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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
4 FEBRUARY 2016 DECISION
(STUDENT CONDUCT AND ACCOUNTAIBLITY)

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I. INTRODUCTION

[1] The Discipline Officer, an administrative decision-maker employed by the Respondent (the "University") made a decision under the University's *Code of Student Behaviour* (the "COSB") that a decision by the Director of the University of Alberta's Protective Services ("UAPS") to discontinue an investigation into a complaint made against approximately 100 demonstrators was reasonable and appropriate. The individuals about whom the complaint was made were both students and non-students engaged in a counter-demonstration. The Discipline Officer carefully considered the evidence available and decided that, having regard for the express provisions of the COSB, the investigation should not continue because no University rule had been broken.

[2] It is important to note that the Applicants were the complainants under the COSB. Complainants have always had limited rights in administrative disciplinary proceedings. Courts have been diligent in preventing complainants from dictating how limited resources for investigating and enforcing administrative regimes are to be expended. Courts have recognized that not every potential offence can be fully investigated, and neither complainants nor judges are well-suited to question the determinations made by the statutory relevant decision-maker.

[3] Although the Applicants may disagree with the conclusion of the Discipline Officer, the process in arriving at that conclusion was eminently fair to the Applicants in the circumstances. The Applicants were afforded every opportunity to make their case as permitted under the COSB.

[4] Ultimately, the Applicants' complaint is that the counter-demonstrators' ability to hold up large signs and aggressively share their opinions about abortion with passers-by impaired *their* ability to hold up large signs and aggressively share their opinions about abortion with passers-by, and that such conduct represents a violation of the COSB. The Discipline Officer concluded otherwise, holding that the language in the COSB compelled the finding that none of the University rules cited by the complainants had been broken; that was a determination open

to the Discipline Officer based on all of the information before him, and it is a determination that is entitled to considerable deference.

II. FACTS

A. Context

[5] Prior to turning to the facts before the Court, it is important to understand the context in which the University operates. Courts have recognized the unique role played by universities in Canada and elsewhere for many years. A university is, at its core, a community of scholars, providing educational and research opportunities to members of faculty and students. In *Harelkin v University of Regina*, the Supreme Court found that the incorporation of a University under provincial law does not alter that traditional approach.[1]

[6] Similar signals exist in the *Post-secondary Learning Act*, SA 2003, c P-19.5 ("PSLA") regarding the autonomy provided to universities in Alberta. The Board of Governors is given:

- the power to make "any bylaws the board considers appropriate for the management, government and control of the university buildings and land";[2]
- the power to make bylaws to control vehicles and pedestrians on university lands;[3]
- broad plenary powers over the governance of the university;
- natural person powers;[4] and
- a general mandate to "manage and operate the public post-secondary institution."[5]

[7] The Board is also the ultimate arbiter of any question relating to the powers and duties of university actors.[6]

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[1] *Harelkin v University of Regina*, [1979] 2 SCR 561 [*Harelkin*] **[Respondent's Book of Authorities ("BoA") at Tab 1]**. See also *Paine v University of Toronto*, 1981 CanLII 1921 (ON CA) at 8 **[BoA at Tab 2]**. The decision in *Paine* was cited with approval in *Vinogradov v University of Calgary*, 1987 ABCA 51 at para 28 **[BoA at Tab 3]**.
[2] *Post-secondary Learning Act*, SA 2003, c P-19.5 [PSLA], s 18(1) **[BoA at Tab 4]**.
[3] PSLA, s 18(2) **[BoA at Tab 4]**.
[4] PSLA, s 59(1) **[BoA at Tab 4]**.
[5] PSLA, s 60(1)(a) **[BoA at Tab 4]**.
[6] PSLA, s 63 **[BoA at Tab 4]**.

[8] The General Faculties Council (the "GFC"), mandated under section 23 of the PSLA, is the body at the University charged with primary responsibility over academic matters and student affairs. Section 31(1) specifically gives the GFC the power to discipline students and to delegate that power to other persons. The GFC has exercised its statutory and delegated powers through the COSB.[7]

[9] Courts have repeatedly recognized that a university has a great deal of autonomy with respect to academic matters, and courts have been reluctant to involve themselves in second-guessing internal decisions made by universities. Provided that universities have satisfied certain standards of participatory fairness, Courts generally do not interfere in the substance of an academic decision.

[10] Universities under the PSLA are generally funded through base government grants, specific grants, and tuition fees. Tuition fees are heavily regulated by government under the *Public Post-secondary Institutions' Tuition Fees Regulation*, Alta Reg 273/2006, and a tuition fee "freeze" has been in place for the past three years, prohibiting universities from raising tuition fees above the 2014-2015 academic year.[8]

[11] Public post-secondary institutions in Alberta do not have limitless resources, and must expend public funds in a manner consistent with its obligations to provide post-secondary education under the PSLA.[9] The Supreme Court of Canada has recognized, in the context of a challenge to mandatory retirement policies, that universities are closed systems with limited resources;[10] requiring a university to devote additional resources to one particular operational area means fewer resources are available for other areas.

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[7] Certified Record of Proceedings ("CRP"), Tab 6.
[8] *Public Post-secondary Institutions' Tuition Fees Regulation*, Alta Reg 273/2006, s 8.1(1) **[BoA at Tab 5]**, which applies to domestic students.
[9] See PSLA, s 60(1)(b) **[BoA at Tab 4]**.
[10] *Mckinney v University of Guelph*, [1990] 3 SCR 229 at 284, 287 [*McKinney*] **[BoA at Tab 6]**.

B. Adjudicative Facts

[12] The Applicants frame this judicial review as a situation where the University has intentionally stifled their ability to engage in debate on controversial issues on campus. The Record before the Court does not support this.

[13] On March 11, 2015, the Applicants, Amberlee Nicol and Cameron Wilson made a complaint to UAPS alleging breaches of the Code by students who participated in a counter-demonstration of the Applicant group's event on March 3–4 2015.

[14] The Applicant group's 2015 event was an approved student group event under the *Student Groups Procedure*. The event was a large-scale two-day event that took place in the main Quad on campus comprised of displays of large billboards depicting graphic abortion images, and similar hand-out pamphlets, both provided by the Canadian Centre for Bio-Ethical Reform ("CCBR").

[15] As depicted in photographs accompanying the Applicants' complaint, on each morning of the 2015 event, a large number of individuals surrounded the group's billboard displays with signs of their own (the "counter-demonstrators"). The counter-demonstrator's signs contained messages such as "We Demand Safe Spaces", "My Pussy, My Voice, My Body, My Choice", "No Shame", "Trigger Warning", "Woman not Wombman", "Don't Like Abortion, Don't Have One", "Beware Graphic Anti-Choice Solicitation", "Let's Talk, Not Shock", "Voices for Choices".

[16] It is important to note the substance of the complaint made by the Applicants. In her statement, the Applicant Nicol stated that:

> …individuals came and went throughout the day, the crowd itself remained until we took down the display around 3:30 pm. The exact same thing happened at the exact same time when we did the display a second day on March 4th.
>
> …one of the main organizers of the event was a student…Not only was she helping block the display in person, but she coordinated the creation of signs for the event, following around our volunteers with a handheld sign in order to disrupt their attempts to engage in conversation (I don't know how successful she was)…

…

> Since the event we have used social media to ID nearly 100 participants in this disruptive counter-protest, which was at least partially successful in stopping community members from engaging with our display and our volunteers. They literally encircled our entire display at certain points of the day, …[11]

[17] The Applicants submitted that the counter-demonstrators violated a number of the provisions of the COSB.[12]

[18] A neutral summary of the facts surrounding the counter-demonstration can be found in Justice Graesser's decision on the Applicants' injunction application related to the same events:

> On March 3 and 4, 2015, Pro-Life held an event in the Main Quad on the North Campus. During this event, they displayed signs showing the consequences of abortion and seeking to engage passers-by in discussion about abortion.
>
> At some time before the March 3–4 event, Pro-Life learned through social media that other campus members were planning to mount a counter-demonstration. Pro-Life advised UAPS of the risk that access to their event might be physically blocked or their displays otherwise disrupted. Counsel for Pro-Life sent a letter to various senior representatives of the University, advising them of the feared disruption, urging the University to uphold the rule of law on campus, to apply the *Code* to all students proposing and planning misconduct, and asking UAPS to take appropriate disciplinary action in respect of certain violations of the *Code*, which Pro-Life alleged had already occurred to that point.
>
> The March 3–4 event was indeed the subject of a counter-demonstration. Photographs put in evidence by the Applicants clearly show that dozens of other individuals formed a human barrier in front of the large displays which Pro-Life had erected, and hoisted large banners of their own. Because Pro-Life's signs were mostly obscured by the counter-demonstrators, it is difficult, but not impossible, to discern their message. However, portions of graphic images can still be seen.
>
> Many of the counter-demonstrators displayed their own signs, large and small. These signs bore messages that opposed the message being conveyed by Pro-Life's signs.

[11] CRP at 57-58.

[12] Sections 30.3.4(1)b, 30.3.4(6)c or 30.3.6(2)a (all counter-demonstrators for engaging in the counter-demonstration; sections 30.3.4(1)c and 30.3.6(5) (three students in relation to counseling or encouraging others to breach the COSB); 30.3.4(1)b, 30.3.4(6)c, 30.3.4(6)a (three students in relation to obstructing a University event or physical assault); and 30.3.4(2)d (one student for harassment).

> Also visible in the photographs are some peace officers observing the crowd. Aside from what appears to be a rather successful attempt by the counter-demonstrator to block access to Pro-Life's members and signs, there is no evidence of any physical skirmish.
>
> According to the Applicants, UAPS limited its actions during the event to oral suggestions that those engaged in violating the Code should cease their misconduct. The Applicants accuse UAPS of a number of shortcomings in discharging their duty during the event. Essentially, the Applicants assert that UAPS "stood by" and allowed the event to be effectively silenced, and that accordingly the University was complicit in seeking to restrict Pro-Life from distributing their literature and conveying their message.
>
> On March 11, 2015, a member of Pro-Life complained to UAPS about the obstruction and disruption of the event. The next day, the Applicants provided UAPS with names and social media posts allegedly identifying over 100 individuals who planned or took part in the counter-demonstration.[13]

[19] The Applicants provided evidence identifying nearly 100 individual counter-demonstrators as well as multiple photographs and videos of the event.[14] The Applicants requested that all of the counter-demonstrators be investigated and sanctioned under the COSB, and that particular students be investigated for specific alleged violations.

[20] UAPS commenced an investigation. At the time of the Applicants' complaint, the University had one employee whose duties included investigating complaints under the COSB. Following the 2015 event, UAPS received complaints—by the Applicant group against the counter-demonstrators; by individuals against the Applicant group and its members; and against the Office of the Dean of Students complaining about the approval of 2015 event. The single UAPS investigator was tasked with connecting with each complainant from these three categories to confirm whether they wished to pursue a formal complaint. Thereafter he compiled written reports in relation to these matters, completing that task in April 2015.[15]

[21] In an email dated April 1, 2015 to the Applicants, the UAPS investigator explained:

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[13] *UAlberta Pro-Life v University of Alberta,* 2015 ABQB 719 at paras 10-15 (emphasis added) **[BoA at Tab 7]**.
[14] CRP, Tab 3 at 58. See generally CRP, Tab 5 at 123-89.
[15] CRP, Tab 5, 121.

> …UAPS has one Code investigator; that person is myself! As you can image (sic) I had other unrelated Code investigations that had been previously reported to UAPS prior, during and after the Go-Life event. Some of those unrelated Code investigations involved violence, the treat of imminent violence and/or immediate safety issues/concerns. I hope that you can understand; that those investigations required my immediate attention and unfortunately, this matter and other unrelated Code investigations had to be delayed to allow the "priority concern" investigations to be addressed. …[16]

[22] By September-October of 2015, progress was made into the investigation of the Applicants' complaint. In October 2015, the UAPS investigator sought interviews with four students alleged to have been the key organizers of, and participants in the counter-demonstration. The UAPS investigator conducted interviews with these students on October 26, October 27, October 30, and November 17, 2015 and concluded his investigation on November 18, 2015.[17]

[23] In the investigation report, the UAPS investigator included the following findings:

- "[t]he specifics of Ms. NICOL's alleged violation allegations of others, moreso describe the actions of peaceful demonstrators, rather than COSB violations";
- the photographs and videos provided by the Applicant could not be authenticated;
- UAPS did investigate the Applicant Nicol's allegations with a view to trying to substantiate the offence of disruption;
- UAPS' jurisdiction under the COSB to investigate the disruption offence was limited to students only;
- the investigation would be limited to the "perceived organizers" of the counter-demonstration (in view of his observation noted above, that the actions of other counter-demonstrators "describe the actions of peaceful demonstrators, rather than COSB violations");
- whether or not a COSB violation could be made out, in part, depended on whether or not these four student organizers/demonstrators were present at the event when UAPS had read out its direction to the counter-demonstrators to move to the area which had been designated for them; and

[16] CRP, Tab 5, 81. UAPS is required to investigate many kinds of violations, including actions which also amount to criminal charges, such as sexual assault. See e.g. *Dalla Lana v University of Alberta*, 2013 ABCA 327 [*Dalla Lana*] **[BoA at Tab 8]**.
[17] CRP, Tab 5 at 101-103.

- since all four students availed themselves of their right under the COSB to remain silent and opted not to participate in an interview with him, he recommended the file be concluded due to insufficient evidence to substantiate a disruption violation.[18]

[24] The Director of UAPS released a decision on November 30, 2015 concluding with "I am exercising my discretion and declining to proceed with your complaint pursuant to section 30.5.2(6)(b)."[19] The Director of UAPS informed the Applicants of their right to appeal the decision to the Discipline Officer in accordance with sections 30.5.2(7)(b) and 30.5.2(8) of the COSB and provided information on how to do so.

[25] On December 18, 2015, the Applicants submitted their appeal to the Discipline Officer. The Applicants provided a detailed written submission prepared by their legal counsel. The Applicants raised seven grounds of appeal.[20]

[26] On February 4, 2016, the Discipline Officer released his decision dismissing the appeal. In the reasons for the decision, the Discipline Officer makes it clear that he reviewed the written appeal submission of the Applicants, he considered the specific concerns raised by the Applicants, and he reviewed the Decision of the Director of UAPS, and the record of the UAPS investigation. The Discipline Officer wrote:

> In determining the outcome of this appeal, the relevant question is, after removing all non-students from the discussion, whether or not it was appropriate for Director Spinks to make the decision not to proceed with charges under the COSB against the accused students. Section 30.5.2(6) of the [Code] lays out four reasons the Director of UAPS may chose not to proceed with a complaint. Of these four, given the facts of the case as reviewed, the only relevant section is Section 30.5.2(6)b which refers to circumstances where the Director believes no University rule has been broken.
>
> As Director Spinks noted, the introduction to the [Code] makes it clear that all parties, both the students in the Go-Life group and the protesters, have a right to free speech. Go-Life and the protesters disagreed on both the fundamental arguments being expressed and on the appropriate mechanisms for engaging in that debate. Both parties expressed their opinions. All of the participants were therefore engaging in acts which the [Code] specifically permits – demonstrating and/or

[18] CRP, Tab 5, 104-105.
[19] CRP, Tab 4, 65.
[20] See CRP, Tab 2 at 6-7; Brief of the Applicants at para 38.

> protesting. Free speech may be pursued aggressively and differences of opinion may be profound, loud and emotional. Two or more groups who disagree may well compete for listeners' attention and they are free to address both the other party's reasoning and the way that they have presented their information.
>
> Free speech is not a clean process where people will always take turns and treat each other with deference We have to expect that profound disagreements over controversial topics may be loud and vigorous. It follows that the University should tread lightly in applying disciplinary processes when people are engaging in a conflict of ideas. We respect the rights of all parties to offer information to an audience and then leave it to the audience to choose whether they will access it and how they will be affected by it. So long as they do not harm people or property, disrupt essential University business, or prevent other parties from speaking at all, the parties should be allowed to argue.
>
> The protesters competed with Go-Life for attention but they did not prevent them from speaking. They did make it more difficult for people to see the displays and challenged people not to speak to the Go-Life volunteers but they did not prevent them from doing so, regardless of the rhetoric on both sides. There is evidence in the material supplied to me by Mr. Cameron in the appeal and in the investigation by UAPS that anyone interested in accessing Go-life material and wishing to talk to their volunteers could do so. Ms. Nicol described, in her statement to UAPS, one of the protesters carrying a sign discouraging people from speaking to the Go-Life volunteers and intimated that the protester was unsuccessful. Ms. Nicol's statement indicates two things. First, it shows that Go-Life volunteers were speaking to people who attended the installation and second, that protesters were attempting to persuade people not to interact with Go-Life materials, not physically preventing them from doing so…The photographs supplied by Mr. Cameron show that enough of the displays were visible so that passersby would know what information Go-Life was offering and could therefore make an informed choice whether to view it in its entirety or not.[21]

[27] His conclusion was:

> My review of the evidence provided to me by [counsel for the Applicants] and UAPS suggests that the decision of Director Spinks not to proceed with COSB charges is reasonable and appropriate given the circumstances.[22]

[28] It is that decision of the Discipline Officer (referred to as the "First Decision" in the Applicants' brief) that is the subject of the current application for judicial review.

[21] CRP, Tab 1 at 2.
[22] CRP, Tab 1 at 3.

III. ISSUES

[29] This Application raises the following issues:

(1) What is the proper scope of the review of the Discipline Officer's decision?

(2) Did the Discipline Officer breach the duty of procedural fairness owed to the Applicants?

(3) Is the Discipline Officer's decision reasonable in the circumstances?

IV. ARGUMENT

1. The Proper Scope of the Applicants' Review

i. Standing

[30] First, despite suggestions to the contrary in the Applicants' brief, it is the decision of the Discipline Officer and not the decision of the Director of UAPS that is under review. The Applicants' submissions, to the extent they only address the underlying decision of the Director of UAPS, have no relevance to the current Application.[23]

[31] More importantly, the Applicants also have limited standing to challenge the Discipline Officer's decision. Again, context is important in approaching the review of this issue. The Applicants were complainants under the COSB. The rights of a complainant under the COSB are specifically set out in that document. Their standing to bring a judicial review application of that decision, and the content of any duty of fairness owed to the Applicants, is based on that framework.

[32] Here, the Applicants made a complaint under the COSB and the Director of UAPS decided to discontinue his investigation of it. The COSB provided the Applicants with the ability to seek a review of the Director's decision to the Discipline Officer, which they did.[24] The

[23] Specifically see Applicants' Brief at paras 59-63.
[24] COSB, s 30.5.2(8), CRP, Tab 6 at 221.

decision of the Discipline Officer was made and the decision to discontinue the investigation without charges or sanction was confirmed.

[33] The Applicants' rights under the COSB end there, unlike the rights of the investigated student and the Director of UAPS. The COSB provides each of those parties with the right to appeal the decision of the Discipline Officer further to the University Appeals Board.[25]

[34] Further, the COSB sets out the rights and obligations of both the student accused of misconduct, and complainants or those allegedly injured in section 30.1.1. Students whose conduct is impugned under the COSB have the full range of procedural and natural justice rights. For example, the COSB provides the student being investigated with the presumption of innocence, the right to appeal with legal counsel, the right to have their case adjudicated within a reasonable time, the right to disclosure, the right to notice of any investigative meeting or hearing, the right to respond to allegations, and the right to reasons.[26] The Courts have recognized that the rights conferred to accused students under the COSB are akin to those rights provided to parties before the courts.[27]

[35] The rights provided to complainants are significantly more limited. Complainants are entitled to be consulted before an informal resolution is proposed to an accused student, to provide evidence of injury or damages suffered to the decision-maker under the COSB, to notice of any hearing, to be consulted about whether the complainant will act as a witness, and to be informed of any sanctions imposed on the accused student.[28] The COSB does not provide a complainant the right to participate in the proceedings apart from an opportunity to provide evidence of injury and damages, and it does not provide a complainant with a right to a timely adjudication.[29]

[36] The COSB does not guarantee that all complaints will be fully investigated, nor that investigations will result in charges or sanctions. It is clear that the Director of UAPS has a

[25] COSB, ss 30.6.1(1), 30.6.1(2), CRP, Tab 6 at 230-31.
[26] COSB, s 30.1.1(1). CRP, Tab 6 at 193.
[27] See *Dalla Lana* at para 14 **[[BoA at Tab 8]**.
[28] COSB, s 30.1.1(2), CRP, Tab 6 at 193-94.
[29] Cf COSB, s 30.1.1(1)(c), CRP, Tab 6 at 193.

discretion with respect to whether or not to proceed with a complaint.[30] The COSB requires the Director of UAPS to notify the complainant where he or she has decided not to proceed with a complaint, and to provide reasons where requested.[31] The complainant may appeal that decision to the Discipline Officer within 15 days.[32]

[37] Apart from the limited procedural rights noted above, the COSB does not provide a complainant with any other substantive rights in relation to a complaint that has been made. This makes good policy sense, and is reflective of the status of complainants in both criminal and administrative complaint regimes. The law does not recognize a general public duty on the part of statutory bodies to investigate a complaint in the absence of specific language.[33] A complainant cannot compel an investigatory body to issue charges or impose sanctions.

[38] The Applicants' limited rights as a complainant place an important limit on the Applicants' right to seek judicial review of the Discipline Officer's decision. In the University's submission, the Applicants only have standing to seek judicial review of whether the procedural rights granted to the Applicants were followed. The Applicants do not have standing to challenge the substance of the decision made by the Discipline Officer.

[39] This conclusion follows from the status of complainants to challenge disciplinary processes in other statutory regimes. For example, professional regulatory bodies are required by statute to have a complaint process in relation to their regulated members. A complainant may make a complaint which is then generally considered by a specialized statutory officer who decides whether or not to investigate the complaint. Where a decision is made not to investigate a complaint, or to dismiss a complaint without a hearing after investigation, complainants are often provided a statutory right to appeal or review that decision by another statutory review body. Assuming that the dismissal of the complaint is confirmed, complainants have no other statutory remedy, and are left with either a complaint to the Ombudsman or a judicial review (like this case) of the review body's decision.

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[30] See COSB at 30.5.2(5) to 30.5.2(6), CRP, Tab 6 at 220.
[31] COSB at 30.5.2(7)b, CRP, Tab 6 at 221.
[32] COSB at 30.5.2(8), CRP, Tab 6 at 221.
[33] *Burgiss v Canada (Attorney General)*, 2013 ONCA 16 at para 2 **[BoA at Tab 9]**.

[40] Courts in Alberta have been very clear, however, that the rights of a complainant on judicial review from such a statutory scheme are limited to a review of their procedural or participatory rights. Provided that the rules of procedural fairness were respected by the statutory body, complainants have no standing to challenge the substance of the decision.

[41] This issue was decided by the Court of Appeal in *Mitten v College of Alberta Psychologists*.[34] There, a complainant sought judicial review of a decision of the College's Discipline Committee, which confirmed a decision by the Registrar to dismiss the complaint. The chambers justice had struck out the judicial review entirely, stating that complainants had no standing to seek judicial review of such a decision.

[42] The Court of Appeal in *Mitten* overturned the decision in part, but confirmed the dismissal of the aspects of the Originating Application which purported to challenge the substance of the decision. The Court discussed an earlier case, *Friends of the Old Man River Society v Ass'n of Professional Engineers, Geologists and Geophysicists of Alberta*[35] in coming to its conclusion:

> The Court in *Friends of the Old Man River* concluded that the appeal of the decision not to proceed to hearing was just an extension of the investigative process, and was more in the nature of a review than a true appeal. The Court concluded that judicial review was not available:
>
> > The *Act* makes it clear that the disciplinary process is a matter between the Association and the individual member whose conduct has been questioned. The Act is directed solely to the Association and its members; the rights, duties and responsibilities contained in the *Act* relate only to them. Under the investigative process contained in Part 5, a complainant is not made a party either to the investigation or the disciplinary process itself. The only parties are the Association and the member whose conduct is under investigation. . . . Judicial review is not available in these circumstances.
>
> The Court, however, went on to examine whether there had been any procedural unfairness. The Court concluded at paras. 46 and 49 that, given all the circumstances, the duty of fairness would "be limited" and "at the low end of the

[34] *Mitten v College of Alberta Psychologists*, 2010 ABCA 159 [*Mitten*] **[BoA at Tab 10]**,
[35] *Friends of the Old Man River Society v Ass'n of Professional Engineers, Geologists and Geophysicists of Alberta* 2001 ABCA 107 [*Friends of Old Man River*] **[BoA at Tab 11]**.

> spectrum", and that there had been no unfairness in that case. In the circumstances, the Court did not have to express an opinion on the standing of the complainants: see para. 51. Because the application in *Friends of the Old Man River* related only to the investigatory stages of the complaints process, the Court also did not have to express any views on the role of the complainant in later stages of the process.
>
> While the role of the complainant in discipline proceedings at the investigative stage is limited, the statute does afford the complainant some rights. The College and the investigated psychologist may be the only full parties at that stage, but the claimant is clearly a participant in the appeal of the decision not to proceed to hearing. The Act specifically gives that right of appeal to the complainant. What the *obiter* comments in *Friends of the Old Man River* signify is that the complainant cannot turn the appeal of the decision not to proceed to a hearing into a surrogate hearing on the merits. *Friends of the Old Man River* should not be read as suggesting that a complainant who launches an appeal under the statute has no remedies if the appeal process is conducted in a fundamentally unfair manner.[36]

[43] That is, the right of a complainant is limited to challenging alleged unfairness in the appeal process. The Court goes on to clarify that the grounds of review based on the fairness of the appeal were valid and all other grounds of review were struck.[37]

[44] The reasoning in *Mitten* must apply to the issue of standing of the Applicants in this case. Both cases deal with a statutory scheme relating to disciplinary investigations and processes against individuals subject to the jurisdiction of the statutory body: in *Mitten*, the members of the College, who are required to abide by statutory, regulatory and ethical standards established by the College; in this case, students of the University, who are subject to the standards of conduct set out in the COSB. Further, the complainants under each regime are given certain limited procedural rights, including the right to an internal appeal of a decision to dismiss a complaint. A complainant under the COSB is not a party to disciplinary proceedings, and is not entitled to participate as a witness. This is indistinguishable from the regime considered in *Friends of the Old Man River* and *Mitten*.

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[36] *Mitten* at paras 15-17 **[BoA at Tab 10]** (emphasis added).

[37] *Mitten* at para 18 **[BoA at Tab 10]**. *Mitten* was confirmed by the Alberta Court of Appeal in *Warman v Law Society of Alberta*, 2015 ABCA 368 [not reproduced], where the majority determined that the unique circumstances of the case meant that the complainant's judicial review should not be struck based on standing. See also *Tran v College of Physicians and Surgeons of Alberta,* 2017 ABQB 337 [*Tran*] **[BoA at Tab 12]**.

[45] The Applicants therefore have a limited standing in relation to the Discipline Officer's decision. Judicial review is available only in relation to whether their procedural rights in relation to the appeal were satisfied and not on the underlying merits of that decision.

ii. The Standard of Review

[46] If the Applicants only have standing to challenge the procedural fairness of the Discipline Officer's decision, then the law is clear that a traditional standard of review analysis is not appropriate, and the overriding question is whether the proceedings met the level of fairness required by law.[38] As indicated in *Tran*, where the Court is reviewing a matter where a complainant seeks to judicially review a decision of an administrative investigation, the duty of fairness required by law is at the low end of the spectrum:

> *Friends* and *Mitten* indicate that the duty of fairness applicable in these circumstances is "limited" and "at the low end of the spectrum": *Friends* at paras 46, 49; *Mitten* at para 16. The issue is whether the statutory appeal process was conducted "in a fundamentally unfair matter": *Mitten* at para 17.[39]

[47] If this Court finds that the Applicants have standing beyond that limited issue, the University agrees that the standard of reasonableness applies to all other aspects of the Discipline Officer's decision, including the substantive merits. As such, it is entitled to deference.[40] As noted recently by the Alberta Court of Appeal, a decision "will be unreasonable only if <u>there is no line of analysis</u> within the reasons <u>that could reasonably lead</u> the decision-maker to its conclusion."[41]

2. <u>The Discipline Officer's decision was procedurally fair to the Applicants</u>

[48] The focus of the Court's inquiry must be on whether the decision of the Discipline Officer was procedurally fair in the context of the COSB. The rights of the Applicants, as

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[38] *Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v Barry*, 2016 ABCA 354 at para 5 **[BoA at Tab 12]**; *Tran* at paras 25, 29 **[BoA at Tab 12]**.
[39] *Tran* at para 30 **[BoA at Tab 12]**.
[40] See *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, at para 50 [not reproduced].
[41] *Edmonton School District No 7 v Dorval*, 2016 ABCA 8 at para 39 (emphasis added) [not reproduced].

complainants, must be grounded within the procedures set out in the COSB. The Record of the Discipline Officer's decision demonstrates that the appeal process conducted was entirely fair to the Applicants.

[49] First, although not under review, it is important to note that the decision by the Director of UAPS complied with the requirements of the COSB.

- The decision of the Director was communicated to the Applicants in writing on November 30, 2015, satisfying the requirement to provide reasons for the decision to discontinue the investigation (without requiring the Applicants' to request written reasons).[42]
- The Director's decision identifies the section upon which the decision to decline to proceed is made.[43]
- The Director's decision includes a statement about the right of the Applicants to appeal that decision, including a reference to the relevant sections of the COSB, and a referral to the Office of the Student Ombuds for assistance in dealing with the appeal.[44]
- The Applicants had provided evidence to the Director of UAPS prior to him making his determination, as was their right under the COSB, and the Director reviewed and considered that evidence in his decision.[45]

[50] The decision of the Discipline Officer, likewise, complied with the requirements of the COSB and the Applicants fully exercised all of the rights to which they were entitled. As noted previously, the Applicants submitted their appeal and supporting documents prepared by their legal counsel on December 18, 2015.[46] The Office of Student Conduct and Accountability provided confirmation of the receipt of the Applicants' appeal to their legal counsel on December 21, 2015.[47]

[51] As complainants, the Applicants had a fair opportunity to present their arguments to the Discipline Officer in advance of his decision. The appeal was comprised of an 11-page letter

[42] COSB, s 30.5.2(7)(b), CRP, Tab 6 at 221.
[43] COSB, s 30.5.2(6), CRP, Tab 6 at 220.
[44] COSB, s 30.5.2(7)(b), CRP, Tab 6 at 221.
[45] COSB, s 30.1.1(2)(b), CRP, Tab 6 at 193.
[46] CPR, Tab 2 at 56.
[47] CRP, Tab 2 at 54.

with attachments and evidence the Applicants requested be reviewed.[48] The Applicants were represented by legal counsel who did not express any concerns with alleged unfairness relating to the Applicants' ability to make full submissions on the appeal.

[52] The Discipline Officer provided sufficient reasons for his decision. He articulated the Applicants' reasons for appeal, and summarized the information before him. He provided reasons for coming to the conclusion that the decision of the Director of UAPS was reasonable and appropriate.

[53] Even though a complainant has no specific right to a timely adjudication in a COSB proceeding, the decision of the Discipline Officer was issued approximately six weeks after the appeal was received (including the Christmas break). Keeping in mind the decision of the Director of UAPS is not under review, the Applicants have not suggested that there was any inordinate delay in the appeal process which might represent a violation of their procedural rights.

[54] However, even the alleged delay from the Director does not give rise to a breach of procedural fairness in the circumstances. The Applicants' complaint was against over 100 individuals for actions that took place over two full days, not including social media posts before and after. UAPS had a single investigator with any number of other outstanding complaints. The delays did not "taint" the investigation; there is no suggestion that some evidence was lost as result of the delay. The Discipline Officer's decision made it clear that the complaint was not dismissed due to the lack of evidence, but because the evidence when reviewed did not disclose a breach of a University rule.

[55] In any event, given that the Applicants' procedural rights in the context of a statutory appeal are undoubtedly at the "low end" of the spectrum, and given the very fulsome opportunity for the Applicants to provide submissions and evidence to the decision-maker, it is clear that there was no manifest unfairness in the appeal process.

[48] CRP, Tab 2 at 4-11.

[56] This does not mean that, in effect, the Discipline Officer's decision is immune to any review from a complainant. There are many examples of conduct that could render the appeal process "fundamentally unfair" to the Applicants. For example, if the Discipline Officer had refused to conduct the appeal, had refused a request for an extension to seek legal counsel, had refused a request to submit additional information or evidence, had failed to articulate reasons for the decision, or if the evidence indicated that he had made the decision prior to receiving submissions, a successful judicial review might be conceivable. None of those examples apply here.

[57] Ultimately, the Applicants are displeased and disagree with the assessment by the Discipline Officer that the Director's decision was appropriate. But the merits of that decision, and even the scope and conduct of the investigation, are not matters upon which the Applicants, as complainants in the process, can seek judicial review. The Discipline Officer had to be fair towards the Applicants, and the record demonstrates that he was.

3. The Discipline Officer's decision was reasonable in the circumstances

[58] Even if the merits of the Discipline Officer's decision are properly subject to review by the Applicants, the record is clear that the decision was reasonable.

i. The Counter-Demonstration was an exercise of the right to freedom of expression

[59] The Discipline Officer determined that the Director was reasonable and appropriate in concluding that the specific override relating to free speech in the COSB meant that a further investigation was not warranted because no University rule had been broken. The COSB specifically states that: "Nothing in this Code shall be construed to prohibit peaceful assemblies and demonstrations, or lawful picketing, or to inhibit free speech."[49]

[60] The Applicants, despite insisting on the inviolability of their freedom of expression, have taken a narrow view of what freedom of speech under the COSB entails for others. At the

[49] CRP, Tab 6 at 192 (emphasis added).

centre of the Applicants' dispute with the Discipline Officer's decision is their insistence that the counter-demonstration was not a protected form of speech. In their view, their display had a legitimacy that made it deserving of protection.[50] The counter-demonstrators, in contrast, "were not an official campus club, and made no effort to express their own opinions or philosophy. They were a mob whose very formation and purpose was in breach of the COSB."[51]

[61] The law, however, has always had an expansive understanding of freedom of expression and freedom of speech:

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

[62] The counter-demonstrators attempted to convey a meaning: namely that they disagreed with the expressions of the Applicants. It does not matter whether the meaning is expressed negatively or positively, it is still a meaning capable of being communicated. Disagreements and challenges to existing opinions is exactly what freedom of expression is meant to encourage:

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

[63] The Applicants rely on the statement, allegedly made by a counter-demonstrator, "We will not allow any limitation on our ability to block this hateful, deceitful display" as showing no intention of expressing an opinion.[54] However, it is obvious that the writer is expressing an

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[50] See Applicants' Brief at para 95.
[51] Applicants' Brief at para 97.
[52] *R v Keegstra* at 729 (citations omitted) **[BoA at Tab 14]**; see also, *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968-71 [*Irwin Toys*] **[BoA at Tab 15]**.
[53] *R v Keegstra* at 832, per McLaclin J (as she then was) dissenting (emphasis added) **[BoA at Tab 14]**.
[54] Applicants' Brief at para 50.

opinion that the display is hateful and deceitful. Even that statement can therefore qualify as a form of free speech.

[64] As a result, the counter-demonstrators did not need to articulate a particular philosophical position in order to make an expression. Regardless, however, the counter-demonstration involved more than just a mere "blockade." The photographic evidence provided by the Applicants shows that the counter-demonstrators displayed multiple signs expressing multiple opinions. A few examples include:

- "If you had an abortion that is ok; I had an abortion and it was ok"
- "Don't like abortion? Don't have one"
- "I am a woman not a womb"
- "My school is a safe place"
- "Let's talk. Not Shock."
- "Pro-Choice Forever"
- "Abortion is a valid choice"[55]

[65] The counter-demonstrators not only expressed themselves visually but vocally as well: "[n]ot only were the protestors physically obstructing the display, they were also chanting and singing and intentionally disrupting conversations."[56]

[66] The only clear limitation on what constitutes expression is an act of physical violence. There is no evidence or suggestion that the counter-demonstrators engaged in any physical violence. Although tensions were heightened, no physical confrontations or property damage occurred. The counter-demonstrators were in close proximity to the Display but that alone does not take their actions out of the realm of expression and into an act of violence.

[67] The Applicants have incorrectly relied on *Dolphin Delivery* for the proposition that the counter-demonstrators' "obstruction … does not qualify as expression."[57] In *Dolphin Delivery*, the Supreme Court of Canada concluded that secondary picketing in a labour dispute "would

[55] See CRP, Tab 2 at 34-48.
[56] CRP, Tab 3 at 57.
[57] Applicants' Brief at para 49; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 [*Dolphin Delivery*] [Applicants' Book of Authorities at Tab 11].

have involved the exercise of the right of freedom of expression."[58] The only actions of a picketer not protected were threats or acts of violence; none of which apply in the current instance.[59] If the Applicants' aim was to analogize the counter-demonstration to secondary picketing, then this only further supports that it was an exercise of free expression.

[68] The Applicants have emphasized that they were "an official campus club" with approval for their event.[60] The implied corollary is that the unofficial group of counter-demonstrators somehow has an inferior right to express themselves. Club membership is voluntary. Further, the override set out in the COSB referred to above apply to all students at the University, not only in relation to student clubs or organizations.

[69] The issues faced by the Discipline Officer was whether it was reasonable for the Director to conclude that this override would apply to prevent a finding of a breach of the sections of the COSB at issue. That conclusion was clearly one that was available to him given the evidence noted above. The Applicants' plain reading of COSB section 30.3.4(1)(b) is incorrect.[61] The complete reading of that section, incorporating the override section in the preamble, would be:

> No Student shall, by action, words, written material, or by any means whatsoever, obstruct University Activities or University-related Functions, unless done as part of a peaceful assembly, demonstration, lawful picketing or other form of free speech.

[70] To substantiate this violation, there would have to be 1) an obstruction and 2) that is not a form of free speech. The Discipline Officer was not convinced that either was satisfied in this case.[62]

[71] For the reasons noted above, the counter-demonstration is capable of falling into the definition of "expression." It was not violent and it was an attempt to convey meaning. It was

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[58] *Dolphin Delivery* at 588.
[59] *Dolphin Delivery* ("[t]hat freedom, of course would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct" at 588).
[60] Applicants' Brief at paras 2, 19, 53, 63, 78, 95.
[61] Applicants' Brief at para 55.
[62] The Applicants have alleged violations of the COSB beyond section 30.3.4(1)(b). While there are many reasons why those other violations are also not substantially made out in this case, since the free speech exemption in the preamble applies to the entire COSB, the University intends to rely on that exemption as a complete answer to any other COSB violation unless otherwise invited by the Court to discuss those violations.

open for the Discipline Officer to conclude that the Demonstration could be characterized as either "a peaceful assembly, a demonstration, a lawful picketing, or other form of free speech." That was, in fact, the Discipline Officer's primary conclusion:

> As Director Spinks noted, the introduction to the COSB makes it clear that all parties, both the students in the Go-Life group and the protestors, have a right to free speech. Go-Life and the protestors disagree on both the fundamental arguments being expressed and on the appropriate mechanisms for engaging in that debate. Both parties expressed their opinions. All of the participants were therefore engaging in acts which the COSB specifically permits – demonstrating and/or protesting.
> …
> Free speech is not a clean process where people will always take turns and treat each other with deference. We have to expect that profound disagreements over controversial topics may be loud and vigorous. It follows that the University should tread lightly in applying disciplinary processes when people are engaging in a conflict of ideas.[63]

[72] The Discipline Officer also did not find that there was an "obstruction" within the meaning of the COSB:

> The protestors competed with Go-Life for attention but they did not prevent them from speaking. They did make it more difficult for people to see the displays and challenged people not to speak to the Go-Life volunteers but they did not prevent them from doing so, regardless of the rhetoric on both sides. … Ms. Nicol's statement indicates two things. First, it shows that Go-Life volunteers were speaking to people who attended the installation and second, that protestors were attempting to persuade people not to interact with Go-Life material, not physically preventing them from doing so. … The photographs supplied by Mr. Cameron show that enough of the displays were visible so that passersby would know what information Go-Life was offering and could therefore make an informed choice whether to view it in its entirety or not.[64]

[73] The Applicants' statement that the counter-demonstrators "succeeded in large measure, in preventing the Applicants from communicating their message and from engaging other people in discussions and peaceful debate" is unsubstantiated.[65] The Applicants have led no evidence showing that anyone did not receive their message or engage with the Applicants strictly because of the counter-demonstration. The Discipline Officer noted that if anything the

[63] CRP, Tab 1 at 2.
[64] CRP, Tab 1 at 2-3.
[65] Applicants' Brief at para 6.

evidence shows the contrary to be true.[66] Undoubtedly, the Applicants preferred for their message to be communicated without the counter-demonstrators' commentary, but a market-place of ideas does not lend itself to monopolies.

[74] The Applicants have challenged the Discipline Officer's conclusion that charges would be unlikely to be substantiated by pointing out that there was "ample evidence to prove that the COSB had been violated."[67] The Applicant fails to recognize that the issue with pursuing the complaint was legal and not factual. The disagreement is not on what actually happened but on whether what happened should be characterized as an expression of free speech or an unjustified obstruction. It was open for the Discipline Officer to conclude, after accepting all of the evidence of the Applicants as true, that any charge would still not satisfy the elements of a COSB offence.

[75] The Discipline Officer's reasons disclose a decision-making process that is intelligible, transparent and justify the outcome reached, which is itself within a range of possible, acceptable outcomes. Given this, the Discipline Officer's decision meets the standard of reasonableness and ought to be accorded a high degree of deference.

ii. There is no inconsistency with the University's previous actions

[76] When viewed in context, the "contradictions" the Applicants complain of with the University's previous actions simply do not exist.

[77] Dr. Samarasekera's February 27, 2015 letter begins with the following:

> The University of Alberta <u>will always start from a position that supports a right to freedom of expression.</u> It is our duty to foster and facilitate discussion and debate in an environment that is <u>a safe space for all students.</u>[68]

[66] CRP, Tab 1 at 3.
[67] Applicants' Brief at para 63.
[68] CRP, Tab 2 at 12, (emphasis added).

[78] At no point in the letter does Dr. Samaresekera qualify that the right to freedom of expression is limited to the Applicants. Her statement cuts both ways. If the Applicants have a right to erect graphic billboards, the counter-demonstrators have a right, within the confines of the COSB, to hold up signs.

[79] The actual wording the Applicants have focused on in the letter is the following:

> A safe and respectful campus community is always a high priority. The university does not condone activity that violates the Student Group Procedure or the Code of Student Behaviour. Any complaints will be investigated by UAPS, according to our existing policies and procedures.[69]

[80] The University has not condoned any violation of the COSB because it has ultimately found after investigation that there was no violation of the COSB. The complaints raised by the Applicants were investigated following existing policies and procedures, including the University's support for free speech under the COSB.

[81] UAPS did make multiple requests for the counter-demonstrators to move to the designated area during their demonstration and it was either implied or stated that COSB actions could be instituted for non-compliance.[70] The aim of the request was to maintain the safety and security of all individuals on University property. As mentioned above, although it was a tense situation, the safety and security of all individuals was never actually compromised. In any event, COSB actions were instituted against the counter-demonstrators and their actions were investigated, though ultimately dismissed.

[82] However, even if the University's previous actions did contradict the Discipline Officer's decision, it is only the Discipline Officer's decision that is currently under review. That office alone is authorized under the COSB to make the relevant determination. There is no further basis for review.

[69] CRP, Tab 2 at 12, (emphasis added).
[70] CRP, Tab 5 at 74-75.

V. RELIEF SOUGHT

[83] The University respectfully asks that the Applicants' Application in respect of the Discipline Officer's February 4, 2016 decision, denying their appeal of UAPS Director's decision not to proceed with their complaint under the COSB, be dismissed with costs.

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

REYNOLDS MIRTH RICHARDS & FARMER LLP

Per:

MATTHEW WOODLEY
Counsel for the Respondents

LIST OF AUTHORITIES

TAB

1. *Harelkin v University of Regina*, [1979] 2 SCR 561

2. *Paine v University of Toronto*, 1981 CanLII 1921 (ON CA)

3. *Vinogradov v University of Calgary*, 1987 ABCA 51

4. *Post-secondary Learning Act*, SA 2003, c P-19

5. *Public Post-secondary Institutions' Tuition Fees Regulation*, Alta Reg 273/2006

6. *Mckinney v University of Guelph*, [1990] 3 SCR 229

7. *UAlberta Pro-Life v University of Alberta,* 2015 ABQB 719

8. *Dalla Lana v University of Alberta*, 2013 ABCA 327

9. *Burgiss v Canada (Attorney General)*, 2013 ONCA 16

10. *Mitten v College of Alberta Psychologists*, 2010 ABCA 159

11. *Friends of the Old Man River Society v Ass'n of Professional Engineers, Geologists and Geophysicists of Alberta* 2001 ABCA 107

12. *Tran v College of Physicians and Surgeons of Alberta,* 2017 ABQB 337

13. *Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v Barry*, 2016 ABCA 354

14. R. v. Keegstra, [1990] 3 SCR 697

15. Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927

16. University of Alberta Outdoor Site Booking Procedure

17. Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624

18. Greater Vancouver Transportation Authority v Canadian Federation of Students, 2009 SCC 31

19. Lobo v Carleton University, 2012 ONCA 498

20. Lobo v Carleton University, 2011 ONSC 5798

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