COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703 0283 AC
TRIAL COURT FILE NUMBER:	1603 07352
REGISTRY OFFICE:	EDMONTON
APPLICANTS:	UALBERTA PRO-LIFE, AMBERLEE NICOL and CAMERON WILSON
STATUS ON APPEAL:	APPELLANTS
RESPONDENT:	THE GOVERNORS OF THE UNIVERSITY OF ALBERTA
STATUS ON APPEAL:	RESPONDENT
DOCUMENT:	FACTUM

APPEAL OF THE JUDGMENT OF THE HONOURABLE MADAM JUSTICE BONNIE L. BOKENFOHR DATED THE 11TH DAY OF OCTOBER 2017 FILED THE 11TH DAY OF OCTOBER 2017

FACTUM OF THE RESPONDENT

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TABLE OF CONTENTS

A. INTRODUCTION

[1] This appeal deals with two administrative decisions at the University of Alberta ("University") referred to as the "Complaint Decision" and the "Security Cost Decision". Because the decisions involve different decision-making regimes and factual and legal issues, they are addressed separately in this factum.

B. THE COMPLAINT DECISION

Overview

[2] The reviewing Justice correctly found that under the University's *Code of Student Behaviour*, a complainant's standing was limited to challenging the Discipline Officer's decision on the ground of procedural fairness. The Appellants did not challenge the fairness of the decision and therefore, this aspect of the appeal should be dismissed. Further, as a general rule, an appellate court will not hear new issues raised for the first time on appeal. In relation to the Complaint Decision, the Appellants raise new issues of breach of contract and bad faith. The interests of justice do not require a review of these new issues and they should not be considered for the first time on appeal.

I. FACTS

General Background

[3] Under section 26 of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 ("PSLA"), the general faculties council ("GFC"), subject to the authority of the Board of Governors ("Board"), "is responsible for the academic affairs of the university" and "may delegate any of its powers, duties and functions" under the PSLA "as it sees fit".[1] Under section 31 of the PSLA, the GFC has "general supervision of student affairs at a university" and, in particular, authority to discipline students and, again, may delegate that power to any person or body of persons.[2]

[4] Pursuant to its statutory authority over student discipline, the GFC established and the Board approved a *Code of Student Behaviour* ("Code").[3] The Code applies only to the University's students. The Code describes various forms of unacceptable academic and non-academic behavior (i.e. offences), the sanctions that may be imposed upon a student found to

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[1] *Post-Secondary Learning Act*, SA 2003 c P-19.5 ("PSLA"), s 26(1) and (3) **[Tab 1]**.
[2] PSLA, ss 31(1)(a) and (b), **[Tab 1]**.
[3] Code, Extracts of Key Evidence [EKE] at A190.

have committed a Code offence, the student discipline and internal appeal procedures, and the rights and roles of those involved in the student discipline process.[4]

[5] Non-academic misconduct complaints are directed to University of Alberta Protective Services ("UAPS"). The Code expressly authorizes the Director of UAPS ("Director") to decline to proceed with or investigate a complaint in certain circumstances including where the Director "believes that no University rule has been broken."[5]

[6] Where the Director decides not to proceed with, or investigate, a complaint, the complainant has the right to be advised of that decision and the right to appeal that decision to the Discipline Officer.[6] Where the Discipline Officer decides that the Director's decision was appropriate, written reasons will be provided to the complainant and "no further proceedings shall be taken respecting the complaint under this Code."[7] By contrast, the Code specifically notes that the "decision of the Discipline Officer may be appealed to the UAB [University Appeal Board] under 30.6 by the Student who was charged and/or the Director of UAPS."[8]

[7] The Appellant, UAlberta Pro-Life, is a recognized student group at the University ("Pro-Life"), whose status and events are regulated under the University's *Student Groups Procedure* ("Procedure").

[8] Pursuant to the Procedure, Pro-Life applied for and received event approval from the Office of the Dean of Students to hold a two-day demonstration in the Quad on campus over March 3-4, 2015. Quad is a large outdoor area in the centre of campus and is one of the most public, high-traffic, main thoroughfares on campus.[9] Pro-Life's demonstration was comprised of an installation of large above-ground billboards depicting graphic images of aborted fetuses, and pamphlets containing related materials which was offered to passers-by. The billboards' imagery and pamphlets were both provided by the Canadian Centre for Bio-Ethical Reform ("CCBR").[10]

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[4] Code, EKE at A191.
[5] Code, s 30.5.2(6)b, EKE at A220.
[6] Code, s 30.5.2(7)b, EKE at A221.
[7] Code, s 30.5.2(8)a, EKE at A221.
[8] Code, s 30.5.2(8)c, EKE at A221 [emphasis added].
[9] EKE at A273; *UAlberta Pro-Life v Governors of the University of Alberta*, 2017 ABQB 610 at para 5 ["Judicial Review"] [Appeal Record at F1-F14].
[10] Judicial Review at para 1; *UAlberta Pro-Life v Un* at para 10 [*UAlberta Pro-Life Injunction*][**Tab 2**]; EKE at 258.

[9] Students and other individuals learned about Pro-Life's upcoming demonstration and coordinated a simultaneous counter-demonstration.[11] The Appellants learned of the possible counter-demonstration and raised concerns about its potential to interfere with their event to UAPS.[12]

[10] On February 27, 2015, the then-President of the University released an open letter to the University community in regards to concerns raised about the proposed demonstration.[13] Her letter stated, among other things, that:

> The University of Alberta will always start from a position that supports a right to freedom of expression. It is our duty to foster and facilitate discussion and debate in an environment that is a safe space for all students.
>
> ... Go-Life is a registered student group on campus and, as such, has the same rights and privileges as other student groups. That includes access to the same spaces as any other student group.
>
> ... A safe and respectful campus community is always a high priority. The university does not condone activity that violates the Student Group Procedure or the Code of Student Behaviour. Any complaints will be investigated by UAPS, according to our existing policies and procedures.[14]

[11] On both March 3 and 4, Pro-Life's demonstration and the individuals' counter-demonstration took place in Quad. On each morning of Pro-Life's demonstration, a large number of individual counter-demonstrators surrounded the group's billboard installation with signs of their own.[15]

[12] A summary of the event was provided by the reviewing Justice:

> On March 3 and 4, 2015 the UAlberta Pro-Life student group held an event in the main "Quad" on the University of Alberta north campus. The event included large stationary displays of approximately 700 square feet with photographs of whole and dismembered human fetuses at various stages of development. UAlberta Pro-Life is a registered student group recognized by the University and had approval from the University for the event. On both days, throughout the entire time of the display, many University students, faculty, staff, and the general public attended, standing side by side holding signs and

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[11] EKE at A4, A13, A16-22.
[12] EKE at A13-15; *UAlberta Pro-Life Injunction* at para 11 **[Tab 2]**.
[13] EKE at A12.
[14] *Ibid.*
[15] See EKE at A34-48.

banners blocking the displays. They also cheered and chanted to protest the UAlberta Pro-Life display.[16]

[13] Justice Graesser, in his decision on the Appellants' injunction application related to the same event, set out a similar description.[17]

[14] Due to the security risks that arose, the University had UAPS and Edmonton Police Service ("EPS") officers on the site for the two-day event. In order to keep the peace, officers intervened several times with individuals on both sides of the issue. No incidents of actual violence were reported.

Background to Complaint Decision

[15] On March 11, 2015, the Appellants made a complaint to UAPS alleging that students who participated in the counter-demonstration breached various sections of the Code.[18] The Appellants provided evidence identifying nearly 100 individual counter-demonstrators as well as multiple photographs and videos of the event.[19] The Appellants requested that all of the counter-demonstrators be investigated and sanctioned under the Code.

[16] UAPS commenced an investigation. At the time, the University had one employee whose duties included investigating Code complaints.[20] UAPS, in an email on April 1, 2015, explained there would be a delay in the investigation because of UAPS's limited resources and the priority given to unrelated investigations involving "violence, the threat of imminent violence and/or immediate safety issues/concerns."[21]

[17] On November 20, 2015, the Director of UAPS declined to proceed with the complaint pursuant to section 30.5.2(6)b of the Code,[22] provided reasons and notified the Appellants of their right to appeal his decision to the Discipline Officer.[23] On December 18, 2015, the

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[16] Judicial Review at para 1.
[17] *UAlberta Pro-Life Injunction*, 2015 ABQB 719 at paras 12-14 **[Tab 2]**.
[18] See EKE at A60.
[19] EKE at A58. See generally EKE A123-71.
[20] EKE at A81.
[21] *Ibid.* UAPS is required to investigate many kinds of violations, including actions which also amount to criminal charges, such as sexual assault. See e.g. *Dalla Lana v University of Alberta*, 2013 ABCA 327 [*Dalla Lana*] **[Tab 3]**.
[22] Code, s 30.5.2(6)b, EKE A220.
[23] EKE at A65 ("I am exercising my discretion and declining to proceed with your complaint pursuant to section 30.5.2(6)(b)").

Appellants advanced a "full and robust" appeal[24] of the Director's decision, submitting seven grounds of appeal to the Discipline Officer.[25] Under the Code, to succeed on such an appeal, it must be shown that the Director's decision was not appropriate.[26]

[18] On February 4, 2016, the Discipline Officer dismissed the Appellants' appeal and provided written reasons for his decision (the "Complaint Decision"). Upon reviewing the investigation record and considering the Appellants' specific concerns, the Discipline Officer found that the Code permitted the actions of both the Appellants and the counter-demonstrators: namely demonstrating or protesting.[27] He found that while the collective of counter-demonstrators competed with Pro-Life for attention, they did not prevent Pro-Life from speaking.[28] As such, the Discipline Officer found the Director's decision not to proceed with the complaint reasonable and appropriate.[29]

[19] In coming to his decision, the Discipline Officer noted that controversial topics may result in "profound disagreements" and that "the University should tread lightly in applying disciplinary processes when people are engaging in a conflict of ideas."[30] The Discipline Officer stated, in part:

> We respect the rights of all parties to offer information to an audience and then leave it to the audience to choose whether they will access it and how they will be affected by it. So long as they do not harm people or property, disrupt essential University business, or prevent other parties from speaking at all, the parties should be allowed to argue.
>
> The protesters competed with Go-Life for attention but they did not prevent them from speaking. They did make it more difficult for people to see the displays and challenged people not to speak to the Go-Life volunteers but they did not prevent them from doing so, regardless of the rhetoric on both sides.[31]

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[24] EKE at A2.
[25] See EKE at A6-7.
[26] Code, s 30.5.2(8), EKE at A221.
[27] EKE at A2 ("All of the participants were therefore engaging in acts which the [Code] specifically permits – demonstrating and/or protesting").
[28] *Ibid.*
[29] EKE at A3.
[30] EKE at A2.
[31] *Ibid* [emphasis added].

[20] On judicial review of the Complaint Decision[32], the reviewing Justice properly applied well-established case law in the professional disciplinary context and found that the Appellants, as complainants, only had standing to challenge the procedural fairness of the Complaint Decision.[33] No challenge was made to the procedural fairness of that decision, and the reviewing Justice found that it was procedurally fair in any event.[34] The application to review the Complaint Decision was therefore dismissed.

II. GROUNDS OF APPEAL

[21] There are two main issues in the appeal of the Complaint Decision:

1. Did the reviewing Justice correctly find that the Appellants' standing, as complainants in a disciplinary proceeding, was limited to issues of procedural fairness?
2. If the answer to question (1) is "no", was the Complaint Decision reasonable?

[22] The Appellants raise for the first time on appeal two additional arguments. Respectfully, as the interests of justice do not require a review of these new arguments, this court should not entertain them.

III. STANDARD OF REVIEW

[23] The issue of the Appellants' standing is a question of law and subject to a correctness standard.[35] Should a review of the merits of the Complaint Decision be necessary, this court recently confirmed the appropriate standard of review on appeal from a judicial review decision:

> On appeal from a judicial review decision, this Court reviews the chambers judge's selection and application of the standard of review for correctness. Where the appropriate standard is reasonableness, this Court "steps into the shoes" of the reviewing judge to determine whether the Arbitrator's decision was reasonable.[36]

[24] The University submits that the merits of the Complaint Decision would be subject to review on the standard of reasonableness. This Court provided further guidance on the reasonableness standard in the review of administrative decisions in *Edmonton School District*

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[32] Judicial Review at para 14.
[33] Judicial Review at paras 15-28.
[34] Judicial Review at paras 30-34.
[35] *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10 [not reproduced]; *Grivicic v Alberta Health Services (Tom Baker Cancer Centre)*, 2017 ABCA 246 at paras 12-14 **[Tab 4]**.
[36] *Edmonton Police Association v Edmonton (City)*, 2017 ABCA 355 at para 36, citations omitted **[Tab 5]**.

No 7 v Dorval.[37] If there is any line of analysis set out in the decision under review which could lead the decision-maker from the information available to the ultimate decision made, the decision must be found to be reasonable.

IV. ARGUMENT

1. Scope of the Appellants' Standing under the Code

[25] The reviewing Justice correctly found that the Appellants' standing, as complainants under the Code, was limited to challenging the Discipline Officer's decision on the grounds of procedural fairness. The Code explicitly sets out the rights of complainants and does not include a right to have complaints investigated or prosecuted. A complainant's standing in a judicial review of that decision, and the content of any duty of fairness owed, must be based on the Code framework.[38]

A. Law on Standing

[26] The reviewing Justice reviewed the law on standing, noting, in particular, a complainant's standing in both criminal and administrative complaint regimes. The law does not recognize a general public duty on statutory bodies to investigate a complaint in the absence of specific language.[39] A complainant cannot compel an investigatory body to issue charges or impose sanctions. In the context of professional disciplinary complaints, this Court has consistently recognized that complainants' standing on judicial review is limited to issues of procedural fairness and does not extend to a review of the underlying merits of a decision.[40]

B. Analysis on Standing

[27] Section 30.1.1 of the Code sets out the rights and obligations of both the student accused of misconduct and complainants. The reviewing Justice clearly articulated the qualitative differences in those rights.[41] Courts have recognized that the rights conferred to accused students

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[37] *Edmonton School District No 7 v Dorval*, 2016 ABCA 8 at paras 39-40 [*Dorval*] **[Tab 6]**.
[38] It is important to note that no challenge was brought against the Code directly, only in relation to the decisions made pursuant to it. To the extent that the Appellants criticize the policy choices made by the Board of Governors or the GFC, those determinations are beyond the scope of this appeal.
[39] *Burgiss v Canada (Attorney General)*, 2013 ONCA 16 at para 2 **[Tab 7]**.
[40] *Friends of the Old Man River Society v Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107 [*Old Man River*] **[Tab 8]**, *Mitten v College of Alberta Psychologists*, 2010 ABCA 159 [*Mitten*] **[Tab 9]**, and *Warman v Law Society of Alberta*, 2015 ABCA 368 [*Warman*] **[Tab 10]**.
[41] Judicial Review at paras 16-20.

under the Code are akin to those rights provided to parties before the courts.[42] The rights provided to complainants are significantly more limited.

[28] The Code does not guarantee that all complaints will be fully investigated, or that investigations will result in charges or sanctions. It is clear that the Director of UAPS has discretion with respect to whether or not to proceed with a complaint.[43] Apart from the procedural rights noted by the reviewing Justice, the Code does not provide a complainant with any other substantive rights. The reviewing Justice agreed that no other positive rights to complainants could be inferred from the Code.[44]

[29] Given the scope of the Appellants' rights as complainants under the Code, the reviewing Justice correctly found that while the Appellants had standing to seek judicial review of whether the procedural rights granted to the Appellants were fairly followed, they did not have standing to challenge the substance of the Complaint Decision.

[30] The reviewing Justice properly found that professional disciplinary proceedings were an appropriate comparison in this case, and she properly applied those standards to the Code regime.[45] Both deal with a statutory scheme relating to disciplinary investigations against individuals subject to the jurisdiction of a statutory body.[46] Both contain substantially similar complaint and investigation procedures. Further, the complainants under each regime are expressly given certain limited procedural rights.[47]

[31] On judicial review, the Appellants did not challenge the procedural fairness of the Complaint Decision and the reviewing Justice found that it was procedurally fair in any event.[48]

[32] The Appellants attempt to distinguish the case law in this area by noting that, in *Old Man River* and *Mitten*, the complainant was a member of the public and not a member of the profession whereas the Code only regulates "students in relation to their interactions with each

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[42] See *Dalla Lana* at para 14 **[Tab 3]**.
[43] See Code ss 30.5.2(5) to 30.5.2(6), EKE at A220.
[44] Judicial Review at paras 26-27.
[45] See Judicial Review at paras 21-22, citing *Old Man River* **[Tab 8]**, *Mitten* **[Tab 9]**, and *Warman* **[Tab 10]**.
[46] In one case professionals subject to professional standards; in the other, students subject to the Code.
[47] Judicial Review at para 24.
[48] Judicial Review at para 33.

other."[49] This is incorrect. The Code governs the conduct of students in relation to other students, other members of the University Community - which is broadly defined - and members of the public.[50]

[33] On appeal, the Appellants do not challenge the reviewing Justice's finding in this regard. For all of the foregoing reasons, this aspect of the Appellants' appeal should be dismissed.

2. The Merits of Complaint Decision was Reasonable in any Event

[34] In the alternative, if this Court finds that the reviewing Justice erred and that the Appellants have standing to challenge the merits of the Complaint Decision, the University submits that the Complaint Decision was reasonable and is entitled to deference.

A. Law on Complaint Merits

[35] The Code preamble specifically states that: "Nothing in this Code shall be construed to prohibit peaceful assemblies and demonstrations, or lawful picketing, or to inhibit free speech."[51] The Appellants rely on this statement as the source of a "positive right" given to them. However, a proper interpretation of the Code discloses that this language is intended only to delineate the boundary between permissible conduct and conduct caught by the Code. It does not, therefore, create positive rights and the reviewing Justice properly so found. In this regard, the Discipline Officer's finding that the counter-demonstrators were engaging in conduct permitted by the Code is reasonable.

[36] The law in Canada includes an expansive understanding of freedom of expression and freedom of speech:

> Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee." In other words, the term "expression" as used in s. 2(b) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.[52]

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[49] Appellants' Factum at paras 21 and 22
[50] For example see Code, ss 30.3.3(4), 30.3.4(2)a, 30.3.4(4), s. 30.3.4(6), EKE at A201-203.
[51] EKE at A192 [emphasis added].
[52] *R v Keegstra*, [1990] 3 SCR 697 at 729 [citations omitted] **[Tab 11]**; see also, *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968-71 [*Irwin Toys*] [not reproduced].

[37] It does not matter whether the meaning is expressed negatively or positively, it is still a meaning capable of being communicated. Disagreements and challenges to existing opinions are exactly what freedom of expression is meant to encourage:

> It is impossible to imagine a vigorous political debate on a contentious issue in which the speakers did not seek to undermine the credibility of the ideas, conclusions and judgment of their opponents. Yet such debate is essential to the maintenance and functioning of our democratic institutions.[53]

[38] The Appellants dispute the reasonableness of the Complaint Decision. The Appellants' argument is based on the premise that the counter-demonstration was a clear violation of the Code.[54] The Appellants therefore contend that the University, in dismissing the complaint, has "turned a blind eye," "ignore[d] the rule of law," and "deliberately consented to the mistreatment of the Appellants."[55] However, if there was no violation of the Code, then there was no failure to enforce it, and no violation of any alleged "positive right" of the Appellants.

B. Analysis on Complaint Merits

[39] The counter-demonstrators attempted to convey a meaning: namely that they disagreed with the expression of the Appellants. While that would be sufficient for an expression, the photographic evidence also shows that the counter-demonstrators displayed multiple signs expressing multiple opinions. A few examples include: "If you had an abortion that is ok; I had an abortion and it was ok"; "Don't like abortion? Don't have one"; "I am a woman not a womb"; "My school is a safe place"; "My Pussy, My Voice, My Body, My Choice"; "Let's talk. Not Shock"; "Voices for Choices"; "Pro-Choice Forever"; "Abortion is a valid choice"[56] The counter-demonstrators expressed themselves vocally as well.[57]

[40] There is no evidence that the counter-demonstrators engaged in any physical violence. Although tensions were heightened, no physical confrontations or property damage occurred.[58] There is no evidence that any of the counter-demonstrator's actions were criminal or tortious.

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[53] *R v Keegstra* at 832, per McLaclin J (as she then was) dissenting [emphasis added] **[Tab 11]**.
[54] See e.g. Appellant Factum at para 30: "The Record is clear that there were a number of breaches of the *Code*."
[55] Appellant Factum at paras 14, 15, 20.
[56] See EKE at A34-48.
[57] EKE at A57 ("[n]ot only were the protestors physically obstructing the display, they were also chanting and singing and intentionally disrupting conversations").
[58] See *UAlberta Pro-Life Injunction* at para 14 **[Tab 2]**.

[41] The Discipline Officer had to decide whether it was reasonable for the Director to conclude that the "free speech" protection in the Code would apply to the individuals identified in the complaint. Given the evidence noted above, the counter-demonstration was not violent and it was an attempt to convey meaning. It was clearly open to the Discipline Officer to conclude that it could be characterized as either "a peaceful assembly, a demonstration, a lawful picketing, or other form of free speech" protected by the Code.[59]

[42] Regardless of the free speech issue, the Discipline Officer also did not find that there was an "obstruction" within the meaning of the Code to justify a violation:

> The protestors competed with Go-Life for attention but they did not prevent them from speaking. They did make it more difficult for people to see the displays and challenged people not to speak to the Go-Life volunteers but they did not prevent them from doing so, regardless of the rhetoric on both sides. ... Ms. Nicol's statement indicates two things. First, it shows that Go-Life volunteers were speaking to people who attended the installation and second, that protestors were attempting to persuade people not to interact with Go-Life material, not physically preventing them from doing so. ... The photographs supplied by Mr. Cameron show that enough of the displays were visible so that passersby would know what information Go-Life was offering and could therefore make an informed choice whether to view it in its entirety or not.[60]

[43] The Appellants led no evidence showing that anyone was prevented from receiving their message or did not engage with the Appellants strictly because of the counter-demonstrators. The Discipline Officer noted that if anything, the evidence shows the contrary.[61] Undoubtedly, the Appellants would have preferred for their message to be communicated uninterrupted by the counter-demonstrators' commentary, but a market-place of ideas does not lend itself to monopolies.

[44] The reviewing Justice correctly determined that the Appellants' standing was limited to challenging the Complaint Decision on the grounds of procedural fairness. The Appellants do not challenge the Complaint Decision or the process before the Discipline Officer as being procedurally unfair. If a review of the merits of the Complaints Decision is required, that decision was reasonable in light of the express language in the Code set out above.

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[59] That was, in fact, the Discipline Officer's primary conclusion: EKE at A2.
[60] EKE at A2-3 [emphasis added]; also *UAlberta Pro-Life Injunction* ("it is difficult, but not impossible, to discern their message. However, portions of graphic images can still be seen" at 12) **[Tab 2]**.
[61] EKE at A3.

3. New Arguments for Contract and Bad Faith

[45] On appeal, the Appellants raise two new grounds for challenging the Complaint Decision: that the Appellants have an express or implied right to require the University to proceed with complaints under the Code and can enforce that right contractually,[62] and the University acted in bad faith by permitting its delegated decision-makers to decline to proceed with their Code complaint.[63] In their appeal to the Discipline Officer, the Appellants did not raise breach of contract, assert that the Code creates positive rights or allege bad faith. Consequently, the Discipline Officer's decision does not address those issues.

[46] These arguments were also not advanced before the reviewing Justice and, respectfully, should not be considered for the first time on appeal. The interests of justice do not require a review of these issues and they are, in any event, meritless.

A. Law on Novel Arguments

[47] It is a general rule that new issues may not be raised on appeal.[64] The only exception to this rule is when the appellate court is of the view that the interests of justice require a review of the new issue and there is a sufficient evidentiary record and findings of fact to do so.[65] Both conditions must be satisfied; neither are in this case.

[48] There is a high bar for establishing "bad faith."[66] It has been described by the Supreme Court as encompassing:

> not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith."[67]

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[62] Appellant Factum at paras 11-13.
[63] Appellant Factum at paras 30-31.
[64] *Brace v Williams*, 2016 ABCA 384 at para 7 **[Tab 12]**.
[65] *Quan v Cusson*, 2009 SCC 62 at para 37 **[Tab 13]**.
[66] *Jones v Fort Saskatchewan (City)*, 2015 ABQB 194 at para 16 **[Tab 14]**.
[67] *Entreprises Sibeca Inc v Frelighsburg (Municipality)*, 2004 SCC 61 at para 26 [emphasis added] **[Tab 15]**.

B. Analysis on New Arguments

[49] There is no mention of the word "contract" in any of the Appellants' written or oral argument before the reviewing Justice.[68] Similarly there was never any allegation of bad faith as described by the Supreme Court.[69]

[50] Neither the Discipline Officer nor the reviewing Justice made any findings of fact in regards to the existence of a contractual relationship because neither was asked to do so. There is no evidentiary record of the contents of a contractual relationship between the Appellants and University aside from the Code and the bare assertion that this creates positive rights, capable of enforcement by way of civil action.

[51] There is also no evidence in the record to show that any action of the Discipline Officer was intended to cause harm to the Appellants or was markedly inconsistent with his obligations under the Code. The Director was permitted to decline to proceed with the complaint if he believed no rule had been broken, which he did.[70] The Discipline Officer was permitted to find the Director's decision to be appropriate, which he did.[71] The decisions at issue were made by those individuals to whom the relevant powers were delegated by the GFC and the Board in the Code. Other individuals at the University had no power or jurisdiction under the Code to interfere with the exercise of those powers.

[52] The interests of justice do not require addressing these issues: both arguments are premised entirely on the assumption that the counter-demonstration was somehow illegal. However, if there was no actual violation of the Code, then there can be no deliberate failure to enforce it. These arguments are just further attempts to challenge the merits of the Discipline Officer's decision and add nothing to the real issues.

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[68] The concept of a contractual relationship between a university and its students was only raised by the Respondent in oral argument as a way of explaining a possible source of rights, outside of the Code. See Hearing Excerpt at 65:7-68:28 [Appeal Record].

[69] The Appellants argued that there was an inconsistency in the University's actions that was "inherently unreasonable" and that there was an obligation for the decisions to be made in "good faith", but neither of these could amount to an intent to harm or act markedly inconsistent with legislative context. See Brief of the Applicants (filed May 19, 2017) at para 56; Hearing Excerpt at 16:8-16:15 [Appeal Record].

[70] Code, s 30.5.2(6), EKE at A220.

[71] Code, s 30.5.2(8)(a), EKE at A221.

[53] The contractual argument does not change the character of the Appellants in relation to the disciplinary proceeding: they are still complainants.[72]

[54] The statements made by UAPS officers during the March 2015 event and the President also do not change the analysis of the Discipline Officer's decision. What matters is that his decision was reasonable in the circumstances as he is the only one authorized under the Code to make the relevant determination.

[55] Nevertheless, the previous statements are consistent. The Appellants assert that UAPS warned the counter-demonstrators "to cease their obstruction of the Display" or "to cease their conduct" or "that they were in breach of the Code" and assert that then-President Samarasekera "warned" that obstruction would be a breach of the Code[73]. These assertions are incorrect. Rather, the notice read to the counter-demonstrators by UAPS asked only that the counter-demonstrators conduct their counter-demonstration in a designated area across from Pro-Life's demonstration and the then-President's statement noted only that complaints would be investigated by UAPS according to the applicable policies.[74] Code actions were instituted against the counter-demonstrators. Their actions were investigated, though ultimately dismissed.

V. RELIEF SOUGHT

[56] The University respectfully asks that the appeal of the reviewing Justice's decision on the Complaint Decision be dismissed in its entirety with costs.

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[72] The Code makes no distinction between complainants who are students and who are not. The Code defines "Complainant" as "any person who has reason to believe that a Student has committed an offence: EKE at 195" [emphasis added].

[73] Appellants' factum at paras 3(l), 17(c), 5(iii), 25 and similar incorrect assertions at paras 30, 31, 34.

[74] EKE at A12 ("the university does not condone activity that violates the Student Group Procedures or the Code of Student Behaviour. Any complaints will be investigated by UAPS, according to our existing policies and procedures"); EKE at A376 ("The University again advises you that your demonstration on University property is on the strict condition that you remain behind the buffer which has been established on the south of the walkway across from the Go Life event"). See also EKE at A365("It was explained that Code of Student Behaviour and/or other UAPS/EPS action may take place for non-compliance").

C. SECURITY COST DECISION

Overview

[57] The reviewing Justice found it unnecessary to decide whether the *Charter* applied to the University's decision to approve the Appellants' proposed event on the condition that the group cover the actual costs of required security. The reviewing Justice reasonably found that the Security Cost Decision was reasonable on any applicable standard since it reflected a proportionate balancing between the value of expressing diverse points of view on campus and the University's responsibility to take reasonable steps to ensure public safety on campus. Regardless, the *Charter* does not apply to the University's decisions under the *Student Groups Procedure* because it is not carrying out a specific government policy or objective in making such decisions and the government does not exercise any control over the University's regulation in this area.

I. FACTS

General Background

[58] The correct disposition of the Security Cost Decision appeal depends on a careful review of the underlying context. Courts have recognized the unique role played by post-secondary institutions—particularly Universities—in Canada and elsewhere for many years. A university is, at its core, a largely self-governing community of scholars, providing educational and research opportunities to faculty and students. The incorporation of a university under provincial law does not alter that traditional approach.[75]

[59] The PSLA reflects the traditional bi-cameral autonomy provided to universities. University boards of governors are given significant powers, including:

- a general mandate to "manage and operate the public post-secondary institution";[76]
- power to make "any bylaws the board considers appropriate for the management, government and control of the university buildings and land";[77]
- power to make bylaws to control vehicles and pedestrians on university lands;[78]

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[75] *Harelkin v University of Regina*, [1979] 2 SCR 561 [*Harelkin*] **[Tab 16]**. See also *Paine v University of Toronto*, 1981 CanLII 1921 (ON CA) at 8 [*Paine*] **[Tab 17]**. The decision in *Paine* was cited with approval in *Vinogradov v University of Calgary*, 1987 ABCA 51 at para 28 **[Tab 18]**.

[76] PSLA, s 60(1)(a) **[Tab 1]**.

[77] PSLA, s 18(1) **[Tab 1]**.

- natural person powers;[79] and
- the ability to decide any question relating to the powers and duties of university actors.[80]

[60] The University GFC approved the *Student Groups Procedure* ("Procedure") pursuant to its statutory and delegated powers from the Board of Governors.[81] That Procedure provides for the administration and regulation of the activities of "recognized" student groups on campus. A group of students may apply for official recognition on certain conditions. Recognized student groups under the Procedure are accorded a number of benefits not available to other student groups . One of those exclusive benefits is the ability to book University-owned space for events.

[61] Student groups on campus are not required to apply for recognition but the associated privileges and responsibilities under the Procedure are only available to recognized student groups. Recognition and its privileges, however, come with responsibilities as set out in the Procedure, including the requirement to abide by all University policies and procedures.

[62] Universities under the PSLA are generally funded through base government grants, specific grants, and tuition fees. Tuition fees are heavily regulated by government, and a tuition fee "freeze" has been in place for the past three years.[82]

[63] Universities in Alberta do not have limitless resources, and must expend public funds in a manner consistent with their obligations to provide post-secondary education under the PSLA.[83] The Supreme Court of Canada has recognized, in the context of a challenge to mandatory retirement policies, that universities are closed systems with limited resources.[84] Requiring a university to devote additional resources to one particular operational area necessarily means fewer resources are available for others.

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[78] PSLA, s 18(2) **[Tab 1]**.
[79] PSLA, s 59(1) **[Tab 1]**.
[80] PSLA, s 63 **[Tab 1]**.
[81] EKE at A249-55.
[82] *Public Post-secondary Institutions' Tuition Fees Regulation*, Alta Reg 273/2006, s 8.1(1) **[Tab 19]**. The tuition freeze was recently extended to the end of the 2018-2019 academic year.
[83] See PSLA, s 60(1)(b) **[Tab 1]**.
[84] *Mckinney v University of Guelph*, [1990] 3 SCR 229 at 284, 287 [*McKinney*] **[Tab 20]**.

Background to Security Cost Decision

[64] The Appellant group, as a recognized student group, is subject to the Procedure. The Procedure requires approval from the Office of Dean of Students for "student group events and activities", which is broadly defined as any student function organized by a student group, including "demonstrations".[85]

[65] Importantly, the Procedure also states:

> ...The responsibility for running the events in a safe manner belongs to the Student Group.
>
> All Student Group Events and Activities must be approved by the Office of the Dean of Students. This approval must occur at the planning stage of the event and prior to any advertising or announcement of the event.
>
> Student Groups are subject to all University policies and procedures and must adhere to these when organizing Events and Activities. ...
>
> Depending on the nature of the activity, the Dean of Students may require a Student Group to obtain additional insurance or require the presence of University of Alberta Protective Services or the Edmonton Police Service. The cost of these will be the responsibility of the Student Group.[86]

[66] As noted above, the Procedure itself contemplates that the Dean of Students must approve all events and may require the presence of UAPS or EPS depending on the event. The Procedure explicitly requires that the student group bear the cost of such presence. To be clear, this rule applies to any recognized student group holding an event on campus and has been in place long before the issues in this appeal arose.

[67] The Appellants were aware of the requirement to seek approval for their events, as they had done so previously.[87] On January 11, 2016, the Appellants applied for approval of a second two-day event in Quad. The proposed event was essentially the same as the one approved by the Office of Dean of Students the previous year, for the same location and based on the same materials.[88]

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[85] EKE at A254.
[86] EKE at A253 [emphasis added].
[87] EKE at A245-46.
[88] EKE at A258-59.

[68] The Student Event Risk Management Coordinator sought additional information on January 21, 2016 including a request for a security assessment for the event.[89] A security assessment form was submitted by the Appellant group "under protest" on February 3, 2016.[90] The Dean of Students issued her decision on February 12, 2016.[91]

[69] The Dean of Students approved the event, on conditions: the location of the event would be moved to the north end of Quad, and that the Appellant group would cover the costs of security personnel identified as being necessary by UAPS. The decision raised the possibility of relocating the event to reduce the security costs.

[70] The Appellant group requested reconsideration by the Dean of Students.[92] The Dean of Students issued her reconsideration decision on February 24, 2016, and confirmed the imposition of the condition regarding the Appellant group being responsible for the costs of the necessary security personnel.[93]

[71] The reviewing Justice declined to rule on whether the *Charter* applied to the Security Costs Decision as it was not necessary in order to resolve the application.[94] The reviewing Justice found the Security Cost Decision was reasonable in the circumstances and procedurally fair to the Appellants.[95] The Security Costs decision represented a proportionate balancing of the Appellants' rights.[96] The application to review the Security Cost Decision was therefore dismissed.

II. GROUNDS OF APPEAL

[72] There is one main issue in the appeal relating to the Security Cost Decision:

1. Did the reviewing Justice properly find that the Security Cost Decision was reasonable?

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[89] EKE at A309.
[90] EKE at A292-94.
[91] EKE at A256-58.
[92] EKE at A266-68.
[93] EKE at A241-48.
[94] Judicial Review at para 45.
[95] Judicial Review at paras 56-64.
[96] Judicial Review at paras 66-67.

III. STANDARD OF REVIEW

[73] The reviewing Justice determined that the Security Cost Decision was subject to review on the reasonableness standard. On appeal, this determination is subject to review against a correctness standard.[97]

[74] Assuming the Security Cost Decision was properly reviewed against the reasonableness standard, this court will "step into the shoes" of the reviewing Justice and determine itself whether the decision was reasonable, having regard to the historical and legislative context noted above regarding universities. If it is necessary to consider the issue, the application of the *Charter* to the Security Cost Decision is a question of law reviewed for correctness.

IV. ARGUMENT

1. It is Not Necessary to Consider the *Charter*

[75] The Appellants suggest that the reviewing Justice erred in determining that, in the context of the reasonableness review of the Security Cost Decision, it was not necessary to determine whether or not the *Charter* applied.

[76] It is important to clarify what the reviewing Justice actually concluded about this decision before addressing the Appellants' arguments. First, the Justice did not decide whether the *Charter* applied to the University in this case because it was not necessary:

> The legal arguments put forward and the issues engaged when considering whether the *Charter* applied or whether the common law required the University to consider freedom of expression are incredibly interesting. The fact is, however, that the University did consider freedom of expression in making its decision. While I acknowledge that the issue of whether a University is required to consider freedom of expression, regardless of whether the *Charter* applies, is a legal question that is ripe for exploration and decision, it is not an issue that this court must answer today.[98]

[77] The reviewing Justice found that under a *Doré* analysis, the Security Costs Decision was reasonable and did not warrant judicial intervention.[99] It fell within a range of possible,

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[97] *Edmonton Police Association v Edmonton (City)*, 2017 ABCA 355 at para 36 **[Tab 5]**.
[98] Judicial Review at para 45 [emphasis added].
[99] Judicial Review at para 55; *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] **[Tab 21]**.

acceptable outcomes and was a proportionate balancing of any right to free expression the Appellants arguably had under the *Charter* or otherwise.[100]

[78] The *Doré* analysis subsumes a *Dunsmuir* analysis: the starting point is deference to the decision-maker.[101] *Doré* adds a proportionality exercise for the decision-maker beyond the standard *Dunsmuir* analysis.[102] It follows that a decision-maker who satisfies the requirements of *Doré* also satisfies the requirements under *Dunsmuir*. By finding that the University would satisfy a *Doré* analysis, the reviewing Justice's real conclusion was that regardless of whether the *Charter* actually applied, the Security Costs Decision was reasonable. In doing so, she was able to completely and efficiently resolve the dispute before her without unnecessary determinations.

[79] This approach is supported by the consistent cautions of the Supreme Court about deciding issues unnecessarily: "Save in exceptional circumstances, it is not desirable to express an opinion on a question of law which it is not necessary to decide in order to dispose of the case at hand, especially when it is a constitutional question."[103] It is also conforms to the practices of this Court when a decision satisfies both possible standards of review.[104]

[80] The University agrees that a decision on the *Charter*'s application is not necessary in this case as the Security Costs Decision was reasonable regardless of the applicable analysis. Even the Appellants seem to accept that this appeal does not turn on the application of the *Charter*.[105] If this Court agrees, then the appeal in relation to the *Charter*'s application is ultimately moot. However the University wishes to be clear that it <u>does not</u> accept that the *Charter* applies in general to decisions and actions of the University. The University will therefore present argument concerning the *Charter* should this Court find it is necessary to rule on this point.

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[100] Judicial Review at paras 66, 68.
[101] *Doré* at para 45 **[Tab 21]**.
[102] *Doré* at para 56 **[Tab 21]**; *Bonitto v Halifax Regional School Board*, 2015 NSCA 80 at paras 38, 84 **[Tab 22]**; *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130 at para 38, aff'd 2013 SCC 62 **[Tab 23]**.
[103] *Attorney General (Que.) and Glassco v Cumming*, [1978] 2 SCR 605 at 611 **[Tab 24]**. See also *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 6 [not reproduced].
[104] *Northern Sunrise (County) v De Meyer*, 2009 ABCA 205 at para 25 **[Tab 25]**; *Liquor Stores Limited Partnership v Edmonton (City)*, 2017 ABCA 435 at para 38 **[Tab 26]**.
[105] Appellant Factum at paras 54-56.

2. The Proper Framework for a *Charter* Analysis to the University's Decision

A. Law on Charter Application

[81] Section 32 states that the *Charter* applies to "government." Universities are not part of the government *per se* as decided by the Supreme Court of Canada in *McKinney v University of Guelph* and their actions "do not fall within the ambit of the *Charter*."[106] The Court reached this conclusion despite the evidence referred to by Wilson J. in dissent that universities were heavily funded and regulated by government. The majority left open the possibility that the *Charter* could apply to specific activities undertaken by a university where "it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision" but found no indication of that in *McKinney*.[107]

[82] The Supreme Court in *Eldridge v British Columbia* was clear that there are two situations where the *Charter* will apply to a non-government entity: first, where the entity is considered part of government due to the degree of government control exercised over it; or second, where the particular activity under review is governmental because it is the implementation by the entity of a specific government program.[108] This approach remains the proper analysis for determining when the *Charter* may apply to an entity which is not *per se* part of government.[109]

i. Cases Applying Proper Analysis to Student Group Booking of University Space

[83] Courts in Canada have since specifically considered whether the *Charter* applies to the regulation of university-owned space in relation to student groups. These cases conduct a detailed section 32 analysis, and the reasoning ought to be adopted here.

[84] In *Lobo v Carleton University*,[110] the university refused to allow a student group to display posters from the "Genocide Awareness Project" in the outdoor Quad area of campus.[111] The Ontario Court of Appeal unanimously dismissed the appeal:

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[106] *Mckinney v University of Guelph*, [1990] 3 SCR 229 at 275 [*Mckinney*] **[Tab 20]**.
[107] *McKinney* at 274 **[Tab 20]**.
[108] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 44 [*Eldridge*] **[Tab 27]**.
[109] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at paras 13-16 [not reproduced].
[110] *Lobo v Carleton University*, 2012 ONCA 498 [*Lobo* CA] **[Tab 28]**.
[111] *Lobo v Carleton University*, 2011 ONSC 5798 at para 2 [*Lobo* SC] **[Tab 29]**.

> As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.[112]

[85] In *BC Civil Liberties Association v University of Victoria*,[113] the university denied the use of campus space to a pro-life student group wanting to hold a "Choice Chain" demonstration because it had breached the university's established policy for booking space. The Court of Appeal unanimously upheld the chamber justice's decision to dismiss the application because the *Charter* did not apply. Leave to appeal to the Supreme Court was dismissed.[114]

[86] The Court of Appeal in *BCLA* conducted a careful analysis of section 32, including a review of cases relating to universities in Canada following *McKinney*. Importantly, the Court of Appeal disposed of arguments that the *Charter* would apply because a statutory body was exercising powers given by its governing legislation, or due to the fact that government might exercise ultimate control over it:

> However, the argument that the *Charter* may be used to challenge all measures undertaken pursuant to the statutory provisions that create or enable a university was rejected in *McKinney*. In that case the Court said:
>
> > ... [T]he mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government. It would significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining the *Charter* to which I have already referred.
>
> ... [T]he fact that the university was specifically empowered to undertake the impugned decision by statute, was considered by the majority to be insufficient to bring the *Charter* to bear on the decision. The simple fact, in the case at bar, that the Policy can be said to have been adopted pursuant to s. 27 of the *University Act*, does not permit students to invoke the *Charter* in an attempt to quash the policy.[115]

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[112] *Lobo* CA at para 4 [emphasis added] **[Tab 28]**.
[113] *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 [*BCLA*] **[Tab 30]**.
[114] *British Columbia Civil Liberties Association, et al. v University of Victoria*, 2016 CanLII 82919 (SCC) **[Tab 31]**.
[115] *BCLA* at paras 24-25 **[Tab 30]**.

[87] The Court of Appeal also rejected the suggestion that because the university is required to act in the public interest, or carry out a public good, that was sufficient to attract the application of the *Charter*. That suggestion was expressly rejected by the Supreme Court of Canada in both *McKinney* and in *Stoffman v Vancouver General Hospital*.[116] In *Stoffman*, the Supreme Court points out that many private entities would be swept under the *Charter* if that were the case:

> If that was by itself sufficient to bring the hospital and all other bodies and individuals concerned with the provision of health care or hospital services within the reach of the Charter, a wide range of institutions and organizations commonly regarded as part of the private sector, from airlines, railways, and banks, to trade unions, symphonies and other cultural organizations, would also come under the Charter. For each of these entities, along with many others, are concerned with the provision of a service which is an important part of the legislative mandate of one or the other level of government.[117]

[88] The Court of Appeal then examined whether the specific policy at issue in the case before it was an example of the university carrying out a specific government objective as required by the Supreme Court decision in *Eldridge*. It notes that the Supreme Court jurisprudence contemplates a "direct" and "precisely-defined connection". In *Stoffman*, the Supreme Court states:

> [T]his is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying [the mandatory retirement policy] and the actions of the Government of British Columbia was the requirement that [the policy] receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.[118]

[89] The Court of Appeal rejected the suggestion that there is <u>any</u> connection between the regulation of outdoor space by the University and a government objective:

> Applying the criteria *Eldridge* suggests we must use, I cannot find the specific impugned acts of the University of Victoria to be governmental in nature. The government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom, s. 43(1) of the *Education (No. 2) Act* 1986 (UK), c. 61, which imposes an obligation on universities and colleges to:

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[116] *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 [*Stoffman*] **[Tab 32]**.
[117] *Stoffman* at 511 **[Tab 32]**.
[118] *Stoffman* at 516 **[Tab 32]**.

> ... take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.
>
> The *University Act*, by contrast, does not describe a specific governmental program or policy which might have been affected by the impugned decisions and there was no evidence before the judge of any legislation or policy that does so. There is no basis upon which it can be said on the evidence that when the University regulated the use of space on the campus it was implementing a government policy or program.[119]

[90] Both *Lobo* and *BCLA* involved issues that are virtually identical to those in this case. The "Genocide Awareness Project" and "Choice Chain" are both projects created by the CCBR that involve the presentation of large, graphic posters about abortions where participants hand out pamphlets and attempt to engage passers-by in discussion.[120] Additionally, the universities in both cases denied the student group's application entirely. In contrast, in this case, the University has only asked the Appellants to bear the direct costs which arise from the Appellants' event.

ii. *Alberta Cases Applying Charter to Universities*

[91] In Alberta, both this Court and the Court of Queen's Bench have issued decisions relating to the application of the *Charter* to universities. It is important to carefully analyze these decisions in order to articulate an accurate statement of the law on the application of the *Charter* to universities in Alberta.

[92] First, this Court's decision in *Pridgen v University of Calgary* did not resolve whether the *Charter* applies to universities in Alberta. That case involved two students challenging the University's decision to impose disciplinary sanctions on the basis that it violated principles of administrative law and on the basis that it violated their section 2(b) *Charter* right of free expression.

[93] The Court issued three separate decisions. Justice Paperny found that the University's decision was not reasonable and a violation of administrative law principles. She then went on to find that the *Charter* applied specifically to disciplinary proceedings undertaken by the university and the university's decision was an unjustified violation of the student's freedom of

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[119] *BCLA* at paras 32-33 **[Tab 30]**.
[120] EKE at A258.

expression.[121] It is important to note that Justice Paperny based her opinion not on a finding that the *Charter* applied because of the *Eldridge* framework, but because the facts related to an exercise of statutory compulsion, specifically in relation to disciplinary proceedings by the University against a student.[122]

[94] Justice McDonald agreed that the University's decision was not reasonable and that the issue could be resolved solely on well-established administrative law grounds. He found that it was "neither appropriate nor necessary" to conduct a *Charter* analysis in this case and he did not endorse the analysis of Justice Paperny.[123]

[95] Justice O'Ferrall also agreed that the University's decision was not reasonable. He added that the University should have considered the student's freedoms of expression and association regardless of whether the *Charter* applied.[124] He agreed with Justice McDonald that a decision on the application of the *Charter* was not necessary and "perhaps even undesirable" in that case.[125]

[96] Therefore, the Court was unanimous in finding a breach of administrative law principles; the majority found that a *Charter* analysis was not appropriate. Justice Paperny's *Charter* analysis in relation to universities was in dissent and based on a set of facts not before this Court now.

[97] In *Wilson v University of Calgary*,[126] Justice Horner considered a judicial review application arising out of a student disciplinary proceeding. Certain students involved in an anti-abortion demonstration were instructed by the University to turn their signs inward, failed to do so, and were then charged with non-academic misconduct.

[98] Justice Horner concluded that the three sets of reasons in *Pridgen* do not cast doubt "upon the requirement to undertake a consideration as to the effect that disciplinary action has on a student's *Charter*-protected rights." In essence this was only an adoption of Justice O'Ferrall's

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[121] *Pridgen v University of Calgary*, 2012 ABCA 139 at para 128 [*Pridgen*] **[Tab 33]**.
[122] *Pridgen* at para 105 **[Tab 33]**.
[123] *Pridgen* at para 177 **[Tab 33]**.
[124] *Pridgen* at paras 179-80 **[Tab 33]**.
[125] *Pridgen* at para 183 **[Tab 33]**.
[126] *Wilson v University of Calgary*, 2014 ABQB 190 at paras 147-48 [*Wilson*] **[Tab 34]**.

reasoning: certain rights, which may incidentally be protected by the *Charter*, should nevertheless be considered in disciplinary proceedings on the basis of administrative law. That was not the majority decision.

[99] The Court in *Wilson* did not conduct an analysis pursuant to section 32 of the *Charter*. Rather, it only refers to the decision in *Pridgen* and the fact that the judicial review was based on the imposition of discipline against students. With respect, the University submits that the decision of the Court in *Wilson* is incorrect. The Supreme Court of Canada has decided that the *Charter* does not apply in general to universities, and its decision in *Eldridge* contemplates the need to carefully consider the degree of government involvement in the particular issue before the Court.

[100] The reasoning from the Queen's Bench decision in *Pridgen* was also referred to in *R v Whatcott*,[127] a decision arising from Mr. Whatcott's arrest following violation of a trespass notice served on him by the university pursuant to the *Trespass to Premises Act*. Mr. Whatcott was handcuffed, placed in a police cell, and was charged with an offence under that legislation. The Court upheld a Provincial Court Judge's finding that Mr. Whatcott's *Charter* rights had been violated. Given the use of provincial trespass legislation and the liberty issues that arose, the Court concluded that the *Charter* applied to the accused. No similar facts exist here.

B. Analysis on Charter Application

[101] The University rejects the Appellants' submission that the *Charter* applies to the decision of the Dean of Students. The analysis of whether the *Charter* applies begins with *Eldridge*: is there the necessary degree of government control over the decision or is the decision implementing a specific government program?

[102] On the first issue, it is clear that the PSLA grants to the Board of Governors a great deal of discretion over the operations of the University. Section 18(1) of the PSLA states that the Board of Governors "may make any bylaws the board considers appropriate for the management, government and control of the university buildings and land." Bylaws made by the University are not subject to approval by the Minister nor the Lieutenant Governor in Council, unlike the

[127] *R v Whatcott*, 2012 ABQB 231 **[Tab 35]**.

policy at issue in *Stoffman*. Section 60(1) provides the Board with a broad mandate to manage and operate the University. The government exercises no day-to-day or regular control over the University's regulation of land and buildings.

[103] On the second issue, the weight of authority suggests that the regulation of the booking of University space for non-academic, extra-curricular activities is not an implementation of a specific government program. The required level of specificity contemplated by the Supreme Court of Canada in *Eldridge* is entirely absent here.

[104] Nothing in the University's governing legislation requires it to provide a forum for extra-curricular expression by students. There is no specific government direction that such a policy be carried out by post-secondaries institutions in Alberta. While the University may choose to provide supports for extra-curricular activities by its students, it does not attract *Charter* scrutiny merely in doing so. This does not mean, however, that students are without protection for fundamental human rights. The University is subject to the *Alberta Human Rights Act* like any other private or statutory body in Alberta.

[105] The Court in *BCLA* distinguished *Pridgen* in part because of the applicable legislation.[128] Presumably, this was based on Justice Paperny's reliance on the PSLA's Preamble as an indication of specific legislative intent in Alberta to deliver a specific government program: post-secondary education.[129] This distinction is illusory. The Preamble to the PSLA does not rise to the level of a specific government objective. Relying on a general, implied requirement in a preamble that applies to all public post-secondary institutions in Alberta would sweep nearly every aspect of the University and other post-secondary institutions under the *Charter*, contrary to the Supreme Court's decision in *McKinney*.

[106] This case does not relate to the imposition of discipline against a student. It does not relate to the potential or actual exclusion of a student from an academic course or program, nor to a decision relating to research, teaching, or academics. As in *BCLA* and *Lobo*, the powers being exercised here go no further than those powers held by any owner of land: the ability to make rules about who can use the land and to place conditions on that use, including the

[128] *BCLA* at para 37 **[Tab 35]**.
[129] *Pridgen* at para 121 **[Tab 33]**.

requirement that the actual costs associated with ensuring safety and security are passed on to that user. Under a proper *Eldridge* analysis, the *Charter* should not apply to this Security Cost Decision.

3. The Security Costs Decision was Reasonable

[107] The University submits that, as there is no *Charter* implication, the general administrative standard of review applies to the Security Cost Decision, and that standard is reasonableness. Alternatively, if the *Charter* is applicable, the approach set out in *Doré* applies.[130] The University agrees with the reviewing Justice that regardless of the applicable standard of review, the Security Cost Decision was appropriate and should not be interfered with.

A. The Security Costs Decision was Intelligible, Transparent, and Justified

i. Law on Reasonableness

[108] Under either a *Dunsmuir* or *Doré* analysis, the reviewed decision must be reasonable. As described by this Court in *Dorval*:

> A decision is reasonable if it is justifiable, transparent and intelligible. The reasons must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible acceptable outcomes that are defensible in respect of the facts and law. The decision must be able to stand up to a somewhat probing examination, and it will be unreasonable only if there is no line of analysis within the reasons that could reasonably lead the decision-maker to its conclusion.
>
> When assessing reasonableness, the reasons must be reviewed as a whole and the reviewing court should not parse the decision or seize on specific errors; a decision-maker is not required to make an explicit finding on each constituent element, and reasons need not include every argument, statutory provision, jurisprudence or other detail. The decision "must be approached as an organic whole, not as a line-by-line treasure hunt for error." The reviewing court should look at the reasons offered or which could be offered in support of the decision and try to supplement them before seeking to subvert them.[131]

ii. Analysis on Reasonableness

[109] The Dean of Student's decision to pass on the costs of security was required by the terms of the Procedure, was based on objective information, and was entirely reasonable. The Dean of Students was faced with a request to absorb a significant security fee (which the University had

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[130] *Doré* **[Tab 21]**.
[131] *Dorval* at paras 39-40, citations omitted **[Tab 6]**.

absorbed the previous year due to a lack of experience)[132] in relation to a non-academic, non-curriculum based activity undertaken by one student group out of more than 500, where the very purpose of the event was to provoke an emotional response from the University community. It simply cannot be said that her decision falls outside the range of possible outcomes based on the facts, University policy, and the law. The Court ought to defer to the internal decision relating to the allocation of limited resources to non-core University operations.

[110] First, it is clear that the Dean of Students carefully considered the arguments presented by the Appellants in its application for reconsideration, and delivered lengthy reasons for upholding the original decision. The decision was issued in a timely manner, and there is no suggestion that any procedural or natural justice rights were violated.

[111] Second, as indicated above, the University is charged with the "appropriate management, government and control of the university buildings and lands".[133] As an owner of lands, the University has a positive legal duty to take care to ensure that individuals on its lands will be reasonably safe.[134] The University is therefore required to undertake an assessment regarding any risks arising from its operations or on its lands in order to ensure the health and safety of any of its staff, students, or visitors.

[112] In considering the approval of the Appellants' proposed 2016 event, the Office of the Dean of Students required the Appellants to undertake a security assessment. That is, it requested that the internal specialized body charged with security on campus provide it with an assessment of risks and of a recommended level of security presence. This was done in accordance with the terms of the Procedure.

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[132] EKE at A247 ("The similar event held by the group last year on March 3-4, 2015 was the first of its kind on this campus ("2015 Event"). Due to the University's inexperience with this type of event, it did not immediately foresee that the 2015 Event would give rise to the significant public safety risk that it, in fact, did. Thus, when the Group applied for approval for the 2015 Event, this Office did not refer the group to UAPS for a security assessment and approved the event. … The costs of the 2015 Event, had they been known at the time of the approval, would have been the responsibility of the Student Group pursuant to the *Student Groups Procedure*").
[133] PSLA, s 18 **[Tab 1]**.
[134] See Judicial Review at para 57 citing, *Occupiers' Liability Act*, RSA 2000, c O-4, ss. 5-6 [not reproduced].

[113] Further, this assessment did not occur in a vacuum. The reviewing Justice found:

> The security assessment and estimated cost for security is well supported by the Record. The proposed event was virtually identical to the 2015 event. UAPS' experience with the 2015 event informed their assessment of what would be required to provide appropriate security for the proposed 2016 event.[135]

[114] It is clear that the 2015 event was volatile with heightened tensions on each side. Interventions were required by UAPS to deal with repeated complaints, near physical confrontations and allegations of invasion of privacy. The lack of any actual violence is most likely due to the security and EPS presence. The security assessment indicated that the amount of security presence was appropriate, and that a similar number of officers would be required for a similar event. Based on that, the Dean of Students decided to impose the actual anticipated cost of security; there was no surcharge, administrative fee, or other inexplicable charge.

[115] That decision was not influenced by the content of the Appellant group's intended message. The University approved other events involving the same message by the Appellant group.[136] There is no evidence that the University would not approve another similar event in a forum without the same security concerns. The Dean of Students emphasized in her decision that:

> The central issue appears to be the fact that the Group is prevented from expressing its views on campus *through this particular large-scale 2-day Event because* it has not raised the funds necessary to cover the costs of that Event. To the extent that the Group's position is that it should have the right to express its views on campus *by any means that the group chooses*, regardless of the risks to property or public safety occasioned by those means and that another party should bear the costs of implementing security measures, it is not accepted.[137]

[116] The reviewing Justice agreed with the Dean of Student's assessment:

> At its heart the Applicants' argument is that they should be able to express themselves on campus wherever and using whatever means they choose without having to pay any security associated costs. This is simply not the proportionate balancing of freedom of expression these circumstances require.[138]

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[135] Judicial Review at para 59.
[136] EKE at A245-46.
[137] EKE at A246 [emphasis in original].
[138] Judicial Review at para 66 [emphasis added].

[117] The Appellants complain that they have been punished because the security risks arise from the actions of others, not from the actions of the Appellant group. That argument ignores the fact that the event was designed to be controversial and to elicit a response from passers-by. The Dean of Students recognized this:

> It is clear that the purpose or effect of the Event is to evoke a vigorous and emotional response from passers-by, and the Group has asked that it take place in the most public, high-traffic location on campus for maximum exposure.[139]

[118] The images produced in the Record demonstrate that the purpose of the Event was to show images that many people would find offensive or disturbing with the intention of engaging them in public debate on the issue of abortion.[140] This Court recently accepted a reviewing justice's finding that a similarly graphic bus advertisement from the CCBR was deliberately designed to disturb:

> The appellant points out that there was no medical or other specific evidence to support the reviewing judge's inference that the advertisement was likely to cause psychological harm to women who had terminated a pregnancy, or considered doing so. That is true, but the inference drawn by the reviewing judge is nevertheless reasonable. The appellant, after all, admits that the ad is intended to be disturbing; its website discloses that hard-hitting messages are a deliberate tactic. Its objective is to portray abortion as "the decapitation, dismemberment, and disembowelment of an innocent pre-born child". It is well within the scope of judicial notice for a reviewing judge to conclude that such advertising would be likely to cause harm to some women.[141]

[119] The Appellants now seek to gain the benefit of that controversy without paying for the corresponding cost. It is not reasonable for the Appellants to expect the University to bear the costs to ensure that the public controversy specifically sought by the Appellants does not result in harm to individuals on University lands.

[120] In any event, the requirement that recognized student groups (and not others) be responsible for the costs of security is clearly set out in the Procedure. While the amount may seem significant without context, the Appellant group provided no information regarding any efforts made to raise funds for the event or any inability to in the future. The Dean of Students offered up reasonable alternatives and possible fundraising options for the event which would

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[139] EKE at A244.
[140] Examples of the images displayed can be seen at EKE at A408-15.
[141] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at para 84 **[Tab 36]**.

reduce security costs.[142] She confirmed that her office is able to provide guidance to the group in relation to fundraising activities.

[121] The reviewing Justice found that it was reasonable to require a security assessment, it was reasonable for UAPS to prepare the security assessment, and the amount of the security cost was reasonable.[143] She further found that it was reasonable in light of the Procedure and the context of University resources to require the Appellants to bear the security costs.[144] The University agrees with the Dean of Students and reviewing Justice that this was a reasonable and responsible decision to make.

B. The Security Costs Decision did not Disproportionately Limit Charter Rights

i. Law on Charter Right to Expression

[122] The Appellants further claim that the Security Cost Decision represents a denial of a positive right to freedom of expression on campus. It is important to examine the scope of the *Charter* right asserted, and the context in terms of its application. The right to free expression means freedom from any unnecessary government restraint; it does not mean free from any cost: "[t]he traditional view, in colloquial terms, is that the freedom of expression ... prohibits gags, but does not compel the distribution of megaphones."[145]

[123] In the context of the fundamental freedom of religion, Justice McLachlin (as she then was) also noted: "Never ... has it been suggested that freedom of religion entitles one to state support for one's religion."[146] A similar conclusion was reached in *Alberta v Hutterian Brethren of Wilson Colony*.[147] The Court recognized the decision in that case would impose financial costs on a religious group that were beyond trivial. However, the majority found no interference with their freedom because "[t]he *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion".[148]

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[142] EKE at A242-3, A246.
[143] Judicial Review at paras 57-59.
[144] Judicial Review at paras 62-64.
[145] *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1035 [not reproduced].
[146] *Adler v Ontario*, [1996] 3 SCR 609 at para 200, dissenting in part [not reproduced].
[147] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] **[Tab 37]**.
[148] *Hutterian Brethren* at paras 95-99 [emphasis added] **[Tab 37]**.

[124] The Supreme Court also discussed the proper analysis for a positive right claim under section 2(b) of the *Charter* in *Baier v Alberta.*[149] The Court noted that what is protected by section 2(b) is substantial interference with an expression, not access to a "particular channel of expression."[150]

ii. Analysis on Charter Right to Freedom of Expression

[125] The Appellants' claim is to a positive right: the right to hold a particular large scale event at the expense of the University. Like in *Baier*, they are seeking a particular channel of expression, not protection from a substantial inference with the freedom to express their opinions in general. As was the case in *Hutterian Brethren*, the Security Costs Decision may impose a financial cost on the Appellants. The costs may not be trivial. However, it is proper for the Appellants to bear the costs associated with their chosen means of expression. It is not proper for the University to subsidize their expression with its limited resources at the expense of other programs and peoples at the University.[151]

[126] For those reasons, even if the University was required to consider the Appellants' *Charter* rights in rendering the Security Cost Decision, the jurisprudence does not support the Appellants' suggestion that the passing-along of actual costs arising from the exercise of free expression represents a violation of that right. The Dean of Students did consider the impact on the Appellants' right to express their point of view on campus, and concluded nonetheless that the cost condition was a reasonable and proportionate balancing given the manner of the event chosen by the Appellants. Again, the decision fell within a range of possible, acceptable outcomes based on the facts and the law. The reviewing Justice was correct to not interfere.

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[149] *Baier v Alberta*, 2007 SCC 31 at para 27 [*Baier*] **[Tab 38]**.
[150] *Baier* at paras 35, 54 **[Tab 38]**.
[151] See Judicial Review at para 64.

V. RELIEF SOUGHT

[127] The University respectfully asks that the Appeal of the reviewing Justice's decision on the Security Cost Decision be dismissed in its entirety with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS _____ DAY OF JULY, 2018

REYNOLDS MIRTH RICHARDS & FARMER LLP

Per: 

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Counsel for the Respondent

Estimate of time required for oral argument 45 minutes.

VI. TABLE OF AUTHORITIES

Authority	Tab
Post-Secondary Learning Act, SA 2003 c P-19.5 [excerpts]	1
UAlberta Pro-Life v University of Alberta, 2015 ABQB 719	2
Dalla Lana v University of Alberta, 2013 ABCA 327	3
Grivicic v Alberta Health Services (Tom Baker Cancer Centre), 2017 ABCA 246 [excerpts]	4
Edmonton Police Association v Edmonton (City), 2017 ABCA 355	5
Edmonton School District No 7 v Dorval, 2016 ABCA 8	6
Burgiss v Canada (Attorney General), 2013 ONCA 16	7
Friends of the Old Man River Society v Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2001 ABCA 107	8
Mitten v College of Alberta Psychologists, 2010 ABCA 159	9
Warman v Law Society of Alberta, 2015 ABCA 368	10
R v Keegstra, [1990] 3 SCR 697 [excerpts]	11
Brace v Williams, 2016 ABCA 384	12
Quan v Cusson, 2009 SCC 62	13
Jones v Fort Saskatchewan (City), 2015 ABQB 194	14
Entreprises Sibeca Inc v Frelighsburg (Municipality), 2004 SCC 61	15
Harelkin v University of Regina, [1979] 2 SCR 561 [excerpts]	16
Paine v University of Toronto, 1981 CanLII 1921 (ON CA)	17
Vinogradov v University of Calgary, 1987 ABCA 51	18
Public Post-secondary Institutions' Tuition Fees Regulation, Alta Reg 273/2006	19
Mckinney v University of Guelph, [1990] 3 SCR 229 [excerpts]	20
Doré v Barreau du Québec, 2012 SCC 12	21
Bonitto v Halifax Regional School Board, 2015 NSCA 80	22
United Food and Commercial Workers, Local 401 v Alberta (Attorney General), 2012 ABCA 130	23
Attorney General (Que.) and Glassco v Cumming, [1978] 2 SCR 605	24
Northern Sunrise (County) v De Meyer, 2009 ABCA 205	25
Liquor Stores Limited Partnership v Edmonton (City), 2017 ABCA 435	26
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 [excerpts]	27
Lobo v Carleton University, 2012 ONCA 498	28
Lobo v Carleton University, 2011 ONSC 5798	29
BC Civil Liberties Association v University of Victoria, 2016 BCCA 162	30
British Columbia Civil Liberties Association, et al. v University of Victoria, 2016 CanLII 82919 (SCC)	31
Stoffman v Vancouver General Hospital, [1990] 3 SCR 483 [excerpts]	32
Pridgen v University of Calgary, 2012 ABCA 139	33
Wilson v University of Calgary, 2014 ABQB 190	34
R v Whatcott, 2012 ABQB 231	35
Canadian Centre for Bio-Ethical Reform v Grande Prairie (City), 2018 ABCA 154	36
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 [excerpts]	37
Baier v Alberta, 2007 SCC 31 [excerpts]	38