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Court of Appeal File No. CA042551
Vancouver Registry

ON APPEAL FROM: THE ORDER OF THE HONOURABLE CHIEF JUSTICE HINKSON OF THE SUPREME COURT OF BRITISH COLUMBIA, PRONOUNCED ON JANUARY 14, 2015

COURT OF APPEAL

BETWEEN:

THE BC CIVIL LIBERTIES ASSOCIATION AND
CAMERON CÔTÉ

APPELLANTS
(PETITIONERS)

AND:

UNIVERSITY OF VICTORIA AND
UNIVERSITY OF VICTORIA STUDENTS' SOCIETY

RESPONDENTS
(RESPONDENTS)

AND:

JUSTICE CENTRE FOR CONSTITUTIONAL
FREEDOMS

INTERVENOR

FACTUM OF THE INTERVENOR
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

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CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

The Intervenor adopts the chronology set out in the Factum of the Appellants.

OPENING STATEMENT

The public university has aptly been described as being "inherently, and rightly, a battleground for clashing ideas".[1] "[T]he university environment, with its focus on learning and knowledge, should serve as a bastion *par excellence* for freedom of speech and expression."[2] The *University Act*, R.S.B.C. 1996, c. 468 ["the *Act*"] recognizes that the peaceful expression of clashing ideas is not confined to classroom and curriculum. Section 27(2)(t) of the *Act* authorizes the University of Victoria [UVic] to *regulate, prohibit and impose requirements* in respect of activities and events taking place on its property. This regulatory power and the *Outdoor Space Policy* made pursuant to it both recognize that student expression such as the peaceful pro-life advocacy at issue in this case will necessarily take place in the university public square.

Does administrative law have a role to play if a university unreasonably denies students the fundamental freedom to peacefully assemble and express their views in that public square? The court below held that UVic enjoys "autonomous operational decision-making" to regulate expressive activity in its public campus space. If that is correct – if universities are exempt from the overarching and judicially enforceable requirement to take the fundamental value of free expression into account in their decision-making - then they may be unreasonable and arbitrary in limiting or prohibiting student expression. The Intervenor, whose intervention is focused on the second ground of appeal, submits that UVic's decision-making in this area is not "autonomous". The Intervenor submits that even if UVic's decisions at issue on this appeal do not fall within s. 32 of the *Charter*, they are still subject to administrative law review and remedy where, as here, the university unreasonably exercises its statutory power to regulate expressive activities on its public forum used for that purpose by failing to take into account, or to reasonably take into account, the fundamental Canadian value of freedom of expression.

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1 Duff and Berdhal, *University Government in Canada* (U of T Press, 1966) at 86.
2 Kellen, N.W. "If it Looks Like a Duck: Traditional Public Forum Status of Open Areas on Public University Campuses" (2005), 33 Hastings Constitutional Law Quarterly 1 at p. 45.

PARTS 1, 2 and 4: STATEMENT OF FACTS, ISSUES and ORDER SOUGHT

1. The Intervenor adopts the Statement of Facts, issues on appeal and order sought in the Factum of the Appellants.

PART 3: ARGUMENT

A. Introduction

2. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 held that the protection of unborn human life is a valid legal objective that "hangs in the balance" in the shaping of public policy about abortion (per Beetz and Estey JJ, at p. 110-114; 123-28), that there is a "public interest in the protection of the unborn" (per McIntyre and LaForest J., at p. 146), that the state has a "compelling legal interest in the protection of the foetus" (per Wilson J. at p. 183) and that the "protection of foetal interests by Parliament is also a valid governmental objective" (per Dickson CJ and Lamer J. at p. 75). In *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. 925 at para. 12, the majority, citing *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, stated that the resolution of the debate about the personhood of the unborn child is "fundamentally normative" and must be resolved by bodies other than courts based on the open consideration of "broad social, political, moral and economic choices". In *R. v. Watson*, 2008 BCCA 340, this Court stated that "[b]eliefs about the meaning and value of human life are fundamental to political thought and religious belief" (para. 26). "[T]he right to express opposition to abortion is a constitutionally protected right" (para. 91). Difficult though the abortion issue is, there must be room for free and open discussion about the nature of unborn human life and about whether and to what extent that life should be valued and protected within our culture and our legal system.

3. One might reasonably expect our public universities to be a *locus* of peaceful, vigorous and provocative debate on so important an issue. At UVic, however, the pro-life advocacy of Youth Protecting Youth [YPY] was met with more than

the "grapple" of argument.[3] From 2008-2011, opponents succeeded in having YPY censured and punished by the self-declared pro-choice University of Victoria Student Society [UVSS] amid allegations that YPY's expression would "upset, offend and disturb individuals on campus and create hostility" and based on the UVSS's own unique interpretation of the loaded term "harassment": Reasons for Judgment [RFJ], paras. 25, 29, 37, 39-41,43, 46-50, 53, 54, 58-62; *John Dixon Affidavit #2,* Appeal Book [AB], pp. 19-26; *Dale Robertson Affidavit #1*, AB, pp. 33-34, 36-67; 69-70; *Kayleigh Erickson Affidavit #1*, AB, pp. 120-158.

4. The UVSS's repeated condemnation of YPY preceded UVic's issuance in September 2012 of its *Booking of Outdoor Space by Students Policy* [the *Policy*]. During the consultations leading to the *Policy*, the UVSS raised specific concerns about YPY with UVic. The final *Policy* provided that prior UVSS "sanction" was by itself sufficient to justify UVic's refusal to book outdoor space: cl. 15.00(b)(iv); RFJ, paras. 63-68. In effect if not purpose, this targeted YPY as there was "no evidence that any other student group had ever been sanctioned by the UVSS prior to September 2012": RFJ, para. 69.[4] On January 31, 2013, UVic relied on cl. 15.00(b)(iv) when it withdrew the permission it had given YPY to hold a pro-life event on campus, following its receipt of private objections by UVSS in reliance on that clause: RFJ, paras. 76-79: *Dunsdon Aff. #1,* AB, pp. 115-116.

5. Peaceful, public and vigorous pro-life advocacy is just as entitled to protection under the fundamental Canadian value of free expression as is pro-choice advocacy. It is just as entitled to protection as was the speech that was so unpopular in some parts of the United States during the civil rights movement, in which context the US Supreme Court held that bullying against a message – in effect, a heckler's veto - could not justify the sanction or restraint of that message by authorities taking the path of least resistance based on the reactions the

[3] "Let her [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter. Her confuting is the best and surest suppressing": *Areopagitica, Poetry and Essential Prose of John Milton* (2007) (Mod. Lib. Ed), p. 961.

[4] The only group sanctioned following the *Policy* was the Catholic Student Society, for making available pamphlets pertaining to their faith: *Fitzmaurice Affidavit #1*, AB, pp. 29-31.

reactions the speech elicited. Free speech may not be denied because it is provocative, upsets people's settled views or is met with hostility: *Terminiello v. Chicago* 337 U.S. 1 (1949) at 4; *Cox v. Louisiana*, 379 U.S. 536 (1965) at 551.

6. If UVic enjoys "autonomous operational decision-making" to regulate expressive activity in its public campus spaces – if it has unfettered discretion – then UVic may in law make its decisions detached from the rule of law and the judicial enforcement of foundational public values governing our free and democratic society. A university may thereby become a lesser and distorted version of itself, free to capitulate and even embrace ideological opposition to a particular worldview, free to succumb to the human weakness described by Holmes J.:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.... [Cited in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at para. 14]

7. Canadian administrative law offers protection against that profound mischief arising on our public university campuses. Even if s. 32 of *Charter* is not engaged in respect of UVic, administrative law provides meaningful protection for freedom of expression where a university, as here, exercises statutory authority to regulate expressive activities in its public square. Three submissions support this position. First, UVic's regulation of the use of campus public space by students for expressive purposes is subject to judicial review whether or not UVic is "government" for the purposes of s. 32 of the *Charter*. Second, the principles of judicial review include determining whether UVic has reasonably taken into account the fundamental value of freedom of expression. Third, UVic's *Policy* and the decision refusing permission to conduct YPY's event were unreasonable because they failed to consider, or to properly consider, freedom of expression.

B. UVic's decisions are subject to judicial review

8. Lord Diplock once remarked that "progress toward a comprehensive system of administrative law ... I regard as having been the greatest achievement of the

English courts in my judicial lifetime": *R. v. Inland Revenue Commissioners*, [1982] A.C. 617 at 641. "The exact limits of the ancient remedy of certiorari had never been and ought not to be specifically defined": *R. v Criminal Injuries Compensation Board,* [1967] 2 All ER 770 at 778. Manifestly, s. 32 of the *Charter* does not dictate the province of administrative law. The common law charts its own path. Judicial review is available if a court finds a decision has a "public element, which can take many different forms": *R. v. Panel on Takeovers and Mergers* [1987] Q.B. 815 (C.A.) at 838 [*Datafin*].

9. The finding that a decision has a "public element" is of course a conclusion. It is a judicial policy judgment that, given the nature of the decision, administrative law should be in play as a "flexible instrument for doing justice" to protect the individual if an administrative decision capable of going "off the rails" is not fair or reasonable: *Datafin*, pp. 827, 845-46, 849. The finding that a decision is "public" means that the decision is *not* properly treated as being "private and consensual"; that it would be wrong to treat the decision in question as existing in a cocoon, an enclave or a zone of pure contract; that the decision is not an "Alsatia" where the "King's writ does not run": *Datafin* at 828, 838-39, 847.

10. A variety of overlapping criteria inform the public function test. In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, Stratas J.A. held that a decision is more likely to be labeled "public" where, *inter alia*, it is not essentially a private commercial matter, the decision-maker is public in nature and is charged with public responsibilities, the decision emanates from a statute, a public law remedy can be suitably applied, the decision is connected with compulsory power over a defined group or the matter has a serious exceptional effect on the rights or interests of a broad segment of the public": *Air Canada*, para. 60; *West Toronto Football Club v. Ontario Soccer Assn.* 2014 ONSC 5881. In *Judicial Review of Administrative Action* (5th ed, 1995) [*de Smith*] at 167-68, the authors write:

> A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or

> participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services such as health care, education and personal social services, from funds raised by taxation. A body may perform functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection and licensing. [Emphasis added; footnotes omitted]

11. Even if UVic is not "government" for the purposes of s. 32 of the *Charter*, it is manifestly a public body exercising certain public functions amenable to judicial review. Viewed broadly, there is no question that a public university's legislative underpinning and funding are provided by government. Public universities are "public bodies" under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, Schedule 1. They exercise monopolistic degree-granting powers. Their powers of student expulsion can have life-altering consequences for a student. A public university is functionally no less "public" than colleges or other post-secondary institutions that are subject to the *Charter*, and that is especially so in this case where the university derives its powers from statute and no longer incorporates the ancient office of Visitor.[5]

12. "Universities enjoy no special status on judicial review. If the decision is reviewable in the first place, then general principle determines [the court's] authority to interfere for procedural unfairness or on account of the reasoning": *Ahmed v. Dalhousie College and University*, 2014 NSSC 330 at para. 42. "Although the President of York University is not subject to governmental control, she is in other respects subject to the regime of public law": *Freeman-Malloy v. Marsden et al*, [2006] O.J. No. 1228 (C.A.) at para. 25. See *Baharloo v. UBC*, 2014 BCSC 762 at paras. 55-56 and *Wilson v. University of Calgary*, 2014 ABQB 190. As stated by La Forest J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 268: "It was not disputed that the universities are statutory bodies

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[5] Compare *Page v. Hull University Visitor* [1993] A.C. 682; de Smith, pp. 183-84; *Riddle v. University of Victoria* (1978), 84 D.L.R. (3d) 164 (B.C.S.C.) at para. 4.

performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*."[6]

13. The "certain decisions" referenced in *McKinney* must at least include a university's decisions taken pursuant to its statutory power to "regulate, prohibit and impose requirements" in respect of "activities and events" in outdoor spaces: *Act*, s. 27(2)(t)(i). There is no more quintessential public law function than the statutory power to "regulate", a power that neither the *Business Corporations Act*, S.B.C. 2002, c. 57 nor the *Society Act*, R.S.B.C. 1996, c. 433 (*Soc. Act*) confers upon those private entities, except to "regulate" meetings: see *Business Corporations Regulation*, B.C. Reg. 65/2004, s. 11.1; *Soc. Act*, Sch. B., s. 31.1. The regulatory decisions here – the creation of the *Policy* and the decisions made pursuant to it - are inherently public. They do not concern internal matters like grading or student evaluation: *Maughan v. UBC*, 2009 BCCA 447; *Faculty Association of UBC v. UBC*, 2010 BCCA 189. They are in pith and substance decisions involving the regulation on the campus public forum of the most basic common law liberty – the freedom to "utter, and to argue freely, according to conscience" (*Areopagitica*, supra, p. 960) – a liberty that the *University Act* must have intended universities to model *par excellence*. As shown by the facts here, these are decisions where the failure to comply is tied to the threat of discipline for "non-academic misconduct" for the student affected.[7]

14. To merely label this statutory power "domestic" (UVic Factum, para. 42) ignores its nature, its statutory and regulatory foundation, its public face, its impact on the civil rights and academic future of students and the unequal "bargaining power"

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[6] La Forest J.'s subsequent statement in *McKinney* at p. 268 that the prerogative writs "did not deal with substantive rights like those enshrined in the *Charter*" must be seen today as having given way to the principle in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, discussed in Part C, below.

[7] UVSS submits the *Policy* only affects "clubs" not "students" but also says clubs have no separate legal status: UVSS Factum paras. 6, 15, 83-86. This submission, not advanced by UVic, is internally discordant and ignores that Mr. Cote was given a personal disciplinary warning: AB, pp. 117-18. See also *Healy v. James*, 408 US 169 (1972) at 182-183.

between the parties. It obscures the reality that all administrative regimes are "domestic" in that they involve regulatory power exercised over a limited constituency. To exclude judicial review by appealing to academic freedom is also unpersuasive. As stated in *Pridgen v. University of Calgary*, 2012 ABCA 1349 at para. 116: "there is no legitimate conceptual conflict between academic freedom and freedom of expression". See also *Healy v. James* 408 U.S. 169 (1973). "Allowance of free speech within the open and accessible areas on campus does not threaten the effectiveness of the university; quite the opposite, it ensures the exposure of students and faculty to a diversity of ideas".[8] There could be no more "public" function than the exercise of a public university's statutory power to regulate student public expressive activity on its public forum used for that very purpose pursuant a *Policy* tied to the threat of student discipline for non-compliance. The decisions are subject to judicial review.

C. <u>UVic was required to consider students' free expression interests</u>

15. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 56, the Court stated :

> ....though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* .

16. *Baker* clarified that judicial review of discretionary decisions is no longer limited (if it ever was) to procedure and formal jurisdiction. Discretionary decisions are to be assessed also in light of the common law constitution.[9] *Baker's* reference to "the fundamental values of Canadian society" recognizes that certain fundamental values which are today reflected in the *Charter* infuse the legal order and did not suddenly materialize in 1982. "The general view of the rule of law as the rule of fundamental values which documents like the *Charter* articulate

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[8] Kellen, fn. 1, above, at page 45. See generally Kellen at pp. 40-45.

[9] Just one example of this may be seen in de Smith's discussion of private rights "affected by a public interest", and the cases in which common law courts ensured that private powers over certain common callings were exercised reasonably: pp. 159-160.

without exhausting ... underpins the whole of [*Baker*]": Dyzenhaus, Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002), 27 Queen's L.J. 445 at 498 [*Dyzenhaus*].[10] This answers any argument that it is "incoherent" to apply such values if s. 32 of the *Charter* does not apply: UVSS Factum, para. 73. That argument wrongly assumes that the consideration of fundamental values in Canadian public law turns on the scope of s. 32 of the *Charter*.

17. *Baker* does pose the challenge of identifying which values are so fundamental that they must in a given context be considered in exercising discretion. But on these facts, the task is not difficult. Freedom of expression is a basic individual right and a fundamental value of our legal system, a value with both "instrumental and intrinsic justifications": *R. v. Keegstra*, [1990] 3 S.C.R. 697 at para. 181. It precedes and transcends the *Charter*. As noted in *Dolphin Delivery* at para. 12: "Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society." [emphasis added] See also *Pridgen,* per O'Ferrall J.A. at paras. 178-84.

18. McLachlin J. in *Keegstra* explicitly described freedom of speech as a "fundamental Canadian value": para. 190; see also Sossin and Friedman, "*Charter Values and Administrative Justice*" (2014), Osgoode L.S. Research Paper Series, Paper 62, at pp. 21-22. Freedom of expression is precisely the kind of transcendent public law value the Court had in mind in *Doré v. Barreau du Quebec*, 2012 SCC 12 at para. 28 when, in referring to *Baker*, it recognized that: "administrative decision-makers were required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion (*Baker*, at paras. 53-56)." [Emphasis added] As in *Baker*, the norm here is also an international norm reflected in the *Universal Declaration of Human Rights* (art. 19) and the *International Covenant on Civil and Political Rights* (art. 19).

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[10] See also Cartier, "The Baker Effect: A New Interface between the *Canadian Charter of Rights and Freedoms* and Administrative Law – the Case of Discretion", c. 3 in Dyzenhaus, *The Unity of Public Law* (2004) at 76: "[A]dministrative law was itself born out of careful attention to fundamental values".

19. If UVic's decision-making under the *Policy* is subject to judicial review, there is no principled reason why UVic should not be required to reasonably weigh the fundamental value freedom of expression in its regulatory decision-making on matters that are inherently expressive in nature. If "best interests of the child" was a fundamental value required to be taken into account in exercising discretion under the immigration statute in *Baker*, then *a fortiori* should courts be vigilant to ensure that the fundamental value of freedom of expression is taken into account by a university in making decisions for the very purpose of regulating expressive activity on a campus public forum pursuant to the *Act*. Indeed, it is difficult to imagine a place where the fundamental value of free expression is more necessary than at a university, particularly in light of the rationale for that freedom so aptly described by Mill and endorsed in *Dolphin Delivery* at para. 13:

> ...ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

D. UVic's *Policy* and its January 31, 2013 decision withdrawing permission for YPY to conduct its expressive event were unreasonable

20. *Dyzenhaus*, *supra*, has described the *Charter* as a document that "makes more explicit the fundamental values that were already part of the common law Constitution" (p. 489). Presaging *Doré*, the author observes that the superior courts' role is to assess whether a discretionary decision was reasonable because the value "figured in [the] decision and in the right kind of way": p. 492. *Doré* has described this as a "proportionality exercise": *Doré*, para. 56.

21. The clearest and most reliable evidence as to what "figured into the decision" here is found in Mr. Dunsdon's January 31, 2013 letter revoking permission to conduct the event. UVic revoked its decision granting permission to conduct the two-hour event based solely on the UVSS having previously sanctioned YPY:

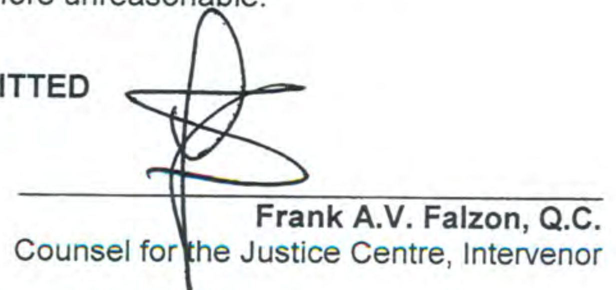
> Based on the UVSS's motion and the bolded provisions of the Booking of Outdoor Space by Students policy, I am cancelling your February 1, 2013 outdoor space booking. Prior to YPY submitting future space booking

> requests, the university will require written confirmation from the UVSS indicating YPY's space booking privileges... [Emphasis added]

22. This letter clearly demonstrates that the denial of expression was based on the fettering of UVic's independent discretion. It was based solely on prior judgments by a third party with its own idiosyncratic processes, and on record as opposing the pro-life position. This fettering was embedded into the *Policy* itself by way of a provision that isolated YPY, the only group capable of being captured by the *Policy* when it was created. The letter does not reflect any exercise of considered judgment or consideration of free expression. It reflects the path of least resistance - capitulation to a form of the "heckler's veto".

23. *Baker* held that "for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker must consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them" (para. 75). Substitute "students' free expression" for "children's best interests", and both the test and the outcome in this case are the same as they were in *Baker*. In this case, no rational exercise of the regulatory discretion to regulate expression in university public space can be reconciled with a decision refusing to allow a student group to peacefully exercise that fundamental freedom based solely on prior "sanction" by a majority student association whose decisions are made in accordance with its own internal processes, professed worldview and internal dynamics. UVic's utter deference to that external process in the *Policy* and in the January 31, 2013 refusal decision necessarily failed to consider or reasonably consider the students' free expression interests. They were therefore unreasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Dated at Victoria, British Columbia, this 10th day of September, 2015.

LIST OF AUTHORITIES

Case law	Paragraph No(s).
Ahmed v. Dalhousie College and University, 2014 NSSC 330	12
Air Canada v. Toronto Port Authority, 2011 FCA 347	10
Baharloo v. UBC, 2014 BCSC 762	12
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817	12 (fn 6), 15-19, 23
Cox v. Louisiana, 379 U.S. 536 (1965)	5
Doré v. Barreau du Quebec, 2012 SCC 12	18, 20
Faculty Association of UBC v. UBC, 2010 BCCA 189	13
Freeman-Malloy v. Marsden et al, [2006] O.J. No. 1228 (C.A.)	12
Healy v. James, 408 US 169 (1972)	13 (fn 7), 14
Maughan v. UBC, 2009 BCCA 447	13
McKinney v. University of Guelph, [1990] 3 S.C.R. 229	12, 13
Page v. Hull University Visitor [1993] A.C. 682	12 (fn 5)
Pridgen v. University of Calgary, 2012 ABCA 1349	14, 17
R. v Criminal Injuries Compensation Board, [1967] 2 All ER 770	8
R. v. Inland Revenue Commissioners, [1982] A.C. 617	8
R. v. Keegstra, [1990] 3 S.C.R. 697	17, 18
R. v. Morgentaler, [1988] 1 S.C.R. 30	2
R. v. Panel on Takeovers and Mergers [1987] Q.B. 815 (C.A.)	8, 9
R. v. Watson, 2008 BCCA 340	2
R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573	6, 17, 19
Riddle v. University of Victoria (1978), 84 D.L.R. (3d) 164 (B.C.S.C.)	11 (fn 5)

Terminiello v. Chicago 337 U.S. 1 (1949)	5
West Toronto Football Club v. Ontario Soccer Assn. 2014 ONSC 5881	10
Wilson v. University of Calgary, 2014 ABQB 190	12
Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.), [1997] 3 S.C.R. 925	2

Statutes and International Documents

Business Corporations Regulation, B.C. Reg. 65/2004, s. 11.1	13
Freedom of Information and Protection of Privacy Act R.S.B.C. 1996, c. 165, Schedule 1	12
International Covenant on Civil and Political Rights (1966)	18
Society Act, R.S.B.C. 1996, c. 433, Schedule B, s. 31(1)	13
Universal Declaration of Human Rights (1948)	18
University Act, R.S.B.C. 1996, c. 468	Opening Statement 13

Secondary Sources

Cartier, G. "The Baker Effect: A New Interface between the *Canadian Charter of Rights and Freedoms* and Administrative Law – the Case of Discretion", c. 3 in Dyzenhaus, ed, *The Unity of Public Law* (2004)	16 (fn 10)
De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (1995)	10, 11 (fn 5)
Duff and Berdhal, *University Government in Canada* (U of T Press, 1966)	Opening Statement fn 1
Dyzenhaus, D. "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002), 27 Queen's L.J. 445	16, 20
Kellen, N.W. "If it Looks Like a Duck: Traditional Public Forum Status Statement,of Open Areas on Public University Campuses" (2005), 33 Hastings Constitutional Law Quarterly 1	Opening (fn 2), 13 (fn 8)
Milton: *Areopagitica*, in *Complete Poetry and Essential Prose of John Milton* (2007) (Modern Library Edition)	3 (fn 3), 13

Sossin and Friedman, "*Charter Values and Administrative Justice*" (2014), Osgoode L.S. Research Paper Series, Paper 62

APPENDIX

ENACTMENTS RELIED UPON

Business Corporations Regulation, B.C. Reg. 65/2004

11.1 The directors may meet together for the conduct of business, adjourn and otherwise regulate their meetings as they think fit, and meetings of the board held at regular intervals may be held at the place, at the time and on the notice, if any, that the board may by resolution from time to time determine.

Freedom of Information and Protection of Privacy Act R.S.B.C. 1996, c. 165

Schedule 1: In this Act...

"public body" means...

(c) a local public body

"local public body" means

(c) an educational body

"educational body" means

(a) a university as defined in the University Act,

Society Act, R.S.B.C. 1996, c. 433

Schedule B

31(1) The directors may meet at the places they think fit to conduct business, adjourn and otherwise regulate their meetings and proceedings, as they see fit.

University Act, R.S.B.C. 1996, c. 469

27 (1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.

(2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:

(t) to regulate, prohibit and impose requirements in relation to the use of real property, buildings, structures and personal property of the university, including in respect of

(i) activities and events.

***International Covenant on Civil and Political Rights* (1966), Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

***Universal Declaration of Human Rights* (1948)**

Article 19 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20 (1) Everyone has the right to freedom of peaceful assembly and association.