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University v. Student

Challenging the Contractual Understanding of Higher Education in Canada

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I. Introduction

When high school graduates arrive on a university campus for their first semester of postsecondary education, perhaps the furthest thing from their mind is how the law defines their relationship to this new institution. Few students are aware that when they register at the beginning of a semester, they are entering into a contract that has legal ramifications. Indeed, the relationship between a university and a student has been identified as a contract in Canada, by institutions and courts alike.[1]

In recent decades, Canadian higher education has undergone some notable changes, particularly in financing structures and student enrollment. With regards to fiscal arrangements of universities across the country, there has been a general decline in public funding from both provincial and federal[2] governments over the last two decades, coupled with an increased dependence on tuition fees from students to cover operational expenditures.[3] Against this structural backdrop, there has been a significant increase in full-time enrollment of postsecondary students that simple demographics alone cannot explain.[4] Because the field of higher education is rapidly changing in Canada in diverse ways, it is a crucial time to reflect on the legal understanding of the university in its various engagements. Dynamism in higher education has prompted a rich discourse on the nature of the modern university in Canada, especially on its objectives as an institution.

A university engages in many complex relationships in pursuit of its diverse objectives. Many large universities serve as centres for research and scholarship; their relationships with faculty members, researchers, as well as public and private sponsoring entities are worth noting. But their relationship to students – in their function as an educational institution – illuminates crucial aspects of their institutional personality. As this paper will try to articulate, applying the lexicon of contract law to the legal relationship governing the university and its students can

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[1] See *Attaran v. University of British Columbia*, [1998] B.C.J. No. 115 at para. 38, 4 Admin. L.R. (3d) 44 [*Attaran*] (university explicitly acknowledges a contract in the Calendar). See also *Howard v. York University et al.* [1974] O.J. No. 2265 [*Howard*] (the court decides there is a contract governing the relationship between the university and student).

[2] Since education is under the sole jurisdiction of provinces in Canada pursuant to s. 93 of the Canadian *Constitution Act, 1982*, every province funds its own system of postsecondary institutions, but the federal government has historically made significant contributions to higher education, albeit indirect ways, in the name of national concerns like economic development. For a more exhaustive account of federal-provincial fiscal arrangements in Canadian higher education, see Donald Fisher, *Canadian Federal Policy and Postsecondary Education* (Vancouver: CHET, 2006).

[3] Between 1985 and 2005, the percentage of university operating revenue in Canada from the government decreased from 81% to 57%, whereas the share from tuition fees increased from 14% to 30%. Canadian Association of University Teachers (CAUT), *Almanac of Post-Secondary Education 2007* (Ottawa: CAUT, 2007) at 4.

[4] Full-time enrollment across Canada increased 31% from 2000 to 2006. The Association of Universities and Colleges of Canada (AUCC), *Trends in Higher Education: Volume 1 – Enrolment* (Ottawa: AUCC, 2007) at 10 [AUCC, *Trends*].

shed light on the interesting predicament of Canada's public universities today and the ability of current legal frameworks to adequately govern them.

This paper aims to use a discussion of the particularities of the university-student contractual relationship to underscore the contemporary issues of commercialization that face Canada's higher education systems. Though this relationship is not the archetype of contractual relationships, the private law of contracts has played a central role in higher education litigation, in part because there is no obvious alternative. When an aggrieved student takes a university to court, there are a number of legal bases outside the parameters of contract law for making a claim, particularly on constitutional grounds. On issues of academic freedom or freedom of expression, for example, constitutional claims have been attempted in Canada, but with no success.[5] Part of the reason for this is that major universities in Canada are autonomous entities incorporated by private provincial statutes and therefore do not act as governmental authorities[6] in the way that some public community colleges do.[7] Universities in Canada generally do not come under the purview of the *Charter* because they do not fall within the definitions set out in section 32.[8]

The incorporating statutes grant universities quasi-judicial capacities with internal procedures of appeals.[9] As a result, apart from exceptional cases where it is proven that the university acted unreasonably, arbitrarily, discriminatorily, or in bad faith, the courts defer to the autonomy of universities' governing and adjudicative bodies.[10] Courts are generally unwilling to scrutinize university decisions on *Charter* grounds, but they have acknowledged that universities do owe obligations to the student based on the private law of contracts.

This paper will first propose possible explanations for the emergence of a contractual understanding of the university-student relationship, given the social and economic context in which these pertinent issues stand. Second, it will explore the symmetrical and asymmetrical characteristics of the contract between university and student. Third, it will illuminate the shortcomings in the private law of contracts that prevent it from properly reflecting each party's rights and obligations. Fourth, this paper will argue that special regulations on the university-student contract may help better reflect the needs and interests of universities, students, and society at large. Finally, the paper will place this discussion of contracts in the context of broader higher education policy concerns.

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[5] See *Students For Life v. University of British Columbia (Alma Mater Society)*, 2003 BCSC 864, [2003] B.C.J. No. 1326 [*Students For Life*].
[6] See *Howard*, *supra* note 1.
[7] See *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94 (when engaging in agreements, the community college's actions are like those of the government for the purposes of s. 32 of the *Charter*).
[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 [*Charter*].
[9] *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 595 [*Harelkin*].
[10] See *Fédération des médecins résidents du Québec c. Université de Montréal*, [1997] J.Q. no 1823, R.J.Q. 1832 [*Fédération*].

II. Canadian Higher Education: Contracts in Context

When university students register for a new semester at the beginning of a new academic year, knowingly or not, they enter into a contractual relationship with the university. Some universities like the University of British Columbia (UBC) explicitly state, "A student upon registering has initiated a contract with the University for payment of assessed fees."[11] In the dawn of the twenty-first century, the landscape of higher education in Canada is changing rapidly, and there are many ways to explain why the contractual framework has emerged in this field.

First, universities have become a crucial player in what is now understood as the "knowledge-based economy"[12]. The modern Canadian economy has shifted focus to more nuanced, intangible forms of capital – namely, knowledge capital. Against this economic backdrop, university campuses have become a centre for knowledge capital development and exchange. According to the principles of contract law, by providing a postsecondary education to students, a university is effectively increasing the students' capital in exchange for monetary capital, which is also known as tuition. Conversely, the student's participation with and contribution to the academic community of the university is exchanged for the education and accreditation provided by the institution. A contractual framework aptly recognizes this capital exchange between a university and a student.

Second, the contemporary political climate of liberal democratic ideals has led to an increased focus on individual rights and interests. Students are more likely to demand recognition as entities separate and independent from their universities. From a public policy point of view, the focus of economic analysis is the strength and vibrancy of Canadian universities. Increasingly, however, the strength of individual brainpower and talent has become an important aspect of the economy such that individual students are recognized as separate entities bearing individual knowledge capital.[13] Students are no longer considered a component of the university, and the relationship *between* the university and student has become a contentious issue that has yet to be properly addressed.

In the discourse on higher education in Canada, the focus has turned to the perspective of the student. The rationale behind an individual's choice to enroll in a postsecondary program can

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[11] University of British Columbia, "Calendar 2008-2009", online: <http://www.students.ubc.ca/calendar>. See also *Attaran*, *supra* note 1.

[12] The term "knowledge-based economy" was first coined by the Organisation for Economic Co-operation and Development (OECD). See OECD Directorate for Science, Technology and Industry (STI), "Policy Issues" (Conference on Globalisation and the Knowledge Economy, 9 October 2006), online: <http://www.oecd.org>. However, the concept of "knowledge capital" and "knowledge management" can be traced back to the work of Peter Drucker, a pioneer in re-conceptualizing the economy as one that is driven by knowledge, not money. See Peter F. Drucker, *Managing the next society* (New York: St. Martin's Press, 2002).

[13] The historical trend of federal fiscal arrangements in postsecondary education policy since the mid-1990s also denotes a shift from funding institutions to funding individual students through large financial assistance programs like the Canadian Student Loans. See Fisher, *supra* note 2 at 119.

include social and cultural factors, but the economic objective of attaining a superior level of education has become increasingly significant. To evidence this last point, it is worth noting that there are enormous financial returns on a higher education for an individual in today's knowledge economy. The 2001 Canadian Census reported that university graduates in their fifties earned fifty percent more income than their counterparts without postsecondary degrees.[14] It is estimated that over a forty-year working life, there is a cumulative one million dollar income differential between those with higher education and those with only high school diplomas.[15] The economic interest of an individual student is coupled with the reality that a university education has become increasingly expensive,[16] hence making the decision to enroll in a postsecondary program even more burdensome. Acknowledging the university and student as distinct parties to a contract may help recognize that students have social, cultural, and economic interests that are distinguishable from the interests of the university.

Third, due to the increased domestic and international mobility of Canadians, accreditation by higher education institutions has become more instrumental as globally recognized indicators of an individual's credentials and skill sets in the labour market. Universities, with the power to grant degrees and diplomas, play a definitive role in an individual's life and future earning potential. As a counterpoint, students are highly dependent on universities to help build their individual human capital. A contractual relationship between the university and the student helps recognize the individual student's expectations and her reliance on the institution for this accreditation.

In summary, a contractual relationship between the university and the student recognizes the modern reality of a knowledge-based economy, the rise of individualistic interests separate from institutional interests, and the significant role of academic credentials in determining a student's future. The following section will elaborate on how the university-student relationship can and cannot fit into a contractual framework.

III. The Nature of the University-Student Contractual Relationship

The contract between the university and student exhibits both symmetrical and asymmetrical characteristics.

The Two-Way Street of the University-Student Contract

The archetypical contract is a commercial exchange where two parties come together in agreement to exchange one thing for another to further both parties' respective interests. This bilateral model highlights the neoclassical assumption that private ordering schemes allow people to freely and rationally choose how they interact with one another to maximize utility and value—the philosophical underpinning of the private law of contracts. Two key characteristics of

[14] Statistics Canada, *Labour Force Survey*, 2001 Census, online: <http://www12.statcan.ca/english/census01>.
[15] AUCC, *Trends*, *supra* note 4.
[16] CAUT, *supra* note 3 at 37 (the average undergraduate arts tuition in Canada increased by 155% from 1991 to 2006).

this symmetrical, two-way exchange can be found in the university-student contract: mutual obligations and mutual interests.

a) Mutual obligations. The university and the student owe obligations to one another. This *quid pro quo* characteristic of a contract is known as the bilateral nature of a contractual obligation in the *Civil Code of Québec*. The parties obligate themselves to each other "so that the obligation of one party is correlative to the obligation of the other."[17] In common law, a promise from one party requires consideration from the other party in order for the promise to be enforceable. In other words, "[s]omething must be given or promised in exchange for the promise sought to be enforced."[18]

The student, when enrolling at a university, obligates herself to pay the tuition fee and abide by applicable regulations and codes as stipulated by the university. In return, the university obligates itself to provide an education and grant a degree to the student on the condition that she remains in good standing with the university and fulfill necessary academic requirements to merit the accreditation.

b) Mutual interests. An underlying neoclassical assumption of contract law is that each party has something to benefit from the relationship. The university-student relationship connotes an onerous contract because the two parties both gain an advantage from their relationship to one another.[19]

The student has the interest of attaining a postsecondary level of education. By enrolling in an academic program, he hopes to attain a degree that will serve as a credential in his academic history. This accreditation is not merely a piece of paper that serves as proof of having completed a course of postsecondary studies; rather, it can additionally hold great symbolic value that is transferrable into tangible assets and advantages. The reputation and prestige of the university, the social network of fellow students, and the employability of alumni can all be considered social, cultural, and human capital – the benefits a student hopes and expects to enjoy when enrolling in a program of studies at a university.

The public university in Canada seeks to benefit from the contractual relationship with the student in two capacities, both as an autonomous institution, and as the medium for pursuing public aspirations. First, as an autonomous institution, the university has an interest in attracting a collective pool of strong, talented students in this competitive knowledge-based economy. The better the students, the more knowledge capital, and ultimately, the bigger the advantage in the domestic and international market of higher education institutions[20]. The university has a

[17] Art. 1380, para. 1 C.C.Q.
[18] S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, Inc., 2005) [Waddams, *Contracts*].
[19] Art. 1381, para. 1 C.C.Q.
[20] The notion of an international market of higher education institutions has been evidenced by the increased standardization of degree programs, most notably in Europe through the Bologna process. See European Commission, *Bologna Declaration* (Paris: Europa, 1999) online: <http://www.bologna-bergen2005.no/Docs/00-

particular interest in attracting talented graduate students, who are employed by the university to teach and conduct research under the tutelage of a faculty member. Their work effectively becomes a part of the institution's knowledge capital, and their academic merit can also attract monetary capital through indirect public and private grants.[21] Second, as a public institution that channels a significant amount of public funding through both direct and indirect fiscal arrangements, the university engages with students in the pursuit of developing strong building blocks for Canada's economic future. In this respect, the university's interest is a communal one with the objective of maximizing the collective welfare of Canadians.

In summary, the university-student contract can in many respects be characterized as a symmetrical relationship in which both parties owe obligations to one another in the pursuit of their respective interests. However, this relationship also bears significant asymmetries that illuminate the nuances in the legal understanding of this contract.

The Asymmetries Within the University-Student Contract

Although the rules of contract law were developed with a theoretically symmetrical relationship in mind, the notion of a contract encompasses many more nuanced relationships with varying degrees of symmetry, both inside and outside the commercial context.

a) Asymmetrical negotiations. Canadian courts have recognized both explicitly and implicitly that the university-student relationship is essentially a contract of adhesion because only the university has the power to set the terms of the contract, and the students are in a position to take it or leave it[22]. According to the *Civil Code of Québec*, a contract of adhesion is one in which "the essential stipulations were imposed or drawn up by one of the parties… and were not negotiable"[23].

b) Asymmetrical information. The private law of contracts is based on one major assumption of neoclassical economics that people make decisions with access to and knowledge of all relevant information. In many if not most contractual relationships, however, parties enter into agreements without complete information to facilitate rational decision-making. This asymmetry of information can be problematic when one party is more knowledgeable than the

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Main_doc/990719BOLOGNA_DECLARATION.PDF>), and the dissemination of a internationalized normative framework (See generally Seo Yun Yang, *The Internationalization of French Higher Education and Diversity Recruitment at Sciences Po* (AB Honors Thesis, Harvard University Government Department, 2005) [unpublished].

[21] A graduate student's relationship to the university is particular in that his education is partly or fully subsidized by the school in exchange for his work as a teaching and/or research assistant. Graduate students also create an avenue through which universities can indirectly acquire much-needed public funding. See John Kucharczyk, "Student Aid, Federal-Provincial Relations, and University Finance" (1984) 19 *Journal of Canadian Studies* 87.

[22] See *Fédération*, *supra* note 10 (the Québec Court of Appeal classified the university-student relationship as a contract of adhesion and applied arts. 1436 and 1437 C.C.Q.). See also *MacDonald v. University of British Columbia*, 2004 BCSC 1299, [2004] B.C.J. No. 2106 [*MacDonald*] (the court clearly acknowledged that when it comes to essential terms of the contract such as coursework and tuition fees, students are not party to negotiations with the university).

[23] Art. 1379, para. 1 C.C.Q.

other. In the *Civil Code of Québec*, for example, provisions specifically guard against unfair conduct on the part of the drafting party towards the adhering party.[24] A contract of adhesion such as the one governing the university-student relationship naturally has an asymmetry of information. Since the university sets all the terms of the contract and it is its business to engage students in large numbers, it has a very robust understanding of all relevant information. By contrast, the average student suffers from information deficiency because he is unlikely to have thoroughly read all the printed materials on relevant rules and regulations. In addition, not all the terms of the university-student contract may be in writing.[25] The student is likely to be entering into a postsecondary degree for the first time with a lack of experience in the world of contractual terms and obligations.

c) Asymmetrical bargaining power. In the case of a contract of adhesion, there is often an imbalance of bargaining power because the adhering party has no say in the terms of the agreement.[26] Whereas a university can refuse to give access to courses or refuse to grant a degree if a given student has not paid the tuition, a student has little to no bargaining power by withholding tuition payments and has much more to lose in case the contractual relationship disintegrates.[27] Such contractual problems usually arise after the student has already invested much time, effort, and money with the expectation of attaining a degree upon completion of the course of study.

d) Asymmetrical reliance. One of the principal functions of the private law of contracts is to allow parties to plan for the future through private agreements and to protect their reliance on promises exchanged. In practice, for any given contract, parties may rely on promises to varying degrees, which can lead to problems when one party reneges on the promise to the detriment of the other party that was relying heavily on that promise.

In the case of higher education, the student relies on the university disproportionately more than the university does the student for reasons that are naturally characteristic of this relationship. Because the university has multiple contracts with multiple students at any given time, the institution's reliance on any single contract with a student is negligible. By contrast, a student contracts with one university and relies on that single institution to attain the degree she seeks. This heavy reliance is compounded by the social reality that attending university constitutes a pivotal stage in one's life; a postsecondary education is often the bridge that takes a student from adolescence to adulthood, from dependence to independence. A disrupted

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[24] Arts. 1436, 1437 C.C.Q.

[25] *Students For Life*, *supra* note 5.

[26] Jean-Louis Baudouin, *Les Obligations*, 5e éd. (Québec: Les Editions Yvon Blais Inc., 1998) (in a contract of adhesion, "the essential elements… are imposed and written by the party in the position of power," at 68 [translated by author]).

[27] Though few in number, lawsuits against students for the enforcement of tuition and other fees have largely been successful, whereas lawsuits against universities for the enforcement of various contractual terms have been unsuccessful. See e.g. *Acadia v. Sutcliffe*, [1978] N.S.J. No. 680, 95 D.L.R. (3d) 95 [*Acadia*]. See also *University of British Columbia v. Mirsayah*, 2005 BCSC 452, [2005] B.C.J. No. 702.

relationship with a university that fails to meet the student's expectations can represent an enormous opportunity cost that is irreparable. A student's reliance on the agreement with her university is therefore quite significant, while the university's reliance on the same contract is much less so.

The student's reliance on the university's promises can be particularly significant when her objective for enrolling at a university is primarily the accreditation at the completion of the program. Despite the invaluable academic and social experience of spending multiple semesters studying at a university, attaining the degree at the completion of that program is undoubtedly a central reason for enrolling at a university. Within the university-student contract, one of the promises put forth by the university is certainly to educate the student through coursework. Another key promise put forth by the university, however, is to grant the student a degree if and when a student successfully completes the necessary coursework. Up until that point, the student continues enrolling semester after semester in reliance of this latter promise, which, according to Professor Waddams, is a "*unilateral*" contract, or a promise that is made "*in return for the performance of an act.*"[28]

This unilateral model underscores the student's relatively precarious situation. Despite the student's heavy reliance on the university's promise of a postsecondary degree, the accreditation is essentially revocable at any point until the student's completion of the necessary coursework. A comparable scenario is when a homeowner offers to pay a painter a sum of money if she paints his house. With the understanding that she will be paid once the paintjob is completed, the painter may begin the work but the homeowner may revoke the offer after the painter has already invested significant time and resources.[29] The student's position can be analogous to that of the painter. The postsecondary degree is the student's true objective for enrolling at the university in the same way that the promised payment is the painter's objective in painting the house. It is in pursuit of this accreditation that the student invests time, money, and effort over the course of numerous years into her postsecondary education. When the institution, for one reason or another, refuses to grant the degree or diploma that was initially offered, students feel aggrieved and take the university to court.[30] There is an understandable sense of loss on the part of a student who, after investing much time and resources pursuing a degree, is denied the end goal of such investment—also considered the object and cause of the contract.[31]

e) Asymmetrical obligation. Although the university-student relationship can be characteristic of a bilateral contract where both parties owe an obligation to one another, it can also be understood as a contract where "one party obligates himself to the other without any

[28] Waddams, *Contracts*, *supra* note 18 at 119.
[29] *Ibid.*
[30] To safeguard against litigation on this issue, some institutions in the U.S. expressly deny any sort of irrevocable contract in the university's printed materials such as student handbooks. See *Eiland v. Wolf*, 764 S.W.2d 827 (Tex. Ct. App. 1989) (The student catalogue of University of Texas Medical School states, "The provisions of this catalogue are subject to change without notice and do not constitute an irrevocable contract…").
[31] Arts. 1410, 1412 C.C.Q.

obligation on the part of the latter."[32] Whereas a bilateral agreement assumes some element of *quid pro quo* or consideration, a unilateral contract as defined in the *Civil Code of Québec* does not. As Baudouin articulates, the unilateral characteristic of a contract concerns the effect of the contract; although the agreement constitutes the meeting of both parties' wills, only one party owes an obligation to the other.[33] Under this asymmetrical model, the university owes an obligation to the student, but not the other way around. In other words, the university obligates itself to provide an education and to grant a degree to a student, under the *condition* that the student pay a nominal tuition fee,[34] remain in good standing, and fulfill the necessary academic requirements. By contrast, a bilateral contractual model would understand this condition – particularly the tuition payment – as an obligation in itself being owed by the student to the institution.

This one-sided obligation can liken the university-student relationship to a social contract. The university's interest in engaging with a student is at least in part a public interest in educating Canadians and developing the collective brainpower within the national economy. The public university has the aspiration to provide a service – a unilateral obligation – to educate students for the benefit of the collective good and to serve the community. This moral dimension of higher education de-emphasizes the university's self-interests as an autonomous institution.[35] The tuition fee differential between in-province students, out-of-province students and international students is one way in which this communitarian aspiration can materialize. Provincial residents often get preferential treatment in admissions and tuition fees, thus strengthening the social contract between the institution and its community members. Unlike universities in the United States, however, Canadian universities are not state universities that act essentially as governmental bodies enshrined in the state constitution.[36] Canada's major universities, while incorporated by statute, are autonomous non-governmental entities.[37] As such, the notion of a social contract governing the university-student relationship has its limits. It is more of an ideology than a reality in the Canadian higher education systems.

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[32] Art. 1380, para. 2 C.C.Q.
[33] Baudouin, *supra* note 26 at 74.
[34] Although tuition fees continue to rise across Canadian universities, the public institutions continue to receive more than half their funding from the government. And tuition fees collected from students constitute a relatively small portion of the non-governmental revenues. In the 2005-2006 academic year, tuition fees covered around 20% of total revenues collected by Canadian postsecondary institutions (CAUT, *supra* note 3 at 2). In this respect, the tuition payment from a student can be understood as being nominal—not really representative of an obligation that is correlative to that of the university.
[35] See e.g. Rudolph H. Weingartner, *The Moral Dimensions of Academic Administration* (Lanham: Rowman & Littlefield Publishers, 1999).
[36] *Howard*, *supra* note 1 at para. 15. See also John Aubrey Douglass, *The Conditions for Admission: Access, Equity, and the Social Contract of Public Universities* (Stanford: Stanford University Press, 2007) (an account of the California state university system).
[37] See *Harelkin*, *supra* note 9.

The unilateral obligation also brings forth notions of "contractual governance", which is a growing practice particularly in the United Kingdom.[38] Contracts are understood as an effective governing instrument because a formal agreement between a governing body and governed persons allows for a clear articulation of objectives and responsibilities, as well as a system of accountability. For instance, schools, parents and students enter into home-school agreements, expressing the school's mission and setting out the respective responsibilities of parents and schools in the pursuit of educating the children.[39] Youth offenders also sign contracts with governmental bodies stipulating terms that the parties agree will help improve the youth's behavior, such as agreeing to be home at a certain time. Both types of contracts exhibit a unilateral obligation in the interest of a public, communitarian objective, much like the goal of developing Canada's human and knowledge capital through the increased participation of students in postsecondary education.

The civil law generally accepts this one-sided obligation more readily than common law jurisdictions, where "unilateral" contracts are often reformulated into a bilateral contract by courts to give legal weight to the parties' legitimate expectations in their relationship. Alternatively, unilateral contracts are deemed not to be contracts at all, and the issues are handled within the parameters of tort law or unjust enrichment. There is general discomfort with asymmetries in the university-student relationship because they push the boundaries of contract law. The next section will explore the ways in which this body of law may pose limitations of the legal understanding of this relationship.

IV. Shortcomings of the Private Law of Contracts

It has been established in courts that the private law of contracts is the primary legal framework that governs the relationship between a university and a student, but as the critical analysis above suggests, it may not substantively account for the unique dynamics of the relationship in question and it may not provide adequate procedural access to remedies in situations where the relationship goes awry.

Substantive Limitations

The rules of contract law exist in Canada because we live in an ostensibly free market economy where we believe in people's rights to make free and autonomous choices and to shape their relations with one another.[40] The basic function of this legal framework is to protect parties' reasonable expectations.[41] In the university-student relationship, however, the parties do not always exercise free and autonomous choice or shape their relationship as they see fit. And as many cases attest, the reasonable expectations of the parties—most notably the students—are not always protected by the private law of contracts.

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[38] See generally Peter Vincent-Jones, *The New Public Contracting* (Oxford: Oxford University Press, 2006).
[39] *Ibid*.
[40] See generally Michael J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993).
[41] John Swan, *Canadian Contract Law*, 1st ed. (Markham: LexisNexis Canada Inc., 2006) at 7.

The issue of rising tuition fees has spurred much of the recent litigation in Canada involving student plaintiffs and university defendants. With deregulation of tuition fees across the country and cuts in governmental funding in the mid-1990s, coupled with an increase in demand of higher education and soaring operational costs, universities were pushed to increase fees for students at alarming rates.

In *MacDonald*, twelve MBA students claimed breach of contract or negligent misrepresentation when the management faculty of UBC quadrupled the tuition fee from $7,000 to $28,000 between the offer of admissions and the moment of student registration at the beginning of the semester.[42] Although the university unilaterally instigated this drastic change in an essential element of the contract to the detriment of students, the B.C. Court of Appeal decided that the contract was neither breached nor unconscionable. The court anchored the decision in the fact that the university expressly articulated in the admissions letters, as well as the university calendar, that the institution reserved "the right to change fees without notice."[43] Though the court may have correctly applied general principles of contract law in this case, it is evidence that the private law of contracts does not properly account for the parties' interests and reasonable expectations.

Although the university-student contract is one of adhesion that places the non-drafting party in a vulnerable position, there is neither judicial acknowledgement nor protection of the vulnerable party's interests in this case. The university has the sole power to set the tuition fee – an essential element of a contract – and to change it at any point, even by drastic measure. If one of the aims of contract law is to help people plan for the future, the *MacDonald* case proves that this aim is not always achieved within a contractual framework. The student plaintiffs as the adhering parties did not have power to negotiate the tuition fee. When they received their admissions letters from the university quoting $7,000 as the cost of the program, they presumably relied on this statement to plan their lives and finances accordingly. Some students' choice to accept the offer of admissions to this particular program may have hinged significantly on the $7,000 tuition fee. By changing the tuition fee to $28,000, the university essentially sabotaged the students' ability to plan their futures appropriately based on the university's promises.

In a university setting, there are numerous internal and external variables that are constantly changing, often unexpectedly. Consequently, the terms of the university-student contract remain largely unspecified and vague so as to allow for maximum flexibility. Neoclassical contract theory assumes that parties enter into agreements with full and relevant information, which does not reflect the reality of the university-student relationship. In line with the rules of contract law, the court in *MacDonald* strictly enforced the university's explicit reservation of its right to change tuition fees without notice. On the one hand, the university was

[42] *Supra* note 22.
[43] *Ibid*. at para. 28.

relying on that reservation of rights so that it could make necessary adjustments to changing circumstances. On the other hand, however, having to pay four times more than what was expected or relied on is an unfair predicament for students that the private law of contracts did not account for in this case.

The mass-produced contract governing the relationship between a university and its students also defies certain rules of contract law that developed on the model of individually negotiated transactions.[44] Unilateral contracts often provide a way to enforce promises that are made to the general public, not to any particular individual,[45] but the terms of a unilateral contract are sometimes characterized as advertisement or "puff".[46] It is widely accepted that the published literature of a university (including admissions letters, as in the *MacDonald* case) form part of the contract with a student.[47] But these same printed materials serve as marketing tools for the university to attract and inform prospective students before any contractual engagements ensue. If these materials are in effect advertisements or "puff" that are not enforceable promises,[48] it is difficult to imagine what terms actually *do* form part of an enforceable contract between the university and student.

The university-student relationship also defies the underlying assumptions of contract law because it does not necessarily represent truly voluntary private ordering. Both universities and students deal with forces that limit their freedom to choose their co-contracting party. The student's freedom to choose her university is limited by admissions and financial accessibility. The university's freedom to choose its students is more complicated.

A Canadian public university that is created by statute cannot pick and choose its students with unfettered selectivity.[49] A university's position as a contracting party is inherently limited by its incorporating statute, as well as societal and academic norms of merit. South of the border, American universities, both private and public, often have admissions procedures that exercise relatively more institutional autonomy. The prominence of private standardized testing through SAT's and ACT's also means that there is an independent, uniform evaluation of merit that the universities supplement with other discretionary criteria. By contrast, Canadian universities, though broadly selective based on merit, have no private standardized measure of merit. While theoretically they have autonomy with regards to admissions criteria, they generally admit students based on merit as measured by provinces' educational authorities and the students' high

[44] Swan, *supra* note 41 at 211.
[45] Waddams, *Contracts*, *supra* note 18 at 124.
[46] *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484.
[47] See especially *Attaran*, *supra* note 1.
[48] Hazel Glenn Beh, "Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing" (2000) 59 Md. L. Rev. 183.
[49] There are numerous specialized programs and faculties within universities like fine arts that have more selective admissions procedures that require the exercise of discretion, but programs generally set a GPA minimum threshold for admissions depending on the program and the applicant's home province. See e.g., Queen's University, *2008 Queen's Viewbook*, online: <www.queensu.ca>.

schools.[50] It is evident that Canadian public universities are also working within a normative framework of traditions and moral duties that cannot be accounted for by the competitive market. As such, the universities are not "free" to choose their students as if they were purely seeking to further their economic and institutional interests.

Procedural Limitations

The private law of contracts also presents a crucial procedural obstacle that compromises the student's position in relation to the institution. In *Bell v. St. Thomas University*, the university defendant had not allowed the student plaintiff to repeat a course that he had failed – a course that was a necessary requirement for the degree in social work that the student had nearly completed.[51] The court decided that there was indeed a breach of contract on the part of the university because the university's actions contradicted express policies stated in the University Calendar that allowed students to repeat courses. The student had been denied the specialized social work degree to which he had devoted nearly four years. He was ultimately diverted to a general Bachelor of Arts degree. Despite the finding of breach, however, the court decided that the student did not provide convincing evidence that he suffered a loss, and denied any of the damages he claimed, namely his tuition payments and lost future earnings as a social worker.

The plaintiff student's plight in *Bell* highlights the procedural difficulties inherent in litigating against a university. First, when faced with the inability to attain his special degree in social work, the student naturally used some of his social work credits towards the Bachelor of Arts degree. This natural mitigation of losses made it difficult to convince the court that he suffered a substantial loss. Second, the court found that the evidence of social workers' salaries and employment rate of graduates put forth by the plaintiff was at best "anecdotal and not conclusive." And third, even if the student had been given the opportunity to retake the course, the court understandably noted that there was no guarantee that he would have successfully obtained the social work degree the second time around.

In another case called *Ciano v. York University*, the students wanted to push a class action suit against the university for the missed class time that resulted when the faculty went on strike for the last three weeks of class in the school year.[52] The court concluded that loss of instructional time during a three-week faculty strike was not proof of losses incurred by the student plaintiffs because they were able to complete that academic year and go on to graduate from the program.[53]

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[50] Since the provincial governments set their own academic requirements for secondary school diplomas (and often administer their own exit exams), universities' admissions procedure is generally an administrative, number-crunching ordeal. Aside from a few specialized programs that may require the discretionary evaluation of other admissions materials (such as records for music programs, portfolios for fine arts programs), universities admit students based solely on their GPA.

[51] [1992] N.B.J. No. 608, 97 D.L.R. (4th) 370 [*Bell*].

[52] [2000] O.J. No. 183, 94 A.C.W.S. (3d) 489 [*Ciano*].

[53] *Ciano*, *ibid.* at para. 18.

In order to successfully claim damages for breach of contract, "the basic principle is that the onus is on the plaintiff to prove its damages on a reasonable preponderance of credible evidence."[54] In other words, even when the court finds that there was breach of contractual obligations on the part of the university, the student plaintiff may not be entitled to any damages because it is procedurally difficult to show clear evidence of loss suffered as a result of such a breach.

The university's promises to the student are ambiguous at best, and the object of the contractual agreement is rather intangible. As a result, it is difficult to prove tangible losses suffered from contractual breach, as the private law of contracts demands. The *Ciano* judgment is arguably a more reasonable result because the student plaintiffs ultimately obtained the same degree in the same time frame as they had always intended and reasonably expected. By contrast, the student in *Bell* had the reasonable expectation of being able to repeat failed courses to complete his degree – an unmet expectation that could not be remedied. Such cases highlight the seemingly insurmountable obstacles facing a student plaintiff when claiming breach of contract against a university.

What exactly would it take for a student to prove she suffered losses from the institution's breach of contract "on a reasonable preponderance of credible evidence"? As discussed above, the student's interests and objectives in pursuing a higher education at any given university are significant, yet difficult to pin down in concrete terms. The student aims to gain knowledge, social, and cultural capital, by pursuing a degree at a given university. The end result of an official academic credential is surely a central objective, but the experiences that lead to that credential are also undoubtedly significant. When a student is prevented from making these gains due to the university's failure to deliver on its promises, she will likely have difficulty providing concrete evidence before the courts that she suffered these intangible losses that are more lost opportunities than identifiable, tangible losses to the student's patrimony.

Granted, the end product of an academic degree such as a Bachelor of Arts is a tangible object of the contract that, if not obtained due to the university's breach of contract, the courts would have to recognize the student's financial losses, past and future. In practice, however, this becomes difficult for two reasons. First, students may have difficulty recovering sunk tuition payments because many students would normally try to make the most of the situation in cases like *Bell* and apply whatever credits they already have towards a comparable accreditation, whether it be at the same university or at another institution through a cross-institutional transfer of credits. Second, it is difficult to accurately evidence the loss of future earnings incurred by a student who is unable to complete a postsecondary degree. Because many university degrees like a Bachelor of Arts are not designed to precede a particular career trajectory and do not guarantee any success in the work force, it is nearly impossible to factually quantify in dollars the loss of future earnings of someone who has most likely never been in the workforce.

[54] S.M. Waddams, *The Law of Damages*, 4th ed., (Toronto: Canada Law Book, 2004).

The law of contracts cannot perfectly account for the intricacies of the relationship between an institution and a given student, but in fact, these relationships largely function without any grievances. Universities and students engage with one another in a way that is fruitful and effective with little to no awareness of the private law of contracts that legally binds them. An array of social, relational norms play a heavy hand in governing this relationship that contract law cannot account for.[55] Nevertheless, the law aspires to be an instrument to facilitate objectives, and the considerable limitations of contract law are reason enough to critically assess what action is necessary to improve the administration of justice in this field. The next section will present the argument that the university-student contract calls for special attention from policymakers.

V. A Call for Special Regulations to Govern the University-Student Contract

Given the limitations of the private law of contracts to adequately reflect the real dynamics at play in the university-student relationship, it is worth reflecting on ways to work in and around this body of law to fairly give legal weight to both parties' interests and expectations.

Working Around the Contract: The Quasi-Contract and the Good Faith Standard

While Canadian courts have squarely accepted that there is a contract between the university and student, some American counterparts have often adopted an implied-in-fact contract approach[56] or an implied-in-law (also known as a quasi-contract) approach,[57] rejecting the notion of a straight forward institution-student contractual relationship.

Scholars and judges argue that this latter quasi-contract framework is particularly helpful in the context of a university-student relationship because the good faith standard "*will give courts broader authority for examining university decision-making in the administrative area than would a modified standard of judicial deference and will produce a more legally cohesive body of law than will application of classic contract doctrine with its many judicially created exceptions…*"[58]. Professor Beh agrees that the quasi-contractual good faith standard "acknowledges the consumer nature of the student-university relationship and demands more accountability from the institution."[59]

The Canadian approach of acknowledging a contractual relationship and applying the principles of contract law does not necessarily mean there is no room for carving out exceptions or applying good faith, reasonable or arbitrariness standards. For instance, when U.S. courts

[55] See Ian Macneil, *Contracts: Exchange Transactions and Relations*, 2nd ed. (Mineola: Foundation Press, 1978) [*Macneil (1978)*].
[56] See *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499, 502 (Ct. App. Cal. 1972).
[57] See *Beukas v. Fairleigh Dickinson University*, 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *affirmed*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992) [*Beukas*].
[58] *Beukas*, *ibid*. at para. 784-85.
[59] Beh, *supra* note 48 at 224.

recognize the contractual relationship between institution and student, they apply a "reasonable expectation" standard that holds institutions more accountable to students for their promises.[60] Within Canada's private law of contracts, there is room for implied terms based on custom or usage, particularly in cases where there is ambiguity and room for contractual interpretation.[61] But Canadian courts have not acknowledged the ambiguous obligations owed to the students or the consumer nature of the student's position in relation to the university. There lacks an aspiration to demand more accountability from institutions to protect students' interests.

Judges have been reluctant to apply any good faith or reasonable standard on matters that were expressly set out in the contract. But the university calendars and catalogs that constitute a large part of the contract include legally sophisticated statements excluding liability and reserving rights to change and revoke contractual terms. As a result, the contract, as drafted by the institution, thoroughly and explicitly protects the university's interests, leaving no room for implied terms, standards, or modifications based on custom or usage.

In *MacDonald*, for example, the student plaintiffs claimed that the contract included an implied term that any change in tuition fees would be reasonable.[62] The court rejected the claim because it did not fit any of the three grounds for implying such a term as set out by the Supreme Court of Canada in *C.P. Hotels Ltd. v. Bank of Montreal*[63]. In particular, the court found that the contract was "*not silent with respect to the term sought to be implied*,"[64] and that there was no reason based on custom or usage to imply a reasonable standard to the change in tuition. There was no justification for implying a term of reasonableness based on the officious bystander test, which requires "*that those parties must be presumed to have intended that the term should apply*."[65]

Canada's major universities have the resources to draft the contract in a legally sophisticated way so as to eliminate as much ambiguity as possible, or remain ambiguous about many essential terms while being very clear about the nonbinding nature of any claims. Consequently, there are few terms that the contract is "silent" on because at the very least, the contract expressly claims that the written materials are not exhaustive in any way and reserves the right of the institution to unilaterally make changes without notice. In some cases, amendments to university regulations may even have retroactive effect, and by the act of registration, the student is bound to all of these terms.[66] In short, if courts are unwilling to consider any implied terms of good faith or reasonableness on matters expressly dealt with in the contractual materials, the student plaintiff has little chance of contending the institution's acts or decisions.

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[60] *Mangla v. Brown University*, 135 F.3d 80, 83 (1st Cir. 1998).
[61] According to Swan, "the proponent of the custom has to show that it is certain, reasonable and notorious (or universal)." *Supra* note 41 at 530.
[62] *Supra* note 22.
[63] [1987] 1 S.C.R. 711.
[64] *MacDonald*, *supra* note 22 at para. 31.
[65] *Ibid.* at para. 35.
[66] See *Warraich v. University of Manitoba*, [2003] M.J. No. 138 (QL).

In Québec, where good faith is presumed in all contractual dealings,[67] the onus is on the student plaintiff to prove otherwise. Such a burden is quite significant, considering the extent to which a university's policies and regulations, in addition to its incorporating statute, meticulously and transparently set out fair internal procedures. For any court studying these documents that have been drafted with care and honed to be exhaustive in all aspects, it would take a grossly unreasonable act to find that the institution acted in bad faith within the parameters of the contract. In other jurisdictions, the student plaintiffs have alleged an unconscionable contract, but the courts remain unconvinced.[68] For any claim against the university on a contractual matter, it is difficult to prove something to be unconscionable when the contract expressly reserves the institution's rights to do nearly anything and states that the registering student is presumed to have read and understood all of these terms.

The judgments rendered in these cases tend to heavily favour the university's autonomy as an academic institution to set the terms of the contract as it sees fit. It is worth noting that the private law of contracts (apart from the rules set out in the *Civil Code of Québec*) is largely created and developed by judges who are not impervious to having personal biases that influence decisions.[69] Especially when it comes to good faith or reasonable standards that are derived from outside the contractual terms, these biases can potentially play an interesting role in these decisions. Older generations attended university for reasons and in contexts that are very different from those of today's generation of students. There may be generational differences in attitude about students' rights that can be traced in some of the cases already discussed.

If there is no judicial will to study the university-student contract with a discerning eye, and no legislative will to create a legal framework for this special contractual relationship, it is difficult to imagine how student plaintiffs would succeed in a contractual claim against the university in a Canadian court. Though some student plaintiffs make unfounded claims, many of these cases underscore the vulnerable position of students whose reliance on higher education institutions is growing in our current economy.

The Canadian cases that deal with the contractual relationship between the university and student reveal how little this area of law has developed. A couple of key cases in the late 1970s laid down the groundwork of the contractual relationship between the university and the student.[70] In the last ten years, however, there has been a surge in student plaintiffs taking universities to court to enforce a contract that only the university has the power to draft and modify. In time, there will likely be more diverse sets of facts and claims that will stretch the courts' understanding of the nature of the university-student contract. At this point in time, many questions remain unanswered with regards to this evolving legal relationship.

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[67] Arts. 6, 7, 1375, 2805 C.C.Q.
[68] See *MacDonald*, *supra* note 22.
[69] Swan, *supra* note 41 at 1.
[70] See *Howard*, *supra* note 1. See also *Acadia*, *supra* note 27.

The courts are not willing to interfere with the university's autonomy to make administrative and academic decisions as it sees fit, especially because the printed materials that forms a substantial basis for the contract expressly reserve the institution's right to make any changes to the contractual terms. Such circumstances are precisely the reason why certain types of contracts are specially regulated through legislation. One such nominate contract is the consumer contract, which is regulated by provincial consumer protection acts to protect the vulnerable party. Although a university-student relationship differs significantly from a merchant-buyer relationship, the recent developments in higher education in Canada and abroad prove that a university student resembles a consumer in some notable ways.

The Consumer Contract Model

The consumer contract model can enlighten our understanding of the university-student relationship and help accommodate both parties' rights and interests. By first examining the historical and social context of higher education in Canada, it is possible to underscore the ways in which the consumer contract may illuminate some of the necessary characteristics of the ideal legal framework to govern the university-student relationship.

The nature of higher education in Canada and in much of the western world has changed significantly in the last few decades. In the U.S., for example, the number of higher education institutions grew so drastically in the latter half of the twentieth century that universities started employing marketing tactics to attract the right students and to carve out a niche in the higher education market.[71] Canada has not experienced this phenomenon in the same way. Although there has been a movement towards commercialization,[72] Canadian universities do not have to resort to heavy marketing schemes to attract students because there is a burgeoning demand from students, and a relatively stable supply of institutions to support it.

As discussed above, the university's interest is to attract talented students in order to increase the knowledge, social, and cultural capital of the institution. This mission is not entirely new; rather, it is merely an economic reformulation of a university's more traditional objectives as a public institution. On the other hand, the student's interest and the student's circumstances have changed rather dramatically in two key ways.

First, with an increasingly competitive job market and postsecondary education becoming the expected norm for entry level positions in many growing fields, today's student has a serious interest in obtaining a university degree. As the Association of Universities and Colleges of Canada (AUCC) reports, in roughly the last fifteen years, 1.7 million jobs were created for people with postsecondary degrees while 1.3 million jobs were lost for people with high school

[71] Beh, *supra* note 48 at 187.
[72] See generally James L. Turk, ed., *The Corporate Campus: Commercialization and the Dangers to Canada's Colleges and Universities* (Toronto: James Lorimer and Company Ltd., 2000).

diplomas or less.[73] During that same period, the number of full-time positions filled by graduates of postsecondary institutions doubled.[74]

Second, with aggressive tuition hikes across the country, the average Canadian student needs to take out more student loans to fund her postsecondary education. In fact, university students who received Canada Student Loans increased 42% between 1990 and 2003.[75] A postsecondary degree is therefore even more important for the student in order to boost her earning potential and pay off these loans in the years following graduation. Even for students with plentiful resources who need not take out student loans, the postsecondary degree is a necessary but substantial financial investment; the student has an economic interest in successfully completing the degree in order to maximize her returns on said investment.

In short, when enrolling in a university program, there is significantly more at stake for the student today than there was a few decades ago. In contractual terms, there is a heavier reliance on the institution to fulfill the student's reasonable expectations. Today's student is more dependent on the university than ever before, while the university's interest in any particular student has remained unchanged.

Considering this historical and social context, it is understandable why today's student may be more likely to feel aggrieved by his university than in decades past. But the legal understanding of the university-student relationship has not adapted to the increasing imbalance of interests between the two parties. The consumer contract model could help address these issues, for the underlying rationale behind consumer protection legislation is that consumers rely heavily on merchants and manufacturers without having the power to negotiate contractual terms—much like the contemporary position of university students to their respective institutions.

A consumer contract[76] is a nominate contract that is specially regulated by provincial legislation with the central objective to protect consumer's interests. Consumer protection developed in reaction to an age of mass-market production and distribution because the average market interaction eschewed the neoclassical understanding of a contract where two parties barter an exchange. Although it is neither likely nor desirable to characterize the university as a merchant and the student as a consumer, the consumer contract model can help acknowledge some of the unique dynamics at play in the relationship between university and student.

The consumer and the university student share similar predicaments. The average modern day consumer engages in consumer contracts without making a fully conscious decision to do so; similarly, the average student, when registering at a university, has no clear understanding that

[73] AUCC, "Canada's Universities. Our Strength. Our Future" (Ottawa: AUCC, 2006) at 2.
[74] AUCC, *Trends*, *supra* note 4.
[75] CAUT, *supra* note 3 at 39.
[76] Art. 1384 C.C.Q.

she is entering into a contractual agreement with the university. The consumer's understanding of the product or service in question is largely dependent on whatever representations are provided by the merchant; the student's understanding of the education and the degree program she is entering is mostly based on the representations provided by the university through printed materials like its Calendar and course catalog. The consumer has no negotiating power in relation to the product or service; the student also has no power to negotiate the terms of the contract with the university.

The analogy of the student to the consumer is not seamless. The consumer and the student do not rely on the object of the contract to the same degree. In most consumer contract situations, the consumer, as the adhering party, may not have the power to negotiate the terms of a given contract with a merchant, but usually has the power to choose between and among various merchants' products and services. The act of choosing a university, however, is nothing like the act of choosing a vacuum cleaner off the shelf at the hardware store. The student's ability to choose a university in Canada is limited by at least two major factors: admissions and financial access. Because the major public universities in Canada have a merit-based admissions process, not every student has the freedom to enroll in the university of her choice. The student's financial resources and the costs of various programs can also significantly limit the student's choice in universities.

A restricted choice means that when a student registers with a university and pays tuition to enroll in an academic program, it is usually a major decision that signifies a serious commitment to the institution, as well as considerable reliance on the delivery of its promises. In this respect, the student is in a position that is arguably even more vulnerable than that of a consumer. However, Canadian courts have continuously applied nothing beyond the general principles of contract law to the university-student relationship such that student plaintiffs have little legal recourse beyond the internal adjudicative processes of the university. In the interest of critical analysis, it is interesting to see how principles of consumer protection would apply to the student's predicament in relation to the university.

The provincial consumer protection statutes across Canada aim to protect the consumer's reasonable expectations with regards to the cost of goods and services.[77] If comparable provisions were enacted to protect student's expectations with regards to tuition fees, it is probable that cases like *MacDonald* would have been decided more in favour of the students, despite the university's express reservation of the right to change tuition fees unilaterally and without notice. Students' interests and reasonable expectations would be protected, as well as

[77] In British Columbia, the law prohibits instances where "the supplier's estimate of the price is materially less than the prices subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied." *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 3, s. 4(3)(c)(iii). In comparison, Quebec's legislation similarly stipulates that "[n]o costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract." *Consumer Protection Act*, R.S.Q., c. P-40.1. The Ontario legislation states that "[i]f a consumer agreement includes an estimate, the supplier shall not charge the consumer an amount that exceeds the estimate by more than 10 per cent."[77] If a supplier does so, "the consumer may require that the supplier provide the goods or services at the estimated price." *Consumer Protection Act*, S.O. 2002, c. 30, Sch. A, s. 10(2).

their freedom to plan their lives and studies. In respect of such provisions, universities would no longer be able to depend on reservation of rights clauses in university calendars and would have to plan tuition fee increases and inform students thereof more carefully. Further, institutions would have to insure against unexpected drops in other sources of funding, both from the government and from private entities, as well as unexpected costs.

While some principles of consumer protection legislation can fit into the context of university-student agreements, they cannot account for the public nature of Canadian universities and their unique statutory powers and duties. The incorporating act of a university and its implications provide convincing evidence that universities are not merchants and students are not their consumers. Not only do universities have statutory powers to perform quasi-judicial functions,[78] they also receive various degrees of public funding from the government. This reveals the interesting context in which the institution-student contract functions.

Although judges have largely treated it as an innominate contract to which the generic principles of contract apply, there is an argument to be made that the university-student contract is in fact a nominate contract that demands legislative action and a special set of rules that acknowledge the unique status of a university incorporated by private statute and the distinct interests and obligations of the student. In the U.S., for example, the federal government has recognized the consumer nature of postsecondary students and enacted laws to oversee certain aspects of the institutions' administration, such as full disclosure of detailed information on the program, campus security policies, and graduation rates.[79] In Canada, provincial legislatures and Parliament have enacted special regulations for certain contracts involving consumers and contracts of sale to supplement the private law of contracts. However, they have been silent on the contractual relationship between a university and student.[80] This contract has not been the subject of much scholarly discourse, and there is relatively limited jurisprudence to thoroughly map out relevant issues. The next section of this paper will raise several questions about the university-student contract that remain unanswered.

VI. Concerns for the Future

Who Are the Parties to the Contract?

In a university setting, there are many individuals and entities intermingling and engaging with one another in ways that deal with some of the terms of the university-student contract. It is conventionally understood that in the law of contracts, only the parties to the agreement may sue

[78] *Harelkin*, supra note 9 (a university that is incorporated by a legislative act has the statutory powers to resolve conflicts through internal procedures without interference by the courts; the university's governing bodies like the senate "function as domestic tribunals when they act in a *quasi*-judicial capacity," at 595).
[79] See *Student-Right-To-Know* provisions of the *Higher Education Act*, 20 U.S.C. §1092 (1994 & Supp. 1998).
[80] Courts have explicitly stated that the university-student contract is innominate, or *sui generis*, meaning that there are no special regulations governing them and the general principles of contract law apply. See *Hazanavicius c. McGill University*, 2008 QCCS 1617, [2008] Q.J. No. 3413, at para. 58.

upon it, as per the doctrine of privity of contract.[81] Most of the cases mentioned thus far have involved an individual student plaintiff and the university as a whole; however, it is uncertain how different formulations of plaintiffs and defendants would impact the treatment of the contractual relationship between the student and the university.

In *Students for Life*, the plaintiffs consisted of individual students as well as a student association that was a subsidiary of the Alma Mater Society (AMS), and the defendants included the university and the AMS, the student government of UBC that is incorporated pursuant to the *Society Act*[82] of British Columbia.[83] Understandably, the case centred around the question of appropriately placing the university-student contract among the parties involved. Although AMS is the only representative of the undergraduate student body, and all students who register at UBC automatically become members of AMS, the court found no contractual relationship between the students and AMS. Even citing jurisprudence that stated, "*At law, the by-laws of a society constitute a contract between the Society and its members,*"[84] the court rejected the notion that the relationship between students and AMS was one governed by the private law of contract.

Furthermore, at some universities, student unions have a strong presence on campus and are central to many aspects of students' lives. In a case where the university makes a decision that affects many if not all students, the student union could possibly become the plaintiff as a representative of its student members.[85] If student unions were to be the plaintiffs in a claim against the university, there would arguably be a more balanced equilibrium of bargaining power than there is between individual students and the university. It is unclear, however, what role a student association would play within the university-student contractual paradigm. *What is the relationship between a student union and the university, and would the institution-student contract have any relevance, considering the doctrine of privity of contract?*

Another relationship of interest is that of the university and its numerous faculties and departments that often set their own regulations and policies and exercise a significant amount of autonomy on essential matters including admissions and course requirements. When a student registers in a program in the faculty of law, for example, he may have had little to no exposure to the printed materials of the university as a whole, but the contractual relationship may remain between the student and the university, not the law faculty. In this case, *what is the significance of the promises and representations made by a particular faculty, and can the faculty be party to a contractual relationship with the student, independent of the university as a whole?*

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[81] Waddams, *Contracts*, *supra* note 18 para. 280; Art. 1440 C.C.Q. ("A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.")
[82] R.S.B.C. 1996, c. 433.
[83] *Supra* note 5.
[84] *Nagra v. Khalsa Diwan Society of Victoria*, [1997] B.C.J. No. 192 at para. 16.
[85] *Fédération*, *supra* note 10 (the resident medical students were represented by the student union in litigation).

Policy or Contractual Terms?

A second concern that arises from the university-student contract is what, if anything, actually constitutes a term within the contract. Because of the statutory powers from which the university makes many of its decisions, courts have decided that many of the issues that students claimed as breach of contractual terms were actually decisions of a policy nature.[86] According to this view, when a university sets tuition fees[87] or expressly defends the principles of academic freedom[88], it does not create enforceable contractual terms that confer a "right" on the student. They are rather policy decisions that cannot be contested under the private law regime.

If something as fundamental as the tuition fee is not considered an enforceable contractual term, it is difficult to see what would be treated as an express term of the university-student contract that would be legally enforceable upon the institution. The payment of tuition is indeed a fundamental obligation that the contract demands of the student; it is an essential stipulation of the contract.[89] *Can there be a contract with no enforceable terms, yet enmeshed in a string of policies?*

Contract Formation

Third, it is not entirely clear at what point the university-student contract is formed. While in the U.S. the most contested issue in higher education is the fairness of admissions policies, the issue of affirmative action is not as prominent in Canada, and universities are generally not so selective that their admissions policies are constantly the subject of discussion and criticism. Nevertheless, based on the principles of contract law, the exchanges between institution and student that lead up to the moment of registration could be characterized as pre-contractual dealings that may impose duties and obligations on the parties.

Drawing on similar characteristics of a tendering process, it is possible to envision how both the university and the student may owe each other a duty to present accurate information during the pre-contractual stage of the relationship. If a selective academic program offered admission to a student who falsified information in her application materials, it seems fair that the university would be able to rescind the offer of admission, or even nullify the contract with the student post-registration. In the reverse scenario, however, when a student has tried to enforce representations that the university made during the application stage, the courts have clearly taken the stance that such representations are pre-contractual and therefore do not constitute enforceable contractual terms.[90] The university-student contract is initiated when the

[86] *Attaran*, *supra* note 1 at para. 57; *Students For Life*, *supra* note 5 at para. 92. See also *Wheeldon v. Simon Fraser University* (1970), 15 D.L.R. (3d) 641. See also *Webb v. Simon Fraser University* (1978), 83 D.L.R. (3d) 244 (B.C.S.C.).
[87] *Attaran*, *supra* note 1 at para. 57.
[88] *Students For Life*, *supra* note 5 at para. 92.
[89] Art. 1379 C.C.Q.
[90] *Derakhshan v. University of Toronto*, [2000] O.J. No. 1463.

student registers and pays tuition fees at the beginning of the semester, and courts have stated that any exchange prior to that does not properly constitute a contractual undertaking.[91] *When does the university-student contract officially come into force, and do pre-contractual exchanges bear any weight on this legal relationship?*

VII. Conclusion

Higher education in Canada has undergone some fundamental shifts in recent years. With deregulation at the provincial level, universities hold more autonomy and responsibility than ever before. Market forces play an increasingly significant role for universities in this New Economy[92] where knowledge is the currency that drives leading innovative societies. In Canada, the explicit recognition of a contractual relationship between institution and student evidences this development.

The notion that the relationship between a university and student is governed by contractual principles has at times hit a sensitive nerve among many higher education administrators and policy makers. A contract between university and student can imply that the educational setting is akin to a market of exchangeable commercial goods and services. There is a widespread belief that Canada's universities should be protected from capitalist forces of the private sphere. Many people strongly believe that a school – even at the postsecondary level – is simply above the amoral forces of a market. While some university leaders believe Canada's higher education institutions simply need to adapt to the realities of this New Economy[93] in which talent and ideas are the focal point of global markets, many critics argue that these institutions have been wrongly overtaken by corporatism at an unacceptably high cost to the public welfare of Canadian society.[94]

Does postsecondary education serve the common good or is it a commodity for sale? Policymakers, administrators and scholars have tried to grapple with this pressing dilemma in this period of significant development in Canada's higher education system. What is regrettably missing in this debate is the understanding that deregulation and privatization of Canada's universities are separate and distinct from a movement towards corporatization and commercialization. It is simple fact that many provincial governments have reduced public funding and lifted regulations regarding higher education, particularly with respect to tuition fees. Consequently, universities have undergone varying degrees of privatization by increasing non-governmental sources of revenue such as tuition fees, endowments, and private investments.[95] What is still up for debate is the question of commercialization or commodification of higher education (emphasizing the profitable aspects of education over other

[91] *Wong v. University of Toronto* (1989) 79 D.L.R. (4TH) 652 at page 657, affirmed April [1992] O.J. No. 3608, O.C.A.
[92] Paul Davenport, "Universities and the knowledge economy" (2001) 65 *Ivey Business Journal* 64.
[93] *Ibid*.
[94] See Turk, *supra* note 72.
[95] See Kucharczyk, *supra* note 21.

normative values) and the corporatization of universities in Canada (governing the institution like a profit-seeking corporation).[96]

As this paper strives to show, in today's knowledge economy, higher education institutions and students both have an interest in engaging with one another. Both parties act in the pursuit of not only tangible commercial benefits, but also intangible benefits that can be translatable into commercial value. The contractual model of private ordering aptly recognizes these interests and highlights the commercialized elements as well as the increased autonomy and corporatized governance of universities in Canada. Despite these notes of commodification, higher education in Canada remains a principally public domain. As a result, the university-student relationship embodies many properties that are sometimes at odds with the underlying principles of the private law of contracts.

This legal framework has considerable substantive and procedural limitations that underscore the difficulty of recognizing the nuances in the university-student relationship. Indeed, no body of law is a perfect reflection of real-life interactions, and the law of contracts is certainly no exception. The literature on the relational theory of contracts and the criticism of classical contract law by Macneil speaks to this very point.[97] But the university-student relationship involves a mass-produced contract that can carry significant implications across many sectors of society, and it is crucial to have an adequate legal framework to support it. Consumer protection legislation is built on this principle and can help provide a basic example, but the merchant-consumer relationship is not completely analogous to the university-student one. This latter relationship is of such a unique and complex nature that it may be time for new regulations – ones geared towards protecting rights, not controlling what universities do – to help fairly balance the parties' interests and expectations.

Legislation can serve diverse purposes, only one of which is to provide a legal set of rules to govern the people or entities for whom it applies. A set of regulations protecting postsecondary students' rights would certainly help delineate the obligations of university administration, but it could equally be a symbolic statement of the contemporary principles that shape Canada's higher education systems. Whereas provincial legislatures used to directly regulate universities' ability to make certain decisions in the past, hence limiting their autonomy as institutions, it may now be the appropriate time to enact a body of guidelines protecting both parties' rights as autonomous participants in this knowledge society. Instead of tuition freezes that restrict institutional autonomy, new regulations could protect and acknowledge the students' reasonable reliance on quoted tuition fees as vulnerable adhering parties to a contract, while maintaining the universities' autonomy to set tuition fees and to change them within reason when relevant circumstances change. Such a legal framework would signify how Canada's higher

[96] For a more detailed account of how corporate interests have materialized in universities, see Turk, *supra* note 72.
[97] See generally Macneil (1978), *supra* note 55. See also Ian Macneil, *Contracts: Instruments for Social Co-operation—E Africa* (South Hackensack: Fred B. Rothman, 1968).

education systems are competitive in the knowledge economy, while acknowledging their intimate connection to the general welfare of society.

The controversial debate in Canadian higher education may revolve around institutional privatization and the commodification of education, but these issues do not provide a robust account of what is really happening on university campuses. Analytically speaking of the learning experience as a transmission of knowledge capital does not necessarily mean that students will arrive on university campuses to shop for knowledge capital as if they were in a convenience store. This is but one of many dimensions of the field of higher education that this paper does not aim to fully address. Critically thinking about the knowledge economy and the university's role in it is principally an analytical tool for policymakers, but it can also help administrators, teachers and students understand how they are intricately woven into the world's dynamic knowledge society.

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