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0717789

November 16, 2007

Delivered by Email

Mr. Kyle Marsh  
255 Delaware  
North Bay, Ontario  
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Dear Mr. Marsh:

**Re: Legal Opinion - NUSU Governance**

You have retained us for our opinion as to the legality of certain actions taken by the Nipissing University Students Union ("NUSU"), particularly a decision to amend NUSU's governance package at the upcoming NUSU Council meeting to NUSU members.

### **SUMMARY OF OPINION**

In our opinion, the manner in which the NUSU Executive proposes to amend the governance package, including by closing the upcoming meeting to NUSU members, is illegal, contrary to law, and most likely reviewable by the Superior Court.

What follows is our statement of the facts as we understand them and our legal opinion concerning the questions you have raised for our consideration.

### **OUR UNDERSTANDING OF THE FACTS**

#### ***What We Reviewed***

In preparing this opinion, we have reviewed the following documents provided to us:

1. The Nipissing University Student Union Corporate By-law 1. We understand that this is the by-law NUSU proposes to adopt. For ease of reference, this will be referred to as the "Proposed By-Law".

2. A document entitled "NUSU Constitution", which document contains a Preamble, a Constitution, By-Laws 1 to 16, Operating Resolutions 1 to 11, and "Policies". We understand that this document was current to August 17, 2001 and is a snapshot from NUSU's website taken from that date.
3. Three "Governance Package" documents, with effective dates of August 17, 2004, September 17, 2005, and September 17, 2006. Each of these differs somewhat from the 2001 "NUSU Constitution", most notably in expansions to the Constitution and By-laws and in the inclusion of "Rules of Order" and "Standing Rules" as opposed to Operating Resolutions and Policies.
4. A current Corporation Profile Report for the "Nipissing University Student Union".

We have also reviewed additional documents which will be referred to below as needed. We were not able to obtain NUSU's letters patent of incorporation in time for this opinion.

### ***NUSU in a Nutshell***

NUSU is a non-share capital corporation governed by Ontario's *Corporations Act*. It was incorporated in 1988 under the name "Nipissing University College Student Union". NUSU is a union insofar as it receives dues from its members, namely students at Nipissing University, and expends the dues monies for the benefit of its members pursuant to a set of rules existing from time to time.

Effective August 17, 2001, NUSU was governed in part by the "NUSU Constitution", which document contains a brief Preamble, a brief "Constitution" containing some statements of principles, detailed By-laws, and other Resolutions and Policies.

### ***The NUSU "Governance Packages"***

As we understand it, at some point in September, 2002, the primary documents governing NUSU were changed when a "Governance Package" was adopted at a Board of Executive meeting. These have been updated every year. We understand that there is some difference of opinion as to whether the current 2006 Governance Package contains the documents that lawfully govern NUSU's affairs or whether the "NUSU Constitution" we have reviewed is the last legal document. We will not review this controversy in detail here. In our opinion below, we consider the legality of NUSU's current actions based on the assumption that either the "NUSU Constitution" we have reviewed or the 2006 Governance Package governs.

By September 17, 2006, the Governance Package had been amended and restated into the form we have reviewed. As we understand it, this Governance Package was the last in a series of packages predating the "Proposed By-Law".

### ***Late 2006 and Early 2007 Events***

You have advised us that you were President of NUSU when the 2006 NUSU Governance Package was in effect. Your term of office ended in November, 2006, when you were removed. You advised us that you appealed the removal and that this resulted in a settlement. You recalled that in one of your last meetings as President, the NUSU Board of Executive tasked the General Manager to forward the 2006 Governance Package to an independent law firm for their comment, with an eye to providing advice on how to improve the 2006 Governance Package. We understand that Baker & McKenzie was retained. This firm would have reviewed the 2006 Governance Package. We understand that, at the end of their review, they wrote a letter on April 17, 2006 with their suggestions on amending the 2006 Governance Package. They also enclosed the Proposed By-Law.

You advised us that, at around this time, elections took place for the four elected members of the Board of Executive, now the Board of Directors. These four individuals were elected with a term starting May 1, 2007 and ending April 30, 2008. We understand that, when these new elected executives first started working in their new positions, they found that the Board of Executive had expanded from four elected members and an appointed General Manager to four elected members, the General Manager, and two unelected staff persons who report directly to the General Manager (the Administrative and Associate Administrative Managers).

In reviewing the Proposed By-Law, we observe that the NUSU Board of Directors is defined to include the "Administrative Manager" and the "Associate Administrative Manager", individuals who are also listed as "Representative Members" entitled to vote at annual or general meetings of "the Representative Members": Proposed By-Law, arts. 5.4, 5.8, 5.9, 6.1, 6.2, and 6.3. The 2006 Governance Package, on the other hand, makes no mention of the Administrative Manager and Associate Administrative Manager. Instead, the Constitution portion states that NUSU's Board of Executive "shall be comprised of" the four elected members, the General Manager, and the Director of Faculty of Education: Constitution Section IV 1).

In short, we are of the opinion that, as a matter of fact, the Proposed By-Law must have been approved by the Board of the Executive or Board of Directors between April 17, 2007 when it was received by the Board and early May, when the new Executive assumed their positions. It is not necessary for this opinion that the exact date be known. As the following section indicates, what is relevant is that the Proposed By-Law has been in effect for some short period of time in 2007.

### ***The Friday, November 16, 2007 Meeting***

We understand that seven (7) representatives (or "Delegates", as they are now described

in the Proposed By-Law) have been elected to sit on the NUSU Council.<sup>1</sup> We understand that these Delegates recently circulated throughout the University's classrooms to tell students that a NUSU Council meeting has been scheduled for Friday, November 16, 2007 at 6:00 pm. We also understand that these Delegates advised students that students cannot attend the meeting. You have further advised us that several students have gone to NUSU's office to inquire about attending the meeting and have been told that they cannot by NUSU office personnel. Specifically, you advised that some students have been told that the meeting is a "closed" meeting.

## OUR OPINION

We have focussed on two distinct issues that are relevant for upcoming meeting:

1. By banning NUSU members from attending the November 16, 2007, meeting, is the Board of Directors acting contrary to law and/or illegally?
2. If the Proposed By-Law is adopted at the upcoming meeting, is the process adopted for doing so contrary to law and/or illegal?

### ***Issue 1 - Excluding Students from the Meeting***

Under the *Corporations Act*, the Board of Directors cannot bar members from attending any meeting of delegates regardless of the type of meeting structure used.

Section 130(5) of the *Corporations Act* states that if a delegate system is in place, ordinary members of the corporation cannot be stopped from attending or asking questions at delegate meetings. NUSU must provide full advance notice of the agenda of a general meeting to every member of the Corporation (section 161(1)).

Section 130(5) is very explicit. It says that the power of directors to pass by-laws to govern NUSU does not include a power to bar people from meetings: "No such by-law shall prohibit members from attending meetings of delegates and participating in the discussions at such meetings".

This clause is a complete answer to the current Board's ban on NUSU members from attending the November 16, 2007 meeting. Under the *Corporations Act*, the Board is explicitly prohibited from such actions. We add that, even if NUSU has a by-law right now that allows the Board of Directors or Council to keep the meeting closed, that by-law is regarded as *ultra vires* (without legal authority), meaning that neither the Board, Council, nor NUSU can override the *Corporations Act* by passing such a by-law: it is beyond their power to do so. We refer here in particular to article 5.21 of the Proposed By-Law which

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<sup>1</sup>The term "NUSU Council" is not in the Proposed By-Law but comes from the 2006 Governance Package. The Delegates are now considered "Representative Members" entitled to vote on behalf of NUSU members.

purports to make all Representative Members' meetings "closed".

In concluding our opinion on this first point, we observe that section 130(5) states that by-laws cannot be used to prohibit "members" from attending meetings. In our opinion, "members" here refers to all members of NUSU. You have advised us that the last time you reviewed the letters patent incorporating NUSU, the letters patent defined "member" broadly enough to capture all Nipissing University students who paid their NUSU dues. This, and the fact that the Proposed By-Law, the 2006 Governance Package, and the 2001 "NUSU Constitution" all define "member" this broadly, support our view that all NUSU students who have paid their dues have the right to attend the November 16 meeting.<sup>2</sup>

### ***Issue 2 - Unilaterally amending the by-laws***

In our opinion, if the Representative Members of NUSU approve the Proposed By-Law on November 16, 2007 using the process it has used or on some later date using the same process, they will be acting in breach of the *Corporations Act*, the 2001 "NUSU Constitution", and/or the 2006 Governance Package. Recent law indicates that courts will actively scrutinize NUSU's process here for violations of the *Corporations Act* and NUSU's applicable governance structure. You would have a good argument that the court ought to quash the adoption of the Proposed By-Law.

#### **(a) Corporations Act Requirements**

The *Corporations Act* contains a few ground rules NUSU must comply with to enact and amend by-laws. The *Act* divides by-laws by subject-matter. Certain types of by-laws lead to one set of ground rules [section 129 ones] and other types of by-laws lead to other sets of grounds rules [section 130 ones]. For both, directors have the power to initiate and amend by-laws. However, all members play an important role too.

For certain types of by-laws that regulate certain governance aspects, those by-laws and their amendment are not valid unless confirmed "at a general meeting of the members" where the "members" themselves have the right to confirm or reject the by-laws or amendments [sections 129(2) and 129(3)].<sup>3</sup>

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<sup>2</sup>Even the Proposed By-Law, while dividing NUSU members into two classes, explicitly recognizes that the sum total of the "Student Members" and the "Representative Members" constitute the full membership of NUSU: article 5.1. "Student Members" are defined as Nipissing University students who have paid their NUSU dues: article 5.2. Finally, all but three of the Representative Members must be Student Members as well.

<sup>3</sup>Section 129 by-laws regulate:

(a) the admission of persons and unincorporated associations as members and as members by virtue of their office and the qualification of and the conditions of membership;

(b) the fees and dues of members;

(c) the issue of membership cards and certificates;

For by-laws that regulate delegate elections, delegate meetings, and other such matters, those by-laws and their amendment are not valid unless confirmed by a two-thirds vote of the "members" at a meeting called specifically to deal with amendments [sections 130(1) and 130(2)].<sup>4</sup>

In our opinion, the November 16 meeting is not a s. 129(2) or s. 130(2) meeting of the "members" because NUSU members are being told that it is a closed meeting which they cannot attend. To comply with either section 129 or 130, the Board of Directors would have to call a meeting of the "members". Members would need to be in attendance. Those in attendance would get to vote. And, a two-thirds vote would be required to make section 130 by-law changes. A majority vote would suffice for the section 129 by-law

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- (d) the suspension and termination of memberships by the corporation and by the member;
  - (e) the transfer of memberships;
  - (f) the qualification of and the remuneration of the directors and the directors by virtue of their office, if any;
  - (g) the time for and the manner of election of directors;
  - (h) the appointment, remuneration, functions, duties and removal of agents, officers and employees of the corporation and the security, if any, to be given by them to it;
  - (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members' meetings and at meetings of the board of directors;
  - (j) the conduct in all other particulars of the affairs of the corporation.

<sup>4</sup>Section 130 by-laws regulate:

- (a) the division of its members into groups that are composed of territorial groups, common interest groups or both territorial and common interest groups;
- (b) the election of some or all of its directors,
  - (i) by such groups on the basis of the number of members in each group, or
  - (ii) for the groups in a defined geographical area, by the delegates of such groups meeting together;
- (c) the election of delegates and alternative delegates to represent each group on the basis of the number of members in each group;
- (d) the number and method of electing delegates;
- (e) the holding of meetings of delegates;
- (f) the authority of delegates at meetings or providing that a meeting of delegates shall for all purposes be deemed to be and to have all the powers of a meeting of the members;
- (g) the holding of meetings of members or delegates territorially or on the basis of common interest.

changes. We refer you again to point 1. for our opinion that all dues-paying Nipissing University students are “members” with one vote each.

We believe that the Proposed By-Law initiates some changes that would fall within section 129 and some that would fall within section 130 of the *Corporations act*. As we understand it, the entire 2006 Governance Package, including the Constitution and By-Laws, would be replaced by the Proposed By-Law. Without providing an exhaustive summary of the changes from the 2006 Governance Package to the Proposed By-Law, the following table summarizes some of the key proposed changes and where we believe they would fall within section 129 or 130:

Section 129 Changes	Section 130 Changes
Changing the membership on the Board of Executive to remove the Director of Faculty of Education and to add the Administrative Manager and Associate Administrative Manager.	Dividing NUSU members into two classes of members (Student Members and Representative Members).
Changing the manner or process used to remove or discipline Directors.	Adding a Faculty of Education Delegate as a Representative Member.
	Adding the Administrative Manager and Associate Administrative Manager to the list of Representative Members.
	Changing NUSU Council meetings from ones that are open to all NUSU members to the Representative Member annual and general meeting structure that mandates closed meetings subject to invitation.

We note how some of the proposed changes are section 129 changes and some are section 130 changes to make the following point: the section 130 changes in the Proposed By-Law are not at the moment effective. They will not be effective until a proper general meeting is called and a two-thirds vote of the members succeeds in passing the Proposed By-Law [section 130(2)]. Given this, it is illegal and contrary to law for the Board of Directors to actually use the delegate process set out in the Proposed By-Law to pass the Proposed By-Law when that delegate structure is itself not valid right now. For example, the Proposed By-Law cannot be passed by a Representative Members vote that includes the votes of the Administrative Manager or the Associate Administrative Manager. Their right to vote is a new feature not found in the 2006 Governance Package and is at the moment not valid.

In short, NUSU's approach to amending the 2006 Governance Package falls afoul of the strict *Corporation Act* requirements set out above.

#### (b) Governance Package Requirements

In addition to the ground rules set up by the *Corporations Act* for enacting or amending the Proposed By-Law, both the 2001 "NUSU Constitution" and the 2006 Governance Package contain numerous ground rules that must be complied with before the Proposed By-Law can be adopted. Whether we use the 2001 "NUSU Constitution" ground rules or the 2006 Governance Package ground rules, it is our opinion that a number of those ground rules are not being complied with at all.

The 2001 NUSU Constitution's by-laws require that changes to by-laws must be passed by a two-thirds majority at two consecutive full council meetings where notice of those meetings has been provided to students. This has not happened.

The 2006 Governance Package has some more strict requirements. Section VII of the Constitution states that the Constitution "should be considered the most unchangeable part of the NUSU Governance Package". Some of the changes proposed in the Proposed By-Law are the kinds of changes Section VII indicates require a Referendum to initiate. For instance, the qualification of Members "of ... the Corporation" is something that can only be changed by Referendum. In the 2006 Governance Package, one must be a Member "of the Corporation" to sit on the Board of Executives. Under the Proposed By-Law, the Administrative Manager and Associate Administrative Manager become members of the Board of Executives/Directors. This means that the qualification for membership on the Board has changed, and so a referendum is needed.

Section XIII of the By-Laws section of the 2006 Governance Package also requires that, to amend a by-law, a Council or Board of Executives member must propose at one meeting an amendment to be discussed but not tabled until the following Council meeting where it will be voted on. We have assumed based on your information that this two-meeting process was not adopted here. The other concern we have is that, if the Administrative Manager or Associate Administrative Manager were given a vote in April/May, 2007 to amend the 2006 Governance Package to the Proposed By-Law, that would run afoul of Section XIII as, under Section XIII, those two people would not have at the time been members of the Board of Executives.

In short, the process used to date and the process the Board of Directors proposes to use to adopt the Proposed By-Law violates several provisions contained in the 2001 NUSU Constitution and the 2006 Governance Package.

#### **Jurisprudence Review**

When we stated at the start of our letter that, in our opinion, NUSU's actions were illegal and/or contrary to law, we had in mind the fact that courts would likely be willing to step in and quash NUSU's decisions.

Courts recently have been stepping in to regulate disputes between members of non-share capital corporations and the corporations themselves. Courts have been willing to overturn decisions taken by such corporations' directors where these decisions unreasonably contravene the corporations' own by-laws or other "constating documents" (documents that regulate the corporation's affairs, like constitutions, statements of principle, policies, rules, and other agreements).

The leading decision on point is *Chu v. Scarborough Hospital*. It involved a dispute between Lai Chu, an annual member of Scarborough Hospital, and the Hospital's board of directors. Ms. Chu had accused the Hospital board of improper actions and misinterpretation of their governing constitution and by-laws. This decision has two outcomes particularly relevant to the NUSU issue: (i) the Court's willingness to intervene in a dispute between a disenfranchised at-large-member of the corporation and the Board; and, (ii) the Board's specific canvassing of the actions of the Board in relation to the Board's unilateral imposition and interpretation of by-laws and governance structure. The decision reviews a number of provisions of the *Corporations Act*. The interpretation of by-laws, the calling of special meetings, classes and terms of membership, and the Hospital's governance structure were all considered in the decision which found in favour of Ms. Chu.

The Hospital appealed the order to the Ontario Divisional Court and the decision was released on July 7, 2007.

The appellant's position was that the court had "erred with respect to his application and interpretation of the relevant provisions of the [Act] and the Hospital's by-laws." In requesting that the Hospital's appeal be dismissed, Ms. Chu took the position that the lower court had not, in fact, erred in his decision that the Board had acted unfairly toward its annual members in concluding that the Board had misinterpreted its authority to appoint such members or in deciding that it was not to unilaterally revise the Hospital's by-laws.

The Divisional Court quoted Justice Brown's sound admonishment of the Board's actions:

The Board has not acted fairly towards the Hospital's Approval Annual Members. It has construed its powers to appoint such members and to amend the Hospital's by-laws. In addition, the Board cannot on the one hand adopt a by-law amendment that by its very language created a reasonable expectation that Approved Annual Members would have meaningful input into the governance review process and resulting by-law amendments, and then dash those expectations by removing the item from the agenda and relying on a highly formalistic position that the memberships of the Approved Annual Members had evaporated. The evidence paints the picture of a Board interpreting the Hospital's by-laws in an unreasonable way that places complete control of governance matters in the hands of the directors and negates any meaningful role for Approved Annual Members.

The lower and appeal decisions in *Chu* echo the growing trend in case law which insists that non-share-capital corporations like NUSU comply with corporate governance procedures as set out in their governing statutes, constating documents, and by-laws. It is essential that such compliance be conducted in a manner which is reasonable, fair and in good faith. Acting in accordance with legislation and documentation will assist in preventing, or at least moderating, disputes among those involved with governance matters.

Other more recent jurisprudence on the issue of non-profit governance clearly indicates that the Courts are prepared to intervene when the actions of the "corporation" have been improper. In *Rexdale Singh Sabha Religious Centre v. Chattha* the Court stated the importance of complying with corporate governance issues for both charitable and not-for-profit organizations. The court found that from the outset, an organization's by-laws must be carefully drafted and adopted on a timely basis. The by-laws and applicable legislation must then be consistently followed by both the board of directors and the membership of the corporation. Most significantly, the Court indicated that basic corporate compliance in the fundamentals will assist in averting potential disputes or at least to ensure that they are handled in accordance with the requirements of the applicable corporate statute.

We repeat, then, that if NUSU fails to comply with the *Corporations Act* or its governance structure, there is an increased presence for judicial intervention to correct these errors.

### **Fiduciary Duties**

We conclude our opinion by observing that, as we understand it, there is a suggestion that the Representative Members or Directors have some fiduciary duty to adopt the Proposed By-Law. In our opinion, the Representative Members and Directors have a fiduciary duty to comply with the *Corporations Act* and either the 2001 NUSU Constitution or the 2006 Governance Package.

All directors of non-share capital corporations such as NUSU owe NUSU fiduciary duties. Broadly speaking, these fiduciary duties include duties to act honestly, in good faith, and in the best interests of NUSU. As part of their fiduciary duty, directors have an obligation to exercise due diligence in overseeing and managing NUSU.

Courts have broken up these broad principles into specific examples that tell directors how they comply with their fiduciary duties. From our research, we conclude that directors owe obligations of diligence and obedience that require that they be familiar with the 2006 Governance Package and that they comply with the *Corporations Act* and NUSU's applicable corporate governance documents (for example, NUSU's letters patent and the 2006 Governance Package).

Overall, while the Board of Directors and the Representative Members have a general responsibility to act in NUSU's best interests, they have equally important fiduciary duties

of diligence and obedience we have outlined here.

## **CONCLUSION**

We have concluded that the process proposed for adopting the Proposed By-Law is illegal and contrary to law. It runs afoul of the *Corporations Act* and the NUSU constating documents that govern the affairs of NUSU, including the amendment of those same documents. In our view, you have a reasonably strong argument to seek Orders from the Superior Court of Justice quashing the process used by the Board of Directors or Representative Members here.

We thank you again for entrusting us with reviewing this matter.

Yours very truly,

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