 3237 at paras. 56-72 (C.A.)

the unique facts of the *Kulchyski* case can be extrapolated to other contexts.

The most notable feature of the majority decision that likely does have broader application is the conclusion that the bicameral governance system of the university could not have been intended by the legislature to be so inflexible as to prevent the Board from making a decision to prevent economic loss and to safeguard the university's future. It is likely that this principle would be applied and followed by a court considering the same issue under the Queen's *Royal Charter*. Whether one agrees with the majority judgment or not as a policy matter, it is the most authoritative legal statement on the issue that is currently available.

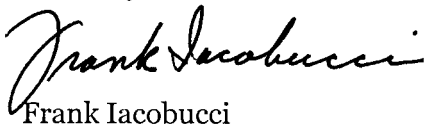
Notably, the British Columbia Court of Appeal in a recent decision endorsed the majority approach in *Kulchyski*, stating: "While I find some attraction in the "double aspect" approach to the problem referred to by Mr. Justice Sharpe [in *Kulchyski*], I think it would present more problems in terms of practical application than it would solve."[14]

At the same time, it is important to stress that the decision in *Kulchyski* involved an extremely important financial decision for the university, whose academic effects were found by the court to be tenuous. Although there was disagreement between the majority and dissenting judges on the nature and extent of the academic effects, the important point from a legal perspective is that the case was decided on the basis that the Board had exclusive jurisdiction over major financial decisions with minor academic effects. Thus one cannot necessarily extrapolate from *Kulchyski* a broader principle that the Board is always paramount over the Senate in decisions with a financial aspect. There is a reasonable basis for concluding, based on the majority judgment, that important academic decisions with lesser financial effects would fall within the jurisdiction of the Senate. This conclusion reinforces the importance of having a very good working relationship between the Senate and Board.

Although you have asked for my legal opinion, I feel obliged to point out, in this regard, that the legalities of whether the Senate or Board at Queen's has the stronger legal claim on a given issue is ultimately not as important as encouraging both organs to be mindful of maintaining a relationship with each other that is in the nature of a partnership. To do that is a better way of ensuring that individual disagreements do not become adversarial and divisive, making the attainment of a collegial or partnership relationship very difficult, if not unattainable.

Thank you for asking me to provide you with an opinion on this interesting topic.

Sincerely,



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[14] *Faculty Association of the University of British Columbia v. University of British Columbia*, [2010] B.C.J. 679 at para. 66 (C.A.)