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APPLICANTS	UALBERTA PRO-LIFE, AMBERLEE NICOL and CAMERON WILSON
RESPONDENT	THE GOVERNORS OF THE UNIVERSITY OF ALBERTA
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WRITTEN SUBMISSIONS OF THE RESPONDENT
24 FEBRUARY 2016 DECISION
(DEAN OF STUDENTS)

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I. INTRODUCTION

[1] The issue before the Court is whether an administrative decision-maker at the University reasonably exercised her discretion to require the Applicant student group to pay for the actual costs of security for a planned non-academic, extra-curricular event, as required by the relevant policy framework. The Applicants attempt to frame this judicial review as a case of the University intentionally stifling their ability to engage in debate on controversial issues on campus. The Record before the Court does not support this.

[2] The Applicants ignore several important legal and contextual issues in their written arguments which are central to the proper analysis and disposition of this judicial review. The University's core function relates to its mandate to provide outstanding post-secondary education to its students, and to support the University's mandate as a comprehensive academic and research institute under the *Post-secondary Learning Act*, SA 2003, c P-19.5 ("PSLA"). As discussed in greater detail below, the University exists in a closed funding system with limited resources. The University is given broad powers to manage its operations and lands, and decisions made by the University or its officers are entitled to considerable deference.

[3] The operations of the University at issue in this judicial review are not those of the government as defined in section 32 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). At its heart, the issue here is whether the University's decision to require a student group to pay for the actual costs associated with an extra-curricular activity fell within the range of reasonable decisions available to the University, keeping in mind the contextual factors noted above.

[4] For the reasons set out below, the Respondent submits that the answer must be yes, and that the judicial review must be dismissed.

II. FACTS

[5] The University adopts the general contextual facts set out in paragraphs 5-11 of the Brief of Law relating to the decision of the Discipline Officer filed in this action. Pursuant its statutory powers, the University created policies and procedures in relation to the regulation of the lands owned by the University, including the use of those lands by affiliated and non-affiliated groups. The University has also created policies and procedures relating to extra-curricular activities by registered students of the University. It is important to note that the issue in this judicial review is not the delivery of academic programs by the University to its students, nor discipline relating to students, but rather regulation of extra-curricular activities on campus by students.

[6] The General Faculties Council of the University approved the *Student Groups Procedure* ("Procedure") pursuant to its delegated powers from the Board of Governors and the PSLA.[1] That *Procedure* provides for the administration and regulation of the activities of "recognized" students groups on campus. A group of students may apply for official recognition by the University on certain conditions. Student groups that receive recognition are accorded a number of benefits which are not available to other student groups who have not sought or obtained recognition. Some of the exclusive benefits that recognized student groups receive include the ability:

a. To book University-owned space for the purpose of meetings and events;
b. To use the University's institutional liquor licences and the ability to receive permission for gaming events;
c. To use the University's name and insignia;
d. To exclusive use of the group's name on campus;
e. To rent University property and equipment; and
f. To use of campus facilities for solicitation of membership.

[1] Certified Record of Proceedings ("CRP") at Tab 16, page 174.

[7] Student groups on campus are not required to apply for recognition as noted in the Procedure, but the associated privileges granted under the Procedure are only available to recognized student groups. Recognition by the University and the associated privileges, however, come with associated responsibilities as set out in the Procedure, including the requirement:

a. To abide by all University policies and procedures—which includes the *Procedure* itself—and all applicable municipal bylaws, federal and provincial laws;
b. To uphold the good name of the University;
c. To live up to the group's stated purpose by acting in accordance with the group's constitution, bylaws and policies;
d. To respect the safety, security and inherent dignity of each member of the University community;
e. To be responsible for members' conduct when members are representing the group, and therefore the University, on and off campus; and
f. To manage the group's assets (financial and otherwise) in a responsible and ethical manner.

[8] The University approved the Applicant group's application for recognition and it is therefore subject to the provisions of the Procedure. The Procedure also 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 the Student Group for its members and their guests, on or off campus, including but not limited to, social events, demonstrations, events involving alcohol, travel, fundraising, guest speakers, physical activity or events involving the issuance of a gaming licence from the Alberta Gaming and Liquor Commission (raffle, 50-50 draw, casino).

[9] 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.
>
> The Dean of Students has the authority to deny or revoke approval for a Student Group Event or Activity (whether an Event or Activity is in progress or is schedule to occur) if the Dean of Students reasonably believes that the Student Group Event or Activity has caused or will cause Risk to Persons or Risk to Property or Reputation.[2]

[10] As noted above, the Procedure itself contemplates that the Dean of Students may require the presence of University of Alberta Protective Services ("UAPS") or the Edmonton Police Service ("EPS") depending on the nature of the event, and requires that the student group bear the cost of such presence. To be clear, this applies to any recognized student group holding an event on campus.

[11] The process for requesting approval for a student event can be seen in the Record. Generally, a representative of the student group is required to submit certain information online, which is then considered by the Office of the Dean of Students. Where the requested event involves the booking of outdoor space, the University's *Outdoor Site Booking Procedure* applies.[3] That Procedure states, in part:

> Submitting a request does not approve the event itself, only the reservation of space. …All Student Group events must be approved by the Office of the Dean of Students – see Student Groups Procedure or contact the Student Event Risk Management Coordinator.

[12] The Applicants were aware of the requirement to seek approval for their events, and the Record indicates that the Office of the Dean of Students has approved all of the Applicant's

[2] CRP at Tab 16, page 229 (emphasis added).
[3] **Respondent's Book of Authorities ("BoA"), Tab 16**.

requested events including for the 2015-2016 academic year including a movie night, a workshop, a guest speaker, a bake-sale and a debate.[4]

[13] The event at issue in this judicial review was, in essence, a large two-day demonstration in the main quad on campus. The display was to involve large signs including graphic photographs of aborted fetuses, and would involve the provision of pamphlets and other visual materials to passers-by.

[14] It is important to note that the proposed event was essentially the same as the one approved by the Office of Dean of Students during the 2014-2015 academic year, for the same location and based on the same materials. The Applicants launched a Court of Queen's Bench action in relation to that event, which was discontinued with costs following an unsuccessful application for an injunction in 2015.[5]

[15] The proposed 2016 event was originally planned for February 23-24, 2016. The Applicants submitted their request for approval to the Office of the Dean of Students on January 11, 2016.[6] On January 14, the Student Event Risk Management Coordinator emailed the Applicant to gather additional information in order to process the request.[7] A response was received from a representative of the Applicant group on January 15, 2016 providing additional information.[8]

[16] The Student Event Risk Management Coordinator sought additional information by email on January 21, 2016, but no response was received.[9] That request for information referred to the Procedure and required the Applicant group to work with UAPS to have a security assessment done for the event. The Student Event Risk Management Coordinator sent a follow-up email on February 4, 2016, again setting out certain requests for information

[4] CRP at 5-6.
[5] *UAlberta Pro-Life v University of Alberta,* 2015 ABQB 719 **[BoA, Tab 7]**.
[6] CRP at 19-20.
[7] CRP at 66.
[8] CRP at 68.
[9] CRP at 69.

including the requirement for the security assessment.[10] A response was then received from a representative of the Applicant Group on February 4, 2016, which included images that the group intended to display at the event. A security assessment form was submitted by the Applicant Group "under protest" on February 3, 2016, 13 days after they were notified of the requirement to submit it.[11] The security assessment form referred to the 2015 event and the fact that counter-demonstrators had "blockaded" the event.

[17] The Student Event Risk Management Coordinator replied the following day confirming receipt of the materials, and requesting additional information in relation to the security assessment.[12] A response was received on February 8, 2016 providing the additional information.

[18] UAPS completed its security assessment on February 12, 2016, four days after the final information was submitted by the Applicant group.[13] That security assessment was provided to the Office of the Dean of Students, and the Dean of Students issued her decision on the same day.[14]

[19] The Dean of Students approved the event, on conditions. The Dean of Students required that the location of the event be moved to the north end of the main quad, and that the Applicant group cover the costs of security personnel identified as being necessary by UAPS as required by the Procedure. The decision required the payment of a deposit towards the cost of security personnel, and raised the possibility of relocating the demonstration to another location to reduce the security costs. The decision also attached the security assessment and notified the Applicant group of its right to request a reconsideration of the decision within 15 business days.

[10] CRP at 70.
[11] CRP at 52-54.
[12] CRP at 80.
[13] CRP at Tab 13.
[14] CRP at Tab 2.

[20] The Applicant group requested reconsideration by the Dean of Students.[15]

[21] The Dean of Students issued her decision on the request for reconsideration on February 24, 2016, and upheld the imposition of the condition regarding the Applicant group being responsible for the costs of the necessary security personnel.[16]

III. ISSUES

[22] In disposing of this judicial review, the Court must determine the following:

a. Does the *Charter* apply to the University's decision under the Procedure?
b. What is the appropriate standard of review in respect of the decision made by the Dean of Students on the Applicants' request for reconsideration under the Procedure?
c. Was the Dean of Students' decision reasonable?

[23] For the reasons set out below, the *Charter* does not apply to the decision made by the University under the Procedure, and the standard of review of the decision is reasonableness. The decision of the Dean of Students was undoubtedly reasonable, and fell within a range of reasonable outcomes available to the Dean of Students based on the facts, the law, and the Procedure.

IV. ARGUMENT

A. The *Charter* Does Not Apply

i. The Proper Framework for the Charter Analysis

[24] The Applicants' brief assumes that the decision of the Dean of Students under the Procedure is one that attracts the application of the *Charter*. No section 32 analysis is offered by the Applicants to support this conclusion. Section 32 states:

[15] CRP at Tab 4.
[16] CRP at Tab 1.

This Charter applies:

(a) To the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[25] Universities are not part of the government *per se*. This issue was decided by the Supreme Court of Canada in *McKinney v University of Guelph*.[17] The majority of the Supreme Court of Canada ruled that universities "do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*."[18] The majority came to conclusion that the *Charter* did not apply despite the evidence referred to by Wilson J. in dissent that universities were heavily funded and regulated by government. The majority decision 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.*[19]

[26] The Supreme Court has also made it clear that there are two situations where the *Charter* will apply to a non-government entity implementing a government policy: first, where the non-governmental entity must be considered to be a part of government due to the degree of control over it exercised by the government; or second, where the particular activity under review is governmental because it is the implementation by the non-governmental entity of a specific government program.[20] This approach was confirmed by the Supreme Court in *Greater Vancouver Transportation Authority v Canadian Federation of Students*.[21]

[27] The reasoning in *Eldridge* remains the proper analysis for determining when the *Charter* may apply to an entity which is not *per se* part of government under section 32 of the *Charter.*

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[17] *McKinney v University of Guelph*, [1990] 3 SCR 229 [*McKinney*] **[BoA at Tab 6]**.
[18] *McKinney* at 275 **[BoA at Tab 6]**.
[19] *McKinney* at 274 **[BoA at Tab 6]**.
[20] *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 **[BoA, Tab 17]**.
[21] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 **[BoA, Tab 18]**.

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

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

[29] In *Lobo v Carleton University*,[22] members of a pro-life student group appealed a chamber justice's decision that struck portions of their claim pertaining to *Charter* breaches. The university in that case refused to allow the group to display posters from the "Genocide Awareness Project" in the outdoor Quad area of campus.[23] The Ontario Court of Appeal unanimously dismissed the appeal:

> 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.[24]

[30] The Ontario Superior Court decision in *Lobo* found that the governing legislation in Ontario did not establish "government control or influence over [the university] in any manner, let alone with respect to the allocation of space or venues on campus property."[25]

[31] In *BC Civil Liberties Association v University of Victoria*,[26] the B.C. Court of Appeal considered a *Charter* challenge to a university's decision denying the use of campus space to a pro-life student group. In that case the student group wanted to hold a "Choice Chain" demonstration. The approval was granted, but was later revoked under the University's *Booking of Outdoor Space by Students Policy* because the student group had been sanctioned by the Student Society. The student group held the event without the approval, and as a result the university revoked its outdoor space booking privileges for a year. The chambers justice

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[22] *Lobo v Carleton University*, 2012 ONCA 498 [*Lobo* CA] **[BoA, Tab 19]**.
[23] *Lobo v Carleton University*, 2011 ONSC 5798 at para 2 [*Lobo* SC] **[BoA, Tab 20]**.
[24] *Lobo* CA at para 4 **[BoA, Tab 19]**.
[25] *Lobo* SC at para 17 **[BoA, Tab 20]**.
[26] *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 [*BCLA*] **[BoA, Tab 21]**.

dismissed the application for judicial review, stating that the *Charter* did not apply to the university in the circumstances. The Court of Appeal unanimously upheld the chamber justice's decision to dismiss the application on the basis that the *Charter* did not apply. Leave to appeal to the Supreme Court of Canada was dismissed.[27]

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

> 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.
>
> … the 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.[28]

[33] The Court of Appeal also rejected the suggestion that the fact that the university is required to act in the public interest, or carry out a public good, is sufficient to attract the application of the *Charter*. As the Court of Appeal noted, that suggestion was expressly rejected by the Supreme Court of Canada in both *McKinney* and in *Stoffman v Vancouver General*

[27] *British Columbia Civil Liberties Association, et al. v University of Victoria*, 2016 CanLII 82919 (SCC) **[BoA, Tab 22]**.
[28] *BCLA* at paras 24-25 **[BoA, Tab 21]**.

Hospital.[29] In *Stoffman*, the Supreme Court points out that many private entities would be swept under the *Charter* if the focus was on whether the organization had a role in delivery services set out under one or more heads of legislative power:

> 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.[30]

[34] 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.[31]

[35] 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:
>
> > … 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.

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[29] *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 [*Stoffman*] **[BoA, Tab 23]**.
[30] *Stoffman* at 511 [**BoA, Tab 23]**.
[31] *Stoffman* at 516 **[BoA, Tab 23]**.

> 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.[32]

[36] Of particular note, both *Lobo* and *BCLA* involved issues that are virtually identical in form to the Applicants'. The "Genocide Awareness Project" and "Choice Chain" are both projects created by the Canadian Centre for Bio-Ethical Reform that involve the presentation of large, graphic posters about abortions where participants hand out pamphlets and attempt to engages passers-by in discussion. The original request form filled out by the Applicant group for the proposed event stated that the pro-life display was from the Canadian Center [sic] for Bio-Ethical Reform" and that the display had "been hosted on many campuses across Canada".[33]

[37] Additionally, the universities in both *Lobo* and *BCLA* denied the student group's demonstration entirely. The University in this case has not simply denied the demonstration but has only asked the Applicant to bear the costs of the security required for it. If a complete denial by a university to use private space for a demonstration does not engage the *Charter* then, *a fortiori*, neither should a decision to permit it without bearing the concomitant costs.

iii. Analysis of the Application of the Charter to Alberta Universities

[38] In Alberta, both the Court of Appeal 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.

[39] First, the Court of Appeal decision in *Pridgen v University of Calgary* does not stand for the proposition that the *Charter* applies to universities in Alberta. On the contrary, the decision purporting to apply the *Charter* was a minority decision, and is *obiter dicta*. Both Justices

[32] *BCLA* at paras 32-33 **[BoA at Tab 21]**.
[33] CRP at 18.

O'Ferrall and Justice McDonald specifically state that a *Charter* analysis was not necessary to resolve the issue at first instance nor on appeal.

[40] In that case the University disciplined two students because of comments they made on Facebook. The students challenged 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.

[41] 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 expression.[34] It is important to note that Justice Paperny applied her analytical framework and 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.[35] To the extent that the Chambers Justice in *Pridgen* relied on the *Eldridge* framework, that analysis was not adopted by any justice of the Court of Appeal.

[42] 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.[36]

[43] Justice O'Ferrall also agreed that the University's decision was not reasonable for the reasons already identified. He added that one of the reasons the decision was unreasonable was because the University should have considered the student's freedoms of expression and association regardless of whether the *Charter* applied.[37] He agreed with Justice McDonald that

[34] *Pridgen v University of Calgary*, 2012 ABCA 139 at para 128 [*Pridgen*] **[BoA, Tab 24]**.
[35] *Pridgen* at para 105 **[BoA, Tab 24]**.
[36] *Pridgen* at para 177 **[BoA, Tab 24]**.
[37] *Pridgen* at paras 179-80 **[BoA, Tab 24]**.

a decision on the application of the *Charter* was not necessary and "perhaps even undesirable" as the violation was not explored in the first instance by the decision-maker.[38]

[44] 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 is therefore not only *obiter* but also in dissent. And in any event Justice Paperny's dissent was based on a set of facts not before the Court here.

[45] In *Wilson v University of Calgary*,[39] Justice Horner considered an application for judicial review 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 so that passers-by would not see them without intentionally engaging with the student group's display. The students failed to comply with that requirement, and were charged with non-academic misconduct by the University. The Court considered allegations that the students' rights to procedural fairness were violated, and whether the decision by the disciplinary body was reasonable, having regard to several factors including the *Charter*.

[46] Justice Horner relied primarily on Justice O'Ferrall's decision in *Pridgen* to conclude 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 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 opinion was not the decision of the majority of the Court of Appeal.

[47] The Court in *Wilson* does <u>not</u> conduct an analysis pursuant to section 32 of the *Charter*. Rather, it refers to the decision in *Pridgen* and the fact that the judicial review before it was based on the imposition of discipline against students.

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[38] *Pridgen* at para 183 **[BoA, Tab 24]**.
[39] *Wilson v University of Calgary*, 2014 ABQB 190 at paras 147-48 [*Wilson*] **[BoA, Tab 25].**

[48] With respect, the University submits that the decision of the Court in *Wilson* is incorrect, and should not be followed. It is clear that the *Charter* does not apply in general to universities, and *Eldridge* contemplates the need to carefully consider the degree of government involvement in the particular issue before the Court. To the extent that is relies upon any binding proposition arising from the Court of Appeal decision in *Pridgen*, no such binding *ratio* exists. A simple finding that, regardless of the application of the *Charter*, a *Charter* analysis must be conducted, is wholly inconsistent with the Supreme Court's decision in *McKinney*.

[49] The reasoning from the Queen's Bench decision in *Pridgen* was also referred to in *R v Whatcott*,[40] a decision arising from a situation where Mr. Whatcott was arrested following violation of a trespass notice served on him by the University of Calgary 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 and that the charge against him should be stayed. 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.

iv. Section 32 Analysis in this Case

[50] The analysis of whether the *Charter* applies to the decision of the Dean of Students begins with an analysis of whether or not the University must be considered part of government due to the degree of control exercised by government, or where the particular activity under review is governmental because the University is implementing a specific government program.

[51] 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 <u>any bylaws the board considers appropriate</u> for the management, government and control of the university buildings and land."[41] Bylaws made by

[40] *R v Whatcott*, 2012 ABQB 231 **[BoA, Tab 26]**.
[41] PSLA, s 18(1) (emphasis added) **[BoA, Tab4]**.

the University are not subject to approval by the Minister nor the Lieutenant Governor in Council, unlike the policy at issue in *Stoffman*.

[52] The Legislature clearly intended for the University to have a high degree of control over University lands. It also grants to the Board of Governors broad powers to "control vehicles and pedestrians on university lands", including the creation of parking, traffic and pedestrian bylaws, and the ability to enforce them (section 18(2)). Section 60(1) provides the Board with a broad mandate to manage and operate the University. With respect to the regulation of University lands, there is no basis to suggest that the government is exercising a high degree of control. The opposite is true: the University is granted a high degree of autonomy over its lands and buildings. The government exercises no day-to-day or regular control over them.

[53] With respect to the implementation of a specific government program, the weight of authority suggests that the regulation of the booking of University space for non-academic, extra-curricular activities, is not representative of the implementation of a specific government program. The level of specificity contemplated by the Supreme Court of Canada in *Eldridge* is entirely absent here.

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

[55] The courts in *Lobo* and *BCLA* note that the PSLA includes a Preamble setting out a statement of the legislation's intention in relation to education. They rely on this as being an indication that the legislation in Alberta is indicative of post-secondaries being required to deliver a specific government program: post-secondary education.

[56] This distinction is illusory. All legislation creating or enabling universities in Canada must include a general legislative intention that the universities deliver education to students. The Preamble to the PSLA cannot be seen as rising to the level of specificity required by the Supreme Court in *Eldridge* relating to a specific government objective. It is important to recall that the PSLA does not create or continue only the University or universities, but rather all public post-secondary institutions in the province. A conclusion that the University is subject to the *Charter* with respect to its regulation of its lands and buildings based on a general statement of legislative intent regarding the delivery of education would turn the *Eldridge* analysis on its head. Every aspect of the University's operations which support the delivery of that general objective would be swept under the *Charter*, contrary to the Supreme Court's decision in *McKinney*.

[57] The Applicants refer to certain alleged "statutory objectives" of the University in stating that the *Charter* applies.[42] But other than the Preamble noted above, they refer to no statutory provision which demonstrates an alleged statutory objective. Instead, they refer to the COSB itself, which is an enactment of the University made pursuant to its broad statutory powers. The autonomous enactments of a statutory body do not assist the Applicants in attempting to demonstrate that the government has assigned it specific statutory objectives. Rather, the COSB sections referred to demonstrate how the University independently decided how to deal with internal student discipline matters.

[58] This case does not relate to the imposition of academic or non-academic 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. The decision at issue relates to the University making regulations on the use that students involved in extra-curricular activities can make of University lands. There is no legislative mandate requiring the University to permit students (or visitors) to occupy or use its lands whatsoever, and the only implied requirement is with respect to the University carrying out its mandate as public post-secondary institution. This general, implied requirement to use University lands in

[42] Applicants' Brief at para 88.

furtherance of its legislative goals cannot be said to be the implementation of a specific government policy objective.

[59] As in *BCLA*, the powers being exercised by the University 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 requirement that the actual costs associated with ensuring the safety and security of users of the land are passed on to that user.

[60] Nothing in the PSLA requires the University to recognize and provide specific privileges to student groups. To the extent that the PSLA addresses collective student activity, it creates for each university a students association which is required to provide (section 93(3)):

> for the administration of student affairs at the public post-secondary institution, including the development and management of student committees, the development and enforcement of rules relating to student affairs and the promotion of the general welfare of the students consistent with the purposes of the public post-secondary institution.

[61] To the extent that the Legislature turned its mind to collective student action, it contemplated that a separate legal entity would be involved.

[62] An example of a situation where a university would be subject to the *Charter* because of the delivery of a specific government program or objective is with respect to British Columbia's *Sexual Violence and Misconduct Policy Act*.[43] That legislation applies to universities, colleges and technical institutes, and specifically requires those institutions to create a policy relating to sexual misconduct (as defined in section 1 of the Act) dealing with very specific issues. The Act requires each institution to consult with students in drafting its policies, and permits the Minister to create by Regulation other standards which must be addressed in each policy.

[63] This direct and specific intervention by the government into the policy operations of post-secondaries to ensure the delivery of a government program designed to address sexual

[43] *Sexual Violence and Misconduct Policy Act*, SBC 2016, c. 23 **[BoA, Tab 27]**. The Act received Royal Assent on May 19, 2016. Pursuant to section 11, it comes into force one year following the date that it received Royal Assent.

violence on campus is an example of where the *Charter* may apply to the operations of a university under *Eldridge*.

[64] A similar law was enacted in Ontario,[44] which applies to all universities and colleges which receive "regular and ongoing operating funds" from the government. Schedule 3 to that legislation specifically requires those entities to have a policy dealing with issues similar to those in the British Columbia legislation, including any matter set out in the Regulations. Again, this demonstrates a specific government objective despite the fact that it is the universities and colleges which ultimately enact the relevant policies in their normal fashion.

[65] For the reasons set out above, the University rejects the Applicants' submission that the *Charter* applies to the decision of the Dean of Students. The University was exercising the same rights as a private landowner in relation to the control of the use of its lands, and requiring those people who use the lands to do so in a safe manner, and to bear the costs of such use.

B. Standard of Review

[66] As the *Charter* does not apply to the University's decisions concerning the regulation of its private property or to its decisions under the *Procedure*, the principles under *Doré v Barreau du Québec* are not engaged.[45] The general administrative standard of review applies, and that standard is reasonableness.

[67] In applying the standard of reasonableness, the role of the Court is not to determine whether it agrees with the decision of the Dean of Students, but rather to determine whether the decision is reasonable having regard to the facts and the law. The overriding question is whether the decision is justifiable, transparent and intelligible.

[68] The Alberta Court of Appeal recently provided guidance on the reasonableness standard in the review of administrative decisions in *Edmonton School District No 7 v Dorval*:

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[44] *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2016, SO 2016, c 2 **[BoA, Tab 28]**.
[45] *Doré v Barreau du Québec*, [2012] 1 SCR 395 [*Doré*] [not reproduced]

> 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: *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55, [2003] 1 SCR 247; *Dunsmuir* at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 164, [2011] 3 SCR 708.
>
> 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: Ryan at para 56; Newfoundland Nurses' Union at para 16. The decision "must be approached as an organic whole, not as a line-by-line treasure hunt for error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458. 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: *Newfoundland Nurses' Union* at para 12.[46]

[69] If there is any line of analysis set out in the decision which could have lead the Dean of Students from the information available to her to the ultimate decision made, the decision must be found to be reasonable. The approach to the reasonableness review in this case must be sensitive to the context noted above regarding the role of Universities in society, and the deference paid to internal decision-making.

C. The Decision was Reasonable

[70] First, it is clear that the Dean of Students carefully considered the arguments presented by the Applicants 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 the process nor the decision violating any of the Applicants' procedural or natural justice rights.

[46] *Edmonton School District No 7 v Dorval*, 2016 ABCA 8 at paras 39-40 [not reproduced].

[71] Second, as indicated above, the University is charged with the "appropriate management, government and control of the university buildings and lands".[47] As an owner of lands, the University has a positive legal duty to take reasonable care to ensure that individuals on its lands will be reasonably safe.[48] 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 its staff, students, and visitors to the University.

[72] In considering the approval of the Applicants' proposed 2016 event, the Office of the Dean of Students required the Applicants to undertake a security assessment. That is, the Office of the Dean of Students 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.

[73] Further, this assessment did not occur in a vacuum. As noted by the Applicants, the University had approved a virtually identical event held by the Applicants in 2015. That event resulted in the attendance of more than 100 demonstrators (staff, students and visitors) which created a real security risk. UAPS and the Edmonton Police Service were required to attend the 2015 event in order to keep the peace. The Dean of Students makes it clear that the 2015 event was the first of its kind held at the University, and that it was not aware of the extraordinary security costs which would arise from it when it was approved.

[74] The Record demonstrates the cogent reasons why a security and police presence was needed for the 2015 Event, and why it was reasonable for the University to plan for a similar response:

- Prior to the 2015 event, UAPS became aware of a planned counter-protest, and met with students who planned to engage in a demonstration. UAPS was aware that one of those individuals had made a complaint of assault in relation to a person who was likely to be at the event.[49]

[47] PSLA, s 18 **[BoA, Tab 4]**.
[48] For example, *Occupiers' Liability Act*, RSA 2000, c O-4, ss. 5-6 [not reproduced].
[49] CRP at 122, point 2.

- UAPS was told by counter-demonstrators that a certain individual "could potentially cause a disturbance at the event."[50]
- UAPS dealt with an unaffiliated person who could have caused a "confrontation."[51]
- The counter-demonstrators failed to abide by UAPS repeated instructions to remain behind a barrier designated for counter-demonstrators.[52]
- UAPS dealt with non-students, who do not fall under the COSB, and who were advised of the *Canvassing and Solicitation Policy*, but who refused to comply.[53]
- One of the Applicants took video recordings of the counter-demonstrators and a counter-demonstrator complained to UAPS about the recording.[54]
- One of the Applicants told UAPS that she had recorded counter-demonstrators for safety reasons in case something untoward happened.[55]
- UAPS officer observed a potential physical confrontation between the individuals from the two groups due to filming without consent, and intervened to prevent a conflict.[56]
- UAPS received a complaint of a member of the Applicants' group "following" a male in an effort to provide him with material.[57]

[75] The Record also indicates that the University received a number of complaints from participants and passers-by about the event, which included allegations of breaches of privacy.[58]

[76] 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. Fortunately, the 2015 Event never escalated into actual violence. The UAPS security assessment indicated that the amount of

[50] CRP at 123, point 5.
[51] CRP at 123, point 12.
[52] CRP at 123, point 13-15; CRP at 124, points 25-27.
[53] CRP at 124, point 17-21.
[54] CRP at 125, point 29.
[55] CRP at 125, point 39.
[56] CRP at 125, point 41.
[57] CRP at 125, point 42.
[58] CRP at 135-153.

security presence was appropriate, and that a similar number of peace and police officers would be required for a similar event the following year.

[77] The decision of the Dean of Students was based on an objective assessment of risk from UAPS, with assistance provided by the EPS, informed by the security needs from an identical event the previous year. Further, the decision was that the Applicant group should be responsible for the actual costs of the security required. It did not purport to levy a surcharge, administrative fee, or other inexplicable or prohibitive charge.

[78] The decision to require the Applicant group to pay the cost of security required for its own event was directly related to the security assessment, and not to the content of the Applicant group's intended message. The record is clear that the Office of the Dean of Students had approved other events involving the same form of expression by the Applicant group. The Dean of Students notes: "[t]hus far in the 2015-2016 year these have included a movie night in October, a workshop in November, a guest speaker in January, a bake-sale in February and a debate in February."[59]

[79] The Applicants essentially complain that they have been punished by having to pay for the costs of security where the security risks arise from the actions of others, not from the actions of the Applicant 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.[60]

[80] 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.[61] The Applicants now seek to gain the benefit of that controversy without paying for the corresponding cost. It is not reasonable for

[59] CRP, Tab 1 at 5-6.
[60] CRP, Tab 1 at 4.
[61] Examples of the images displayed can be seen at CPR at 166-173.

the Applicants to expect that the University will bear the costs for security to ensure that the public controversy specifically sought by the Applicants does not result in harm to individuals on University lands.

[81] The Dean of Students also considered the Applicant group's concerns regarding the amount of the cost condition, acknowledging that the sum of $17,500.00 appears to be significant in the absence of context. She notes, however, that the requirement that recognized student groups be responsible for the costs of security is clearly set out in the Procedure. Further, recognized student groups are responsible to engage in fundraising to ensure that they have sufficient funding for their endeavours.

[82] The Dean of Students then describes the four primary ways in which recognized student groups engage in fundraising for their activities, and notes that the Applicant group provided no information regarding any efforts made to raise funds for the event. The Dean of Students then explains why the University must pass along security costs to student groups:

> There are important reasons for the need to pass along costs of security to Student Groups. Presently, there are almost 500 Recognized Student Groups on campus. Other than through the granting noted above, the University does not have the ability to bear the direct costs related to the extra-curricular activities of Student Groups on campus. While the University has recognized the value provided by Student Groups, it is important to recognize that they are secondary to the University's main function which is curriculum-based learning and academic endeavours. The University does, however, bear many of the indirect costs related to Student Groups, many ground and facility costs, some insurance costs, and costs related to leadership, organizational development, finance and event organizer training provided to Student Groups and their executive members.[62]

[83] The Dean of Students goes on to consider whether her decision on this costs condition would change if she had discretion under the Procedure to not require the security costs to be passed on to the Applicant group. She concludes that it would not having regarding to the policy considerations she noted.

[62] CRP at 4.

[84] The Dean of Students then takes into consideration the Applicant group's submission that the cost condition constitutes a limit on its ability to engage in a legitimate form of expression. She reviews the previously-approved events held by the Applicant group, and their ongoing ability to communicate its views to the campus community through approved events. She then focusses on the flaw in the Applicants' submission that the cost condition is not justifiable:

> 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 risks 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. As the event neared, it became apparent to the University that the nature and scale of the 2015 Event was such that serious risks to public safety were highly likely to occur, it was required to address those risks and, therefore, acted to bring in security necessary for public safety (which included both UAPS and EPS members). As the University was responding to an unforeseen and urgent situation, the University covered the costs of the required security. The size and intensity of the 2015 Event greatly informed the process this year, providing this Office with good reason to refer the event submission to UAPS for a Security Assessment, as per the Student Groups Procedure. With the lessons learned from the 2016 Event, the Security Assessment and its recommendations were part of the event approval process and lead to the conditions of approval, as is normal court of Student Group events where additional steps are required to mitigate risks. The cost 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.[63]

[85] Finally, the Dean of Students offers up reasonable alternatives which would reduce the costs of the security required in order to allow an event to proceed. She confirms that her office is able to provide guidance to the group in relation to fundraising activities.

[86] The Dean of Students was designated by the General Faculties Council of the University to receive, consider and decide on applications by recognized student groups for events. It is clear from the Record that her office has expertise in dealing with those issues. Further, where the potential for a security risk arose, the Dean of Students required that an assessment be

[63] CRP at 7.

conducted by UAPS, which she then used to inform her decision. The security assessment was provided to the Applicants prior to the filing of their request for reconsideration.

[87] The decision by the Dean of Students to pass on the costs of security was consistent with the terms of the Procedure, was based on objective information, and was entirely reasonable. Given the limited pool of funds available for the University's large operation, any security costs that the Dean of Students had agreed to take on would have resulted from that sum of money being unavailable for other University programs. Again, the Dean of Students was faced with a request to absorb a significant security fee (which the University had absorbed the previous year due to a lack of experience with the Applicant group's event) in relation to a non-academic, non-curriculum based activity undertaken by one student group out of more than 500 student groups, where the very purpose of the event was to provoke an emotional response from members of the University community.

[88] 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 therefore defer to the internal decision relating to the allocation of limited resources to non-core University operations.

[89] In the alternative, if the Court concludes that the University is subject to the *Charter*, the correct approach is not to subject the decision to a full *Charter* analysis. Rather, the Supreme Court in *Doré* has directed that a reviewing court determine whether the decision disproportionately limited a *Charter* right. Further, the decision of the administrative decision-maker is still reviewed based on a standard of reasonableness.

[90] Prior to examining that issue, however, it is important to examine the scope of the *Charter* right asserted, and the context in terms of its application. Freedom of expression is a fundamental freedom. There is an important distinction between a freedom and a right:

> Section 2 of the *Charter* protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or

> obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint.[64]

[91] The Applicants' right to free expression means freedom <u>from</u> any unnecessary government restraint; it does not mean free from any cost:

> The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones.[65]

[92] 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."[66]

[93] There was a similar conclusion in *Alberta v Hutterian Brethren of Wilson Colony.*[67] In that case the government removed an exemption for a religious colony to hold driver's licenses without photo identification. The colony argued that they could no longer have a driver's license without violating its members' beliefs, and that they could not support their independent colony without access to vehicles. Writing for the majority, Chief Justice McLachlin stated:

> [I]n many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. <u>The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience.</u> However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue. <u>The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion.</u> Many religious practices entail costs which society reasonably expects the adherents to bear.

…

> The Hutterian claimants argue that the limit presents them with an invidious choice: the choice between some of its members violating the Second Commandment on the one hand, or accepting the end of their rural communal life on the other hand. However, the evidence does not support the conclusion that arranging alternative means of highway transport would end the Colony's rural way of life. The claimants' affidavit says that it is necessary for at least some members to be able to drive from the Colony to nearby towns and back. It does not explain, however, why it would not be

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[64] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, per Dickson C.J., dissenting at 361 [not reproduced].
[65] *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1035 [not reproduced].
[66] *Adler v Ontario*, [1996] 3 SCR 609 at para 200, dissenting in part [not reproduced].
[67] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*] **[BoA at Tab 29]**.

> possible to hire people with driver's licences for this purpose, or to arrange third party transport to town for necessary services, like visits to the doctor. Many businesses and individuals rely on hired persons and commercial transport for their needs, either because they cannot drive or choose not to drive. Obtaining alternative transport would impose an additional economic cost on the Colony, and would go against their traditional self-sufficiency. But there is no evidence that this would be prohibitive.
>
> …
>
> I conclude that the impact of the limit on religious practice imposed by the universal photo requirement for obtaining a driver's licence is that Colony members will be obliged to make alternative arrangements for highway transport. This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.[68]

[94] Similarly, the decision of the Dean of Students may impose a financial cost on the Applicants. The costs may not be trivial. However, it is proper for the Applicants to bear the costs associated with their chosen means of expression. It is not proper for the University to continue to subsidize their expression with its limited resources at the expense of other programs and peoples at the University. As noted in *McKinney*, a university has limited resources.[69] It does not have the independent ability to raise significant resources through taxation. Requiring a university to devote additional resources to one particular operational area means fewer resources are available for other areas.

[95] The Supreme Court also discussed the proper analysis for a positive right claim under section 2(b) of the *Charter* in *Baier v Alberta.*[70] In *Baier*, the Alberta government amended legislation that precluded school employees from running for election as school trustees while employed. The school employees claimed this violated their right to freedom of expression. The Court noted that the section 2(b) analysis requires first a determination on whether there is an expressive activity in question and then to a determination on if the right claimed in positive.[71] If a positive right is claimed then there will be no violation of the *Charter* unless it falls into an

[68] *Hutterian Brethren* at paras 95-99 (emphasis added) **[BoA at Tab 27]**.
[69] *McKinney* at 284, 287.
[70] *Baier v Alberta*, 2007 SCC 31 [*Baier*] **[BoA, Tab 30]**.
[71] *Baier* at para 30 **[BoA, Tab 30]**.

unusual exception. The Court found that the school employees were claiming a positive right because it was a claim "for the government to legislate to enable expressive activity."[72]

[96] The positive right did not fit into an exception requiring government action because 1) the claim was grounded in access to a particular regime and not in fundamental *Charter* freedoms and 2) there was no substantial interference with their expression because there were many other ways of expressing themselves on matters related to the education system.[73] In conclusion, the Court stated at para 54:

> The appellants have not met the evidentiary burden of demonstrating that exclusion from the statutory regime permits a substantial interference with their freedom of expression on school board issues or education generally. Rather they seek a particular channel of expression.[74]

[97] The Applicants' claim is to a positive right, but the facts do not support such a right in these circumstances.

[98] For those reasons, even if the Court concludes that the University was required to consider the Applicants' *Charter* rights in rendering the decision under review, the jurisprudence does not support the Applicants' suggestion that the passing-along of actual costs arising from the exercise of the free expression represents a violation of that right. On the contrary, the Dean of Students did consider the Applicants' submissions on the impact of the decision on free expression, and concluded nonetheless that the cost condition was reasonable and appropriate given the manner of the event chosen by the Applicants to express their views.

[99] Again, the Dean of Students decision on this issue fell within a range of possible, acceptable outcomes based on the facts and the law.

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[72] *Baier* at paras 35-36 **[BoA, Tab 30]**.
[73] *Baier* at paras 43-54 **[BoA, Tab 30]**.
[74] *Baier* at para 54 (emphasis added) **[BoA, Tab 30]**.

V. RELIEF SOUGHT

[100] The University respectfully requests that the application for judicial review of the Dean of Students' decision be dismissed with costs.

[101] Alternatively, if the Court concludes that a remedy must issue, it should be limited to a declaration of the proper principles the University should consider in its future decisions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF MAY, 2017

REYNOLDS MIRTH RICHARDS & FARMER LLP

Per:

per MATTHEW WOODLEY
Counsel for the Respondents

LIST OF AUTHORITIES

TAB

21. *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162

22. *British Columbia Civil Liberties Association, et al. v University of Victoria*, 2016 CanLII 82919 (SCC)

23. *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483

24. *Pridgen v University of Calgary*, 2012 ABCA 139

25. *Wilson v University of Calgary*, 2014 ABQB 190

26. *R v Whatcott*, 2012 ABQB 231

27. *Sexual Violence and Misconduct Policy Act*, SBC 2016, c. 23

28. *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2016, SO 2016, c 2

29. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567