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| Judicial Centre | Calgary |
| Applicants | Cameron Wilson, Alanna Campbell, Leah Hallman, Cristina Perri, Peter Csillag, Joanna Strezynski, and John McLeod |
| Respondents | Board of Governors of the University of Calgary, and the University of Calgary |
| Document | Brief of Argument |


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# Brief of Argument
in respect of a Special Chambers Application
to be heard on Wednesday, April 17, 2013 at 2:00 pm

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## Introduction

1. This is an application for judicial review pursuant to Rules 3.15 – 3.24 of the Alberta Rules of Court,[1] *Alberta Regulation 124/2010*, and pursuant to section 31(1) of the *Post-Secondary Learning Act*,[2] S.A. 2003, c. P-19.5.
2. The Applicants seek to quash a decision of the Board of Governors of the University of Calgary which finds the Applicants guilty of violating section 4.10 of the Non-Academic Misconduct Policy. The Applicants also seek injunctive and declaratory relief.
3. The Applicants are University of Calgary students who seek to exercise their *Charter*, statutory, contractual, and other legal rights to engage in the peaceful expression of their opinions on the campus of a public university, and to do so without censorship, harassment, or intimidation.
4. This Application raises the issue of whether a public university can censor the peaceful expression of unpopular opinions on campus by tuition-paying students.
5. The Applicants were charged with trespassing, and subsequently with violating the University's Non-Academic Misconduct Policy, for having peacefully expressed their pro-life views on campus, and for having refused to comply with the University's demand that they hide their signs from view. The Respondent University has threatened the Applicants with penalties, including expulsion, unless they comply with a demand – directed uniquely at the Applicants and not at any other students or student groups – that they set up their display in a manner that prevents passers-by from seeing the display.
6. The University admits that its demand is not based on any rule, policy, bylaw or regulation. The demand assumes that a public university has the right to censor the peaceful expression of unpopular opinions on campus. The University knowingly permits and tolerates the display on campus of shocking, disturbing, offensive and controversial visual imagery by persons and organizations other than the Applicants.

[1] Applicants' Book of Authorities, Tab 1
[2] Applicants' Book of Authorities, Tab 2

7. The Applicants were found guilty of violating section 4.10 of the University's Non-Academic Misconduct Policy on May 5, 2010, by Associate Vice-Provost Meghan Houghton. Ms. Houghton's decision was upheld by an Appeal Board on August 20, 2010. Ms. Houghton's decision was then upheld by the Board of Governors of the University of Calgary on January 13, 2011.
8. The decisions of Ms. Houghton, the Appeal Board and the Board of Governors assume, without explanation and without addressing the students' arguments, that the University's demand (to turn the signs inwards so that passers-by cannot see the signs) was legal. All three decisions ignore the central issue as to whether or not the Applicants actually endangered safety on campus, which is a requirement if the Applicants are to be found guilty of violating Section 4.10.
9. This Application also raises issues of procedural fairness. When prosecuted by the University for an offence in respect of which *expulsion from the University* was (and is) a possible penalty, the Applicants were denied the right to disclosure, the right to representation by counsel, the right to cross-examine witnesses, the right to an impartial decision-maker, and the right to a decision based on relevant considerations.

## Facts

10. The Applicants were, at all relevant times, tuition-paying students at the University of Calgary and members of Campus Pro-Life, a registered campus club (hereafter "CPL"). Since 2006, students have set up the Genocide Awareness Project (hereafter "GAP") display on campus twice per year, for two consecutive days each spring, and two consecutive days each fall. GAP is a passive, stationary display consisting of large signs set up in a circle, such that people walking by can choose to look at all, some, or none of the signs. The signs include large colour photographs of abortion and of historical genocides. Students stand near the display and invite people who are passing by to engage

in discussion. [**Tab 22** (paragraphs 1-3), **Tab 23** (paragraphs 1-3), and **Tab 25**] Unless indicated otherwise, all Tabs in this Brief refer to the Certified Record of Proceedings, filed July 15, 2011.

11. Since 2006, each GAP display has generated debate and discussion on campus about the nature and morality of abortion, and related issues and topics. The unchallenged evidence before the Board of Governors indicates that the Applicants have not, at any time, engaged in violence, or in inappropriate or disrespectful behaviour, and the Applicants have not endangered the safety or security of anyone on campus. Further, at no time has violence been perpetrated by anyone on campus against the Applicants or against the GAP display. [**Tab 22** and **Tab 23**]
12. During the first four GAP displays on campus, in the spring and fall of each of 2006 and 2007, the University of Calgary (hereafter "the University") posted its own signs on pathways leading towards the GAP display, stating: "The exhibit is protected under the relevant section of the Charter of Rights and Freedoms related to Freedom of Expression." [**Tab 23** (paragraph 6 and Exhibit "D")]
13. On the second day of the October 2007 GAP display, some people opposed to GAP physically blocked, interrupted, and obstructed the display by holding up large banners which covered the GAP signs. These opponents did not set up their own competing display or protest, or express their own opinions, but instead they stood near and around the GAP display, preventing passers-by from viewing the display, and preventing the Applicants from engaging people in discussion. The Applicants brought this physical blocking and physical obstruction to the attention of Campus Security, which took no action and allowed the obstructionists to continue with their physical disruption of the GAP display. [**Tab 23**, paragraphs 7-11]
14. In response to the University's decision to condone the physical blocking and physical obstruction of their display, the Applicants retained counsel, who wrote to the University explaining that the Applicants welcome debate and do not wish to restrict or curtail the peaceful and non-physical expression of others' viewpoints. In a letter to the University dated March 10, 2008, Applicants' counsel argued that the obstructionists' behaviour was a potential threat to safety and security on

campus, and asked the University to uphold the rights of *all* students to express their views without being subjected to physical obstruction. [**Tab 23**, paragraph 11, Exhibit "E"]

15. Campus Pro-Life holds its volunteers to a strict code of conduct whereby they pledge non-violence. Even in the face of very frustrating behaviour by the obstructionists in October of 2007, the Applicants and other students remained calm, composed and peaceful. [**Tab 23**, paragraph 10]
16. In the spring of 2008, after GAP had been set up on campus on four occasions, for two consecutive days each time, the University's Legal Department began demanding that CPL set up GAP with the signs in a circle facing *inwards*, such that no passers-by could see the signs. The University described its new demand as a "reasonable compromise" and threatened CPL students with trespassing charges, and with charges for non-academic misconduct, if the CPL students fail to comply with this new demand. [**Tab 22** (paragraphs 6 and 10) and **Tab 23** (paragraphs 12 and 13)]
17. Subsequent to the University's new demand in 2008, the Applicants and other students continued to set up the GAP display on campus for two days in the spring and two days in the fall. In the spring of 2008 and in November of 2008, Campus Security asked the students to turn their signs inwards such that people walking by would not be able to see the signs. The students refused to do so. In November of 2008, Campus Security also ordered the Applicants' counsel, who was present on campus pursuant to the Applicants' invitation and instructions, to leave campus immediately or face trespassing charges. [**Tab 22** (paragraphs 8 and 10) and **Tab 23** (paragraph 16)]
18. At no time has the University or its Campus Security indicated what rule, regulation, bylaw, or policy forms the basis for the demand that the Applicants' signs be "turned inwards" so that no passers-by can see them. [**Tab 22** (paragraph 7) and **Tab 23** (paragraph 14)]
19. In the fall of 2008, large colour photos were displayed on campus which showed the horrific results of torture perpetrated by the Chinese communists on the adherents of the Falun Gong religious movements. Campus Security did not ask these people to dismantle their signs, or to turn their signs inwards such that passers-by could not see the signs. Gory and disturbing photos produced by the

Alberta Occupant Restraint Program, showing a face injured by having gone through a windshield, were displayed at numerous locations on the University campus in the fall of 2010, including MacEwan Hall, the women's washrooms in Craigie Hall and Murray Fraser Hall, and the men's changeroom in the Kinesiology Building. [**Tab 22** (paragraphs 4 and 9, and Exhibits "A" and "B") and **Tab 23** (paragraph 15, and Exhibit "F")]

20. In January of 2009, two months after another non-eventful GAP display on campus, several of the Applicants (as well as other students) were charged with trespassing, and received a summons to attend at Provincial Court and enter a plea. The Applicants and other students entered a plea of "not guilty" to the trespassing charges. A trial date was set for November 4, 2009. Two days before the scheduled trial, the Crown Prosecutors stayed the charges, as they had not been able to obtain from the University an indication as to what University rule, regulation, policy, or bylaw had been violated by the students. [**Tab 22** (paragraphs 11-13) and **Tab 23** (paragraphs 17-19)]

21. CPL students set up the GAP display twice in 2009 and twice in 2010, for two days in the spring and for two days in the fall, for a total of twenty days from 2006 to 2010. The unchallenged evidence before the Board of Governors indicates that neither the Applicants nor their display have posed any threat to the safety or security of anyone on campus since the first display in the spring of 2006, or during the nine displays thereafter. The unchallenged evidence before the Board of Governors indicates that the only potential threat to safety and security on campus came from individuals who engaged in the physical blocking, obstruction and interruption of the display, on one occasion in October of 2007. This potential threat to safety and security was condoned by Campus Security. [**Tab 22** (paragraphs 14-15, 21, and 23) and **Tab 23** (paragraphs 7-11, 20-21, 28 and 32)]

## The Houghton decision finding Applicants guilty of non-academic misconduct

22. After the GAP display in April of 2010, each of the Applicants received a letter from Associate Vice-Provost Meghan Houghton, dated April 14, 2010, in which she accused each of them of having violated the University's Non-Academic Misconduct Policy. Ms. Houghton wrote: "The specific violation that I am charging you with is listed in Section 4.10 of the Non-Academic Misconduct Policy, item e), which is a Major Violation, that reads "failure to follow the direction of a Campus Security officer or University official in the legitimate pursuit of his/her duties." [emphasis added] [**Tabs 1-A**, **2-A**, **3-A**, **4-A**, **5-A**, **6-A**, and **7-A**]

23. Section 4.10 of the University of Calgary Non-Academic Misconduct Policy defines "Major Violations" as actions "which endanger the safety and/or security of another individual or the University of Calgary community, or that contravene municipal, provincial or federal law." Finding the Applicants guilty of non-academic misconduct requires the University to prove that the Applicants' actions, in erecting a passive, stationary display on campus, "endangered the safety and/or security of another person or the U of C community", or that the Applicants contravened "municipal, provincial or federal law." [**Tab 17**, page 4]

24. The Non-Academic Misconduct Policy's "Major Violations" are not directed at hiding controversial or unpopular expression from public view, or at saving adults at the University from feeling upset by the expression of opinions they disagree with. Rather, the "Major Violations" are directed at protecting the physical safety, physical health, and physical property of people on campus. Examples of Major Violations listed in section 4.10 include:

    - possessing, using, exchanging, manufacturing or selling illegal drugs;
    - possessing, storing, using or misusing any firearm, weapon, hazardous material or explosive substance;
    - damage or destruction of property over $500;
    - hazing;
    - sexual assault or sexual misconduct;
    - fraud, including misuse of Student ID card or furnishing false information;

- vandalism, tampering, defacing or damaging property that is not one's own;
- theft;
- engaging in disruptive behaviour that involves substantial disorder and/or disruption to the operation of the University;
- tampering with fire and/or emergency equipment;
- setting unauthorized fire(s);

Section 4.31 of the Non-Academic Misconduct Policy lists the penalties which may be imposed on those found guilty, one of which is *expulsion from the University*, with such expulsion to be noted in the student's academic transcript. [**Tab 17**, page 4 and pages 8-9]

25. Prior to the Applicants' scheduled hearings before Associate Vice-Provost Meghan Houghton on April 28 and April 30, the Applicants' counsel wrote to Ms. Houghton requesting "copies of all relevant University of Calgary documents which enumerate and describe the duties and procedures of Campus Security at the University of Calgary." [**Tab 8**, fourth paragraph, last sentence] Ms. Houghton did not respond to this request prior to or at the hearing, [**Tab 22** (paragraph 17) and **Tab 23** (paragraph 24)] nor did the University of Calgary provide this requested disclosure subsequently, when these proceedings were continued before the Appeal Board and before the Board of Governors. These requested documents were not provided to the Applicants until after the Applicants commenced this litigation against the University.

26. Each of the Applicants attended individually at a hearing before Ms. Houghton on April 28 or 30, 2010. The Applicants requested to have their counsel present, which request was denied. [**Tab 22** (paragraph 18) and **Tab 23** (paragraph 25)] Although the Applicants faced the possibility of expulsion from the University [**Tab 17**, section 4.31-j), page 9] for having committed a "Major Violation", the Applicants were only permitted to be joined by an "Advisor," described by the Non-Academic Misconduct Policy as a "support person" who "does not represent the student." [**Tab 17**, section 3, page 2]

27. At the April 28 and 30 hearings before Ms. Houghton, the University did not present any evidence that the Applicants, by setting up the GAP display, had endangered the safety or the security of anyone on campus. [**Tabs 16**, **22** and **23**] Nor did the University present evidence that the Applicants had contravened municipal, provincial or federal law by erecting a stationary display on campus and refusing a demand to hide its signs by turning them inwards. Nor did the University put forward any evidence or arguments in support of its position that censoring unpopular or controversial expression is an acceptable method of addressing security concerns. [**Tab 16**; **Tab 22** (paragraph 19); **Tab 23** (paragraph 26)]

28. At the April 28 and 30 hearings, no witnesses testified on behalf of the University. The absence of testimony from witnesses and the absence of other evidence, along with the University's refusal to provide the Applicants with the Campus Security job description and policies, made it impossible for the Applicants to cross-examine witnesses or otherwise challenge the legitimacy and legality of the University's demand (put to the Applicants by Campus Security) that the Applicants hide their signs from view. [**Tab 16**; **Tab 22** (paragraph 19); **Tab 23** (paragraph 26)]

29. The only document put into evidence by the University during the April 28 and 30 hearings before Ms. Houghton was the "Notice to Campus Pro-Life Protesters" [**Tab 15**] which sets out the University's position and makes various assertions. The Applicants acknowledge having received this document, but the Applicants have consistently expressed their disagreement with the University's assertions contained therein, which are not supported by actual evidence.

30. At the April 28 and 30 hearings, each of the seven Applicants specifically raised the issue of whether Campus Security's demand to turn the signs inwards was made "in the legitimate pursuit of his/her duties", as this is expressly required in order to find a student guilty of violating section 4.10-j) of the Non-Academic Misconduct Policy. As revealed in the Unofficial Transcripts [**Tab 16**], this issue was raised by Asia Strezynski (page 3), Alanna Campbell (page 7), Cristina Perri (page 9), Peter Csillag (page 12), Leah Hallman (pages 14 and 15), John McLeod (repeatedly, at pages 17-26), and

Cameron Wilson (page 28) who articulated the issue as follows: "Is Campus Security allowed to ask us to do anything, or are there some things that Campus Security is not allowed to ask us to do?"

31. During the hearings, each time a student raised the question of the legality of the demand of Campus Security to turn the signs inwards, Ms. Houghton responded by *asserting* that the demand ought to have been obeyed, thereby implying that it was indeed made "in the legitimate pursuit of his/her duties." Ms. Houghton never explained her assertion, and the University did not present evidence at the hearing to support this assertion. Ms. Houghton steadfastly refuses to address or even consider whether or not Campus Security had the authority to censor unpopular speech that is expressed peacefully on a university campus. Ms. Houghton offers neither explanation nor justification, and simply assumes the truth of her own assertion. [**Tab 16**]
32. On May 5, 2010, each of the Applicants received a letter from Ms. Houghton stating that she had found each student guilty of the same Major Violation that she herself had charged the students with. [**Tabs 1-B**, **2-B**, **3-B**, **4-B**, **5-B**, **6-B**, and **7-B**]. Ms. Houghton's decision was rendered in writing to each Applicant individually, but with identical content in each letter. Ms. Houghton acted as both accuser (April 14, 2010) and judge (May 5, 2010), which prompted the Applicants to raise the issue of institutional bias before the Appeal Board, again before the Board of Governors, and now again before this Court.
33. The penalty imposed by Ms. Houghton was a warning to each of the Applicants that her or his continued refusal to comply with the University's demand would lead to a more severe penalty, which could mean probation, suspension and expulsion from the University. [**Tabs 1-B** through **7-B** inclusive, second-last paragraph, page 2; **Tab 22** (paragraph 22) and **Tab 23** (paragraph 29)].
34. In her May 5, 2010, letter to each Applicant, Ms. Houghton continues to assume, without evidence and without providing analysis, that the Applicants endangered safety on campus by not complying with the demand of Campus Security to hide their signs from view. Ms. Houghton declares at the top of page 2 that "there are issues of safety and security." She makes this declaration without evidence,

without any explanation of what these "issues" might be, and without any explanation as to why or how the Applicants' passive, stationary display might threaten someone's safety. Ms. Houghton then faults the Applicants for failing to lead evidence in support of their contention that the Campus Security demand was not made "in the legitimate pursuit of his/her duties," all while having refused the Applicants' written request for information about the duties of Campus Security.

35. Mid-way into the third paragraph of her May 5 letter (sixth sentence), Ms. Houghton repeats the University's claim [**Tab 15**, Notice to Campus Pro-Life Protesters] that "the University intended to maintain good order to minimize the risk of violent confrontations on its property in order to protect the safety and security of its students, faculty and staff." Her claim assumes, without evidence, that the Applicants (or their GAP display, or both) should be held responsible for non-existent "violent confrontations" by submitting to censorship of their peaceful expression of opinion on campus. Ms. Houghton's claim assumes that people who respond violently, or who might respond violently, to opinions they dislike should be appeased by censoring the controversial opinion with which the would-be perpetrators of violence disagree. Ms. Houghton's decision also assumes that a university should not be a forum for the free, frank and uncensored expression – by peaceful means – of all opinions and ideas.

36. In the second-last sentence of the third-last paragraph of her May 5, 2010, letter, Ms. Houghton states that the Applicants "have acknowledged that [they] intentionally failed to comply with the written direction of Campus Security." She then continues: "On this basis, I find that Campus Security properly exerted its mandate and exercised its discretion in a reasonable manner." Here again, Ms. Houghton refuses to provide any analysis, explanation or justification for her position – and the University's position – that the demand to hide the Applicants' signs from public view was a legitimate and legal demand. In the last two sentences of the third-last paragraph on page 2, Ms. Houghton makes the nonsensical claim that the Applicants' refusal to comply with the demand proves that the demand was legitimate.

37. By finding the Applicants guilty of a Major Violation under section 4.10 of the Non-Academic Misconduct Policy, Ms. Houghton assumes that the Applicants, by setting up a stationary display on campus, endangered the physical safety of individuals or contravened municipal, provincial or federal law. While the University had certainly made its position clear in its Notice [**Tab 15**], there was no actual evidence before Ms. Houghton that the Applicants had contravened municipal, provincial or federal law, or that the Applicants had endangered anyone's physical safety. The University's bare assertions, no matter how frequently they are repeated, are not evidence.

## Appeal Board decision finding Applicants guilty of non-academic misconduct

38. On May 14, 2010, the Applicants appealed Ms. Houghton's decision that they were guilty of non-academic misconduct to the Appeal Board. In their five-page appeal letter, the Applicants also request a hearing before the Appeal Board [**Tab 9**]. On page 3 of this appeal letter, the Applicants summarize their grounds of appeal by stating that Ms. Houghton:

- failed to consider relevant facts;
- relied on unfounded assumptions;
- made assertions not supported by evidence;
- failed to consider and apply relevant legal principles (e.g. contractual rights, Charter rights)
- failed to produce relevant documents requested prior to the hearing (e.g. Campus Security job description); and
- failed to adhere to principles of natural justice.

39. Although these grounds of appeal (in the paragraph immediately above) are firmly established as valid grounds in administrative law, the Non-Academic Misconduct Policy expressly rejects their availability within student discipline proceedings. Notwithstanding its own declaration to follow the principles of natural justice [**Tab 17**, section 1, page 1], the Non-Academic Misconduct Policy recognizes only the following grounds of appeal:

- relevant fresh evidence;
- bias;

- the Non-Academic Misconduct Policy procedures not followed; and
- an excessively severe sanction.

By limiting the grounds of appeal to these four, the Appeal Board could easily uphold Ms. Houghton's decision, even though Ms. Houghton's decision failed to consider relevant facts, relied on unfounded assumptions, made assertions not supported by evidence, failed to consider and apply relevant legal principles, failed to provide the accused persons with requested disclosure, and failed to adhere to the principles of natural justice.

40. The Appeal Board itself was chaired by Meghan Houghton's supervisor Ann Tierney, to whom Meghan Houghton reports. According to the Appeal Board Composition and Procedures [**Tab 17**, page 18] the Appeal Board consists of Ms. Tierney, a vice-chairperson selected by Ms. Tierney, another University administration staff member, one student, and one faculty member. Only two of the five people on the Appeal Board have any independence from the University's own administration; the student and the faculty member are the only "outsiders" who might possess some objectivity. The Appeal Board's composition is such that it cannot be an independent and impartial decision-maker.

41. By way of a letter dated August 20, 2010, Vice-Provost Ann Tierney on behalf of the Appeal Board dismissed the students' appeal, without holding a hearing. [**Tabs 1-C**, **2-C**, **3-C**, **4-C**, **5-C**, **6-C**, and **7-C**] Ms. Tierney's decision asserted that Ms. Houghton was not biased and did not act as a prosecutor, but then fails to address the institutional bias resulting from Ms. Houghton acting as both accuser [**Tabs 1-A** through **7-A** inclusive] and judge [**Tabs 1-B** through **7-B** inclusive].

42. Like Ms. Houghton, the Appeal Board makes no effort to explain or justify its assumption that the Campus Security demand to hide the GAP signs from the view of passersby was legal, or its assumption that the Applicants endangered safety on campus or contravened a municipal, provincial or federal law. Instead, the Appeal Board concludes, without evidence and without analysis, that Campus Security's demand was legal and was made "in the legitimate pursuit of his/her duties."

Rather than refuting the arguments raised in the Applicants' appeal [**Tab 9**] the Appeal Board simply ignores them, and repeats the same assertions made by Ms. Houghton in her May 5 decision without supporting evidence.

43. For example, at the top of page 3, the Appeal Board acknowledges the Applicants' argument that "there was no evidence of a risk to safety and security." Rather than addressing this argument (by pointing to actual evidence, or by justifying the absence of evidence), the Appeal Board instead notes that Ms. Houghton's assertion (that "safety and security" concerns exist) was *also* made by Campus Security. It seems that in the Appeal Board's mind, assertions need no evidentiary support, especially when made by *both* Ms. Houghton *and* Campus Security. Following this reasoning, the more parties there are making an unfounded assertion, the stronger the assertion becomes.

44. Another example of the Appeal Board's failure to actually consider the Applicants' arguments is found in the second paragraph on page 3. The Appeal Board acknowledges the Applicants' argument that "Campus Security lacked the authority to issue a direction as to how displays may be set up on the University of Calgary property." In response, the Appeal Board declares that "Ms. Houghton addressed this in her original decision," and then reiterates Ms. Houghton's claim that the Applicants "did not lead any evidence in that regard," notwithstanding the fact that Ms. Houghton had refused to provide the information about the job description of Campus Security that was requested by the Applicants prior to the hearings.

45. The Appeal Board's reasoning assumes that the Applicants have the onus of somehow proving that Campus Security does *not* have the authority to order that unpopular or controversial expression be hidden from view. The Applicants submit that the onus is on the University to establish that Campus Security *has* the authority to censor speech; there is no onus on the Applicants to establish that Campus Security does not have this authority.

46. In short, Ms. Houghton and the Appeal Board assert and assume that the Campus Security demand was legal, and that the Applicants' refusal to comply with it endangered safety and security on

campus. But neither Ms. Houghton nor the Appeal Board provides an explanation as to why or how the Campus Security demand is legal, and neither decision points to any evidence to support the assertion that the Applicants pose a threat to safety and security on campus.

## Board of Governors decision: Applicants guilty of non-academic misconduct

47. The Applicants filed their appeal to the Board of Governors on October 29, 2010 [**Tab 13**] along with the Affidavit of Cameron Wilson [**Tab 23**] and later that of Alanna Campbell [**Tab 22**]. The University elected not to cross-examine Ms. Campbell and Mr. Wilson on their Affidavits. The University filed no evidence before the Board of Governors that might challenge or contradict the evidence of Alanna Campbell and Cameron Wilson, and included both Affidavits in the Certified Record of Proceedings. On January 13, 2011, the Board of Governors dismissed the Applicants' appeal, without a hearing [**Tab 14**].

48. The unchallenged evidence before the Board of Governors [in particular: **Tabs 16**, **22** and **23**] indicates that:

- The University of Calgary condones gory, graphic images being displayed on campus when displayed by persons or organizations other than the Applicants [**Tab 22**, paragraphs 4 and 9; **Tab 23**, paragraphs 4 and 15] and no other campus group has been asked to hide its expression from the view of passers-by [**Tab 22**, paragraph 21; **Tab 23**, paragraph 28]
- Neither the Applicants nor their display posed any danger to the safety or security of any person on campus when the GAP display was set up for four days per year (two days in spring; two days in fall) from 2006 onwards [**Tab 22**, paragraphs 14, 15, 19 and 21; **Tab 23**, paragraphs 5, 20, 21, 26, 28 and 32]
- The only potential threat to safety and security on campus came from some individuals who engaged in the physical blocking, interruption and obstruction of the GAP display on one day in the fall of 2007. This physical obstruction and blocking was knowingly condoned by Campus Security. [**Tab 23**, paragraphs 7-11]
- No evidence was adduced by the University of Calgary at the April 28 and 30 hearings, or before the Appeal Board or before the Board of Governors, that the GAP display or the Applicants pose any threat to safety or security on campus [**Tab 16** (Unofficial Transcript of Hearings); **Tab 22**, paragraph 19; and **Tab 23**, paragraph 26].
- The Applicants have reasonable grounds to believe, based on the University's written policies and on the public statements of Provost Alan Harrison, that they have a contractual right, along with all other students, to express their opinions on campus in a peaceful manner regardless of how

popular or unpopular those opinions may be. [**Tab 22**, paragraphs 25-28; **Tab 23**, paragraphs 33-37]

49. The Board of Governors ignored the unchallenged evidence that was before it, making no reference in its decision to the Affidavits of Alanna Campbell and Cameron Wilson, although receipt of each Affidavit was acknowledged [**Tab 13** (University Secretariat date stamp, October 29, 2010) and **Tab 14** (letter from Elizabeth Osler)]. Instead, the Board of Governors repeats the same unsupported assertions that were made by Ms. Houghton and by the Appeal Board.

50. The Board of Governors decision, under "**Bias**", states that there is no evidence of bias. This ignores the institutional bias arising from the fact that Ms. Houghton acted both as accuser [**Tab 1-A**] and judge [**Tab 1-B**], such that the Applicants were denied their right to an independent and impartial decision-maker. The Board of Governors apparently assumes that there is no violation of natural justice when the accuser subsequently acts as the judge.

51. Also under "**Bias**", the Board of Governors notes that "the students were not allowed to have legal counsel present although they were allowed to have an advisor" and then makes no effort to explain why, when the Applicants faced possible expulsion from the University, they were not entitled to representation by counsel. In respect of the demonstrated institutional bias and the denial of the Applicants' right to counsel, the Board's reasons are limited to stating: "I am unable to conclude that there was a lack of natural justice or unfairness in the hearing or appeal."

52. The Board further declares under "**Bias**," that "credibility was not in issue and the facts were not in dispute – the students acknowledged that they refused to follow the instructions of Campus Security." The Applicants have admitted that they refused Campus Security's demand to hide their signs from the view of passersby, but other facts *are* in dispute. First among these is the University's assertion – and the Board of Governors' conclusion – that the Applicants endangered the safety or security of people on campus, or that the Applicants contravened a municipal, provincial or federal law.

53. Finding a student guilty of a "Major Violation" of the Non-Academic Misconduct Policy [**Tab 17**, section 4.10, page 4] requires that the student endanger another's safety or security, or contravene a municipal, provincial, or federal law. The unchallenged evidence before the Board of Governors indicates that the Applicants have *not* endangered anyone's safety or security, and have *not* contravened any municipal, provincial or federal law. The evidence before the Board of Governors indicates that the only potential threat to safety and security on campus came from individuals who, on one occasion in October of 2007, engaged in the physical obstruction, interruption and blocking of speech that they disagree with.

54. The Board of Governors' assertion that "the facts were not in dispute" is correct, and the Board of Governors errs by ignoring these undisputed facts.

55. Further under "**Bias**", the Board of Governors asserts that cross-examination would not have changed the outcome of the hearing because "credibility was not in issue". It is true that credibility was not in issue, for the simple reason that the University did not present any evidence or witnesses in support of its position that the Applicants had violated section 4.10 of the Non-Academic Misconduct Policy by endangering the safety or security of people on campus. When you have no evidence, and only assertions, there cannot be questions about credibility.

56. Under "**New Evidence**" the Board of Governors states:

> In addressing the issue of information being withheld from the students involved, this had already been brought forward by Mr. Carpay in his letter following Ms. Houghton's initial decision. Given the interval of several months between Ms. Houghton's decision and the consideration of the Appeal Board, there would have been sufficient time for the appellants and Mr. Carpay (a Barrister and Solicitor) to obtain and review public documents under which Campus Security's duties are defined. I do not find that Mr. Carpay's concerns with withholding documents remained at the time of any hearing of the Appeal Board.

The Board's assertion here assumes that the relevant documents were publicly available, that the onus was on the Applicants to obtain the relevant documents, and that the refusal of the University to provide the relevant documents became justified with time. The *Campus Security Goals and Objectives 3 Year Plan 2008-2011*, which the University provided to the Applicants only after

litigation had been commenced, was not publicly available, so the Applicants had no way of obtaining it. Further, even after this litigation had been commenced, the University initially refused to provide this document [**Questioning of Bruce Evelyn**, 57:32 to 58:5 and 62:13-24]. The University changed its mind only after the Applicants scheduled a Court Application for October 26, 2011, which was adjourned after the University agreed to bring Mr. Evelyn back for further questioning and take a less obstructionist approach to answering questions and providing documents.

57. In its decision under "**Unfairness/Natural Justice**" the Board of Governors does not address any of the numerous grounds of appeal that were specifically raised by the Applicants in their October 29, 2010 appeal under the heading "Unfairness" [**Tab 13**, pages 9-10]. The Board, without any explanation, simply declares itself "unable to find any error by Ms. Houghton or the Appeal Board".

58. In its decision under "**Application of the Law/Charter**" the Board of Governors asserts that the University acted reasonably "in attempting to balance the interests of all involved in this matter" and that the University "attempted to strike a balance between the students' rights and concerns for safety and security". The Board of Governors' assertions here are made without explanation; without reference to evidence; without analysis of the students' *Charter* rights, contractual rights, or rights to natural justice; and without any analysis of administrative law principles like the proper exercise of discretion.

59. In short, the Board's decision is not defensible in respect of the facts or in respect of the law. Even if the Board of Governors' decision is reviewed on the standard of reasonableness rather than correctness, the Board's decision lacks the justification, transparency and intelligibility which are necessary requirements for a decision to be considered reasonable.

## The supplementary affidavit evidence and questioning thereon

60. The record in this judicial review application has been supplemented by the University (Affidavit of Bruce Evelyn) and by the Applicants (Affidavit of Peter Csillag). The July 29, 2011, Order of Justice Jeffrey provides that "the use and weight" of these two Affidavits, as well as questioning on these Affidavits, "is reserved for determination by the Judge hearing the merits of the judicial review Application". The Consent Order of Justice Jeffrey does not impose any restrictions or limitations on permissible questioning, nor did the University ask for such restrictions before the Order was granted.

61. The Affidavit of Peter Csillag, filed July 18, 2011, establishes that in the fall of 2010, after the GAP display had been on campus nine times, the University began charging Campus Pro-Life a $500 security fee in relation to the GAP display. The Affidavit goes on to explain that the Applicants have not yet earned or obtained professional designations, that their earnings are very modest, and that the sum of $500 is very large for them. The Applicants believe that their right to protection by campus security from potential violence or other illegal conduct on campus should not depend on their ability to pay additional costs, and that they should not be penalized for the misbehaviour of other people, when they themselves have behaved respectfully and appropriately at all times. Mr. Csillag further swears that the University is selective in its demand for security fees, and that imposing them in relation to controversial or unpopular expression is unfair.

62. The Applicants submit that this Court can and should rely on the evidence in Mr. Csillag's Affidavit because this Affidavit's contents do not contradict any of the evidence that was before the Board of Governors. Further, questioning on Mr. Csillag's Affidavit did not elicit answers or information which contradicts the evidence that was before the Board of Governors. This Court should also rely on the evidence in Mr. Csillag's Affidavit because Mr. Csillag was forthright and candid in his responses to questions, and because Applicants' counsel did not seek to obstruct the normal range of questioning that one would ordinarily expect when an affiant is questioned on her or his Affidavit.

63. The University's affiant, Vice-Provost Bruce Evelyn, makes repeated references to "safety and security" at paragraphs 19-23 of his Affidavit, and cites this concern to justify the University's demand that the Applicants set up their signs in a way that prevents passers-by from seeing the signs.

64. The Applicants submit that this Court should not place any weight on Mr. Evelyn's Affidavit because:

    a. during questioning, the University was hostile to the normal range of questioning that one could reasonably expect on an Affidavit; and

    b. the University refused to give undertakings to provide relevant information requested by the Applicants, changing its mind only after the Applicants filed a Court Application; and

    c. the Affidavit's assertions about "safety and security" contradict the evidence that was before the Board of Governors as contained in the Certified Record of Proceedings; and

    d. the Affidavit's assertions about "safety and security" at paragraphs 19-23 are vague, and the affiant's responses to questions about facts are vague, evasive and contradictory; and

    e. the affiant was ill-informed and ill-prepared for questioning, having failed to familiarize himself with the University's files and policies and with relevant facts; and

    f. the University's last Responses to Undertakings contradict statements made earlier by Mr. Evelyn when questioned on his Affidavit; and

    g. the University's last Responses to Undertakings display a continued refusal to answer relevant and permissible questions.

## (a) The University's refusal to answer questions

65. When Mr. Evelyn was first questioned on his affidavit on September 2, 2011, the University's counsel objected to no fewer than 86 questions about factual matters which were expressly raised by Mr. Evelyn in his Affidavit. The University justifies its refusal to answer questions by taking the

curious and very creative position that the University has the right to *supplement the record on a judicial review application* with an Affidavit, but that normal questioning on that same Affidavit constitutes an impermissible and inappropriate attempt to *supplement the record on a judicial review application*. The University's position departs radically from the Order of Justice Jeffrey, which placed no restrictions or limitations on questions.

66. In effect, the University considers itself to be entitled to *supplement the record on a judicial review application* with an Affidavit that asserts the existence of a "safety and security" concern, but challenging questions about (for example) the duties and responsibilities of Campus Security, and the behaviour of the obstructionists who blocked the pro-life display in October of 2007, are not allowed because these questions *supplement the record on a judicial review application*.

67. The University uses this self-contradicting position to refuse to provide specific answers to questions about facts.

## (b) The University's refusal to provide relevant documents

68. At pages 57-58 and again at page 62 (lines 13-24), the University refuses requests to produce a copy of the safety and security policy, and other documents which enumerate and describe the duties and procedures of Campus Security. The University changed its mind only after the Applicants filed a Court Application, scheduled to be heard on October 26, 2011, which was adjourned after the University agreed to provide the requested documents, and agreed to take a less obstructionist approach in a further session of questioning.

## (c) The contradictory assertions about "safety and security"

69. The unchallenged evidence before the Board of Governors as contained in the Certified Record of Proceedings indicates that the only threat to safety and security on campus came from individuals

who, on one occasion in October of 2007, engaged in the physical blocking, obstruction and interruption of the pro-life display. This threat to safety and security was condoned by Campus Security.

70. Mr. Evelyn attempts to contradict this unchallenged evidence with vague assertions about "safety and security" at paragraphs 19-23 of his Affidavit. When Mr. Evelyn is asked (from page 28 through to the end of the questioning at page 114) to provide specific facts and details in regards to his "safety and security" assertions, his answers are vague and evasive. In contrast, the evidence in the Certified Record of Proceedings about factual matters, particularly the evidence at Tabs 22 and 23, is clear and specific, and the veracity of this evidence was not disputed by the Board of Governors.

## (d) The assertions about "safety and security" are vague and confused

71. At pages 64-65 and 82-85, Mr. Evelyn is questioned about his assertion, at paragraph 19 of his Affidavit, that the University had a "longstanding" concern about "safety and security". At no point during questioning is Mr. Evelyn able to explain in a coherent fashion when this "concern" first arose, or what it was based on, or what it consisted of. For example, when Mr. Evelyn is asked whether this "longstanding" concern first arose in October of 2007 when obstructionists blocked the Applicants' display, Mr. Evelyn answers by declaring (page 64, lines 20-38) that the longstanding concern "arose through a longstanding concern" and that "it's based on the safety and security concern" and "it's based on a longstanding concern over safety and security." The vagueness and evasion seen here are typical of Mr. Evelyn's responses to questions throughout the transcripts.
72. Mr. Evelyn then hints that the security concern first arose in 2006 (page 64, line 37) with the first GAP display on campus. When asked "What was the security concern in 2006 when the display first came to campus?" Mr. Evelyn avoids the question entirely, responding: "The decision that gave rise to this was out of a longstanding concern about safety on campus." When questioned again (in

December of 2011, at the second questioning) about his "longstanding" claim in paragraph 19 of his Affidavit, Mr. Evelyn (at pages 82-85) still provides vague, evasive and contradictory answers as to when the University's "longstanding" concern first arose and what, specifically, it may have consisted of. Other examples of vagueness and evasion abound throughout the transcripts, and are too numerous to mention.

## (e) The affiant was ill-informed and ill-prepared for questioning

73. At page 3 (lines 38-40) Mr. Evelyn admits that, in preparing for the questioning on his affidavit, he has not familiarized himself with the University's policies regarding safety and security. Further admissions to possessing only a vague knowledge of the relevant files are found on page 5 (lines 3 to 18). These admissions, together with Mr. Evelyn's inability or unwillingness to provide specific information in response to questions about basic facts, suggest that Mr. Evelyn's assertions about "safety and security" at paragraphs 19-23 of his Affidavit should not be taken very seriously.

74. On page 15 (lines 3-21) Mr. Evelyn reveals that he has very little understanding of what he means when he refers in his Affidavit to the "core functions" of the University (the term "core functions" being a phrase that just happens to have been used by the Supreme Court of Canada in its *McKinney* decision). The high frequency of vague and evasive answers from Mr. Evelyn that are found throughout the transcripts further undermine Mr. Evelyn's credibility as a fact witness.

## (f) Responses to Undertakings contradict Mr. Evelyn's earlier statements

75. During questioning, Mr. Evelyn admits repeatedly that the Applicants were subjected to the physical blocking and physical interruption of their display by obstructionists in October of 2007. Mr. Evelyn acknowledges this fact at page 26 (line 33), page 43 (lines 13-18), page 44 (lines 2-12), page 47 (lines 1-5), page 52 (lines 5-7), page 65 (line 32), page 102 (lines 5-7), page 105 (lines 19-22) and page 106

(lines 21-24). Surprisingly, in its Response to Undertaking No. 8 (To review documents and advise whether Campus Security did not stop the action of the obstructionists in the fall of 2007), the University repudiates all nine of Mr. Evelyn's admissions, stating: "Mr. Evelyn does not accept the characterization of anyone on campus as being an "obstructionist" or that there was "physical obstruction" of the pro-life display." The University then goes on to assert that "on the occasion in question, nothing occurred that would, under the Security Policy, trigger further involvement or action by Campus Security or City of Calgary police."

76. Mr. Evelyn's Affidavit, at paragraphs 19-23, asserts a "safety and security" concern that is so *serious* that, in the University's opinion, it justifies censoring the Applicants' expression. Yet the University's Response to Undertaking No. 8 states that the October 2007 occurrences are so *minor* that they do not warrant any action on the part of Campus Security or Calgary police.

## (g) Continued refusal to answer questions in Responses to Undertakings

77. At pages 104 and 105, Mr. Evelyn is asked very specifically whether Campus Security stopped the behaviour of the obstructionists who blocked the pro-life display, whether Campus Security asked the obstructionists to stop their behaviour, and whether Campus Security asked the obstructionists to provide their names and student ID numbers. These questions resulted in Undertakings 8 through 11, all taken under advisement. In its Responses to these Undertakings, the University states only that nothing would "trigger further involvement or action by Campus Security or City of Calgary police." Again, the University fails to provide specific answers to the questions that were asked about basic facts.

## Argument

## A. The GAP display did not endanger the safety or security of anyone on campus

78. The Applicants have been found guilty of committing a "Major Violation" under Section 4.10 of the Non-Academic Misconduct Policy [**Tab 17**]. To be found guilty of a "Major Violation" a student must "endanger the safety and/or security of another individual or the University of Calgary community," or "contravene municipal, provincial or federal law." Section 4.10 lists examples of Major Violations which include misusing firearms; property damage or destruction exceeding $500; sexual assault; theft; disruptive behaviour involving substantial disorder; setting unauthorized fires; and other examples of actions which threaten the physical safety and physical property of other people.

79. Nothing in Section 4.10 prohibits the expression of controversial or unpopular opinion on campus by peaceful means. Nothing in Section 4.10 suggests that it intends to shield the University's students or professors from feeling upset by seeing expression they disagree with. Section 4.10 is directed at physical safety, not emotions. Moreover, if section 4.10 did prohibit – or even restrict – upsetting or disturbing speech, this would repudiate the University's mission, and run counter to the principles of academic freedom which the University claims to hold dear.

80. The unchallenged evidence before the Board of Governors indicates that the Applicants' display is a passive, stationary display, surrounded by a security fence that appears to be about four feet tall. The University has established that a petition for the removal of the display in 2009 (one year *after* the University started demanding that the signs be turned inwards) garnered more signatures than a petition in support of the display. This 2009 petition indicates that the Applicants' display was definitely unpopular with some people, but there was no evidence before Ms. Houghton, or the Appeal Board, or the Board of Governors, that the display endangered the physical safety of any individual or the University community.

81. If this Court places any weight on the Affidavit of Bruce Evelyn (and the Applicants urge the Court to disregard his evidence, for reasons set out above) it should be noted from the transcripts on questioning that Mr. Evelyn states that the physical display is not dangerous (107:16-20), and Mr. Evelyn admits there is no security concern other than the petition (97:30-35). There was no evidence before Ms. Houghton, the Appeal Board or the Board of Governors to suggest that the physical safety of individuals on campus (or their property) required hiding the display from the view of passers-by by turning the signs inwards.

## B. The Applicants did not endanger the safety or security of anyone on campus

82. The unchallenged evidence before the Board of Governors indicates that the Applicants behaved appropriately and respectfully at all times, and did not endanger the safety or security of anyone on campus. Further, there was no evidence before Ms. Houghton or the Appeal Board or the Board of Governors to suggest that the Applicants engaged in behaviour that could be described as rude, harassing, offensive, disruptive, threatening, or intimidating.
83. If this Court places any weight on the testimony of the University's affiant Bruce Evelyn (and the Applicants urge the Court to disregard his evidence) it should be noted from the transcripts that Mr. Evelyn confirms that the Applicants behaved respectfully and appropriately in the spring of 2006 (89: 29-36), in the fall of 2006 (89:38-90), in the spring of 2007 (90:20-37), in the fall of 2007 (90:39 – 92:8), in the spring of 2008 (92:10-21), in the fall of 2008 (92:23-93:10), in the spring of 2009 (93:3-96:29), in the fall of 2009 (96:31 – 97:35), in the spring of 2010 (99:6-11) and in the fall of 2010 (99:17-20).
84. If the Applicants had not behaved respectfully and appropriately when conducting their display, the University could easily have charged the Applicants with violating one or more provisions of the Non-Academic Misconduct Policy [**Tab 17**], namely section 4.9(b) (harassing or offensive

communication toward an individual or group), section 4.9(c) (disruptive behaviour which invades or disrupts the rights of others), section 4.10(k) (disruptive behaviour that involves substantial disorder and/or disruption to the operation of the University), section 4.10(l) (engaging in physical actions which endanger safety or are considered intimidating or physically abusive by the victim), section 4.10(m) (intimidating, threatening and/or offensive verbal or non-verbal behaviour or communication toward an individual or group). The University has not accused any of the Applicants of engaging in any disrespectful or inappropriate behaviour, let alone actions which actually *endanger* the safety or security of anyone on campus.

85. There was no evidence before Ms. Houghton or the Appeal Board or the Board of Governors that setting up a stationary display on campus with signs facing outwards had endangered the safety or security of anyone on campus. By necessary implication, the Applicants' refusal to hide the signs from view did not endanger the safety or security of anyone on campus.

## C. The obstructionists posed a threat to safety and security on campus

86. The unchallenged evidence before the Board of Governors indicates that the only threat to safety and security on campus came from a number of individuals who, on one day in October of 2007, engaged in the physical blocking, interruption and obstruction of the GAP display. The Applicants felt very frustrated by this behaviour, as their ability to express their opinions and engage other students in dialogue was severely compromised. The Applicants also felt disappointed by Campus Security knowingly condoning the physical blocking of their stationary display [**Tab 23**, paragraphs 7-11]. The March 10, 2008, letter sent to the University by Applicants' counsel about this situation [**Tab 23**, Exhibit "E"] speaks for itself.

87. If this Court places any weight on the testimony of the University's affiant Bruce Evelyn (and the Applicants urge the Court to disregard his evidence), it should be noted from the transcripts on

questioning that Mr. Evelyn admits repeatedly (pages 89-99) that there were no security concerns in relation to the Applicants' behaviour or in relation to their display during any of the twenty days that the display was set up on campus, from the spring of 2006 through to the fall of 2010. Mr. Evelyn admits that the University's concern about "safety and security" only arose in the fall of 2007, and this concern did not stem from the display itself or from the Applicants' behaviour.

88. Mr. Evelyn admits that the University's demand to turn the signs inwards was made only *after* "some individuals had engaged in the physical obstruction and physical interruption of display" (43:13-18) and he also admits this obstruction occurred only once (106:21-24). Apart from the obstruction in October of 2007 (and later the petition in 2009), the University had no concerns about "safety and security". Mr. Evelyn further admits that Campus Security did not arrest or detain those engaged in physical obstruction (44:2-4), did not call the Calgary Police Service for assistance (44:6-8), and did not charge the obstructionists with non-academic misconduct (105:19-22). In its Responses to Undertakings No. 8 through 11, the University provides further confirmation that Campus Security took no action against those who physically blocked and obstructed the display in October of 2007.

89. The University's concern about safety and security stems from only one source: the behaviour of those who physically blocked, interrupted and obstructed the display. Yet the University believes that these obstructionists should not be responsible for their behaviour. Instead, Mr. Evelyn claims repeatedly that "The event itself gives rise to a security concern on campus" (99:30-32 and elsewhere).

90. The University could have acted to defend safety and security on campus in October of 2007 by charging the obstructionists with non-academic misconduct for "conduct which seriously disrupts the lawful education and related activities of other students and/or University staff" under the non-academic misconduct policy which was then in force. But rather than charging with non-academic misconduct the only individuals who were actually posing a threat to safety and security on campus,

the University instead ordered the Applicants – who had done nothing wrong – to turn their signs inwards so that nobody walking by would be able to view the Applicants' signs.

## D. The display did not contravene any municipal, provincial or federal law

91. A student can be found guilty of violating section 4.10 by endangering "the safety and/or security" of others on campus, or by contravening a municipal, provincial or federal law. The unchallenged evidence before the Board of Governors indicates that neither the Applicants' display nor their behaviour posed any threat to safety or security on campus. Further, in respect of the alternative component of section 4.10, there was no evidence before Ms. Houghton or the Appeal Board of the Board of Governors that Applicants' display on campus contravened any municipal, provincial or federal law. Further, the Applicants' display did not violate any rule, regulation, bylaw or policy of the University.

## E. The Applicants did not contravene any municipal, provincial or federal law

92. There was no evidence before Ms. Houghton or the Appeal Board or the Board of Governors that the Applicants, by setting up a stationary display on campus with signs facing outwards for passers-by to see, had contravened any municipal, provincial or federal law.

## F. The obstructionists contravened the Non-Academic Misconduct Policy

93. Those who engaged in the physical blocking, interruption and obstruction of the display in October of 2007 were not charged with violating the University's non-academic misconduct policies. The policies in place in October of 2007 were different from those under which the Applicants were charged, but nevertheless the obstructionists' behaviour constituted, or may have constituted, a threat to safety and security on campus. The Applicants submit that Campus Security should – at the very

least – have asked these counter-protesters to stand back at a reasonable distance, and engage in their own expression rather than suppressing the expression of others. Campus Security refused to do so.

94. Campus Security should not have condoned behaviour which appears to run counter to section 430 of the *Criminal Code of Canada*, which prohibits obstructing, interrupting or interfering with "the lawful use, enjoyment or operation of property" and also prohibits obstructing, interrupting or interfering with "any person in the lawful use, enjoyment or operation of property." The Applicants' signs were the Applicants' property. The lawful use and operation of this property was to display the signs on a university campus, in order to express an opinion and to engage people in discussion. The obstructionists' physical blocking of the Applicants' property obstructed and interfered with the Applicants in their lawful use and operation of their property.

95. The Applicants submit that whether or not the obstructionists violated the *Criminal Code of Canada* is not an issue in this litigation. However, there can be little doubt that the obstructionists' behaviour in October of 2007 posed a threat – or at least a potential threat – to the safety and security of the Applicants and other people on campus. The decision of Campus Security to condone this behaviour without even asking the obstructionists to cease their blocking (let alone charging them with non-academic misconduct) speaks volumes about the University's commitment to upholding free speech on campus.

96. The University's demand that the Applicants' signs be hidden from view, had it been complied with, would have achieved exactly the same result that was sought by the obstructionists in October of 2007. The University's demand to hide the signs from view is an open invitation for others to engage in similar behaviour: "If you don't like someone else's expression on campus, engage in physical blocking and obstruction, and then the University step in, cite concerns about "safety and security," and censor the expression you dislike."

## G. Campus Security's demand made "in the legitimate pursuit of his/her duties"?

97. There was no evidence before Ms. Houghton or the Appeal Board or the Board of Governors that Campus Security's duties include determining what can and cannot be displayed on campus. Nor has the University adduced any evidence to suggest that Campus Security has the authority to censor (whether in full or in part) expression that is controversial or unpopular. As there is no evidence to suggest that the Applicants' behaviour or their display posed any danger to safety or security, the demand from Campus Security that the Applicants' signs be hidden from view [**Tab 15**] was not directed at safety, but merely at censoring unpopular expression on campus.

98. If this Court places any weight on the evidence provided by the University's affiant Bruce Evelyn (and the Applicants urge this Court to disregard his evidence) it should be noted from the transcripts on questioning (111:20-22) that Mr. Evelyn admits that evaluating the content of expression on campus is *not* one of the duties of Campus Security.

99. The *actual* threat to safety and security on campus, which arose only once in October of 2007, and which did not arise from the Applicants or from their display, was ignored and condoned by Campus Security. Therefore, the Campus Security demand that the Applicants hide their signs from view has nothing to do with safety and security, and was therefore not made "in the legitimate pursuit of his/her duties."

100. While the decisions of Ms. Houghton and the Appeal Board and the Board of Governors have all *asserted* that the Campus Security demand was made "in the legitimate pursuit of his/her duties", not one of these three decisions of the University points to any evidence in support of that conclusion. Assertions are not evidence, nor do they become evidence when repeated numerous times.

## H. The standard of review is correctness

101. In *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190,[3] the Supreme Court of Canada held at paragraph 58 that constitutional issues are necessarily subject to a correctness review because of the unique role of section 96 courts as interpreters of the Constitution. At paragraph 55, the Court set out the following test:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

102. In the circumstances of this Application, there is no privative clause in the *Post-Secondary Learning Act* (under which the University found the Applicants guilty of Non-Academic Misconduct); the Board of Governors has no special expertise within "a discrete and special administrative regime;" and the questions of law raised in this Application are of central importance to the legal system, including constitutional, contract, and administrative law issues.

103. Applying the four criteria set out by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982,[4] at paragraphs 23-38, brings the same result as the test in *Dunsmuir*. First, there is no privative clause in the relevant statute that would limit the court's jurisdiction to review the University's conduct or decisions. Second, neither the Board of Governors nor its Discipline Appeal Committee claims to have expertise in statutory interpretation, the application of the *Charter*, the extent of legal authority enjoyed by public universities, the appropriate standard of procedural fairness to which the Applicants are

[3] Applicants' Book of Authorities, Tab 3
[4] Applicants' Book of Authorities, Tab 4

entitled, or other questions of law. Third, less deference should be extended to decisions arising from proceedings which feature the "bipolar opposition of parties" (*Pushpanathan*, paragraph 36). The University's prosecution of the Applicants for Non-Academic Misconduct, with the possible penalty of expulsion from the University, is an example of the "bipolar opposition of parties." Fourth, this Application raises numerous questions of law, including the Applicants' contractual rights, the manner in which the *Canadian Charter of Rights and Freedoms* may apply to the students and to the Respondent University, administrative law issues of procedural fairness, and the interpretation of the *Post-Secondary Learning Act* and the *Alberta Bill of Rights*.

104. Thus the functional and pragmatic approach established by *Pushpanathan* also requires a standard of correctness, as does the test in *Dunsmuir*. In the alternative, if the standard of review is reasonableness, the Board of Governors' decision fails to meet this standard.

## I. The University's demand violates the Applicants' contractual rights

105. The University of Calgary was created by *The Universities Act*, S.A. 1966, c. 105, s. 3(1) and is today governed by the *Post-Secondary Learning Act*, S.A. 2003, c. P-19.5. The University's legitimate right to manage its own affairs and to supervise what takes place on campus is not disputed or challenged by the Applicants. However, this right cannot be used by the University as a license to disregard the terms – express and implied – of the contract it has entered into with its own students.

106. In *Young v. Bella*, [2006] 1 S.C.R. 108,[5] at paragraph 31, the Supreme Court of Canada recognized that a contractual relationship exists between a student and a university: "The appellant, even as a "distant" student, was a fee-paying member of the university community, and this fact

[5] Applicants' Book of Authorities, Tab 5

created mutual rights and responsibilities. The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort."

107. The Alberta Court of Queen's Bench in *Yen v. Alberta (Advanced Education)*, 2010 ABQB 380,[6] at paragraph 40, held that "a student who is registered and paid tuition in a post secondary program is in a contractual relationship with the institution." At paragraph 43, the Court explains where the terms of the contract are found: "A summary of these cases confirms that a contract exists between a student and an educational institution, and further confirms that the terms of the contract governing the relationship are contained in the university calendars, internal admission, withdrawal and appeal procedures and academic policies. Within that contract, the University owes a duty of care to a student – a duty of fairness in making career-ending academic decisions."

108. The Ontario Court of Appeal in *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601,[7] held at paragraph 47 that the terms of the educational contract can be found in the course calendar, but are not limited to that document.

109. In *Symonds v. All Canadian Hockey School Inc.* (c.o.b. St. Peter's A.C.H.S. College School), [2009] O.J. No. 3688,[8] the Ontario Superior Court of Justice applied rules of contractual interpretation to evaluate both the express and implied terms of the contract between the students and the hockey school. At paragraph 19, the Court held that the terms of the contract were found in the "bundle of documents that typically make up its contract of instruction – the school's brochure or catalogue, the application for admission, the letter of acceptance, tuition schedule, and any handbook distributed to students or parents on acceptance or at the start of the school year."

110. The University claims to be "steeped in the principles of academic freedom" [**Tab 18**, University Mandate]. The University further claims that students "are encouraged to pursue their education according to the principles of academic freedom embodied in the university itself," that

[6] Applicants' Book of Authorities, Tab 6
[7] Applicants' Book of Authorities, Tab 7
[8] Applicants' Book of Authorities, Tab 8

"freedom of inquiry is fundamental to the search for truth and the advancement of knowledge," that the University must ensure the freedom "to express views without fear of retribution" about all issues "including those surrounded by controversy." [**Tab D**, Affidavit of Bruce Evelyn, Statement on Academic Freedom and Institutional Autonomy]. On its website, the University claims to be "a place of education and scholarly inquiry" where "ideas can flourish." The University claims to be "dedicated to the pursuit and development of knowledge" in keeping with its mission "to seek truth and disseminate knowledge." The University claims to pursue its mission "with integrity for the benefit of the people of Alberta, Canada and the world." The University asserts that it partakes of "the great privilege of fostering ideas and facilitating the growth of ideas every single day" and claims that "Members of the University community engage in discovery and discourse." [**Tab 22** (paragraphs 26-29) and **Tab 23** (paragraphs 33-37)]

111. Any former, current or prospective University student would readily and reasonably conclude from the University's assertions that the University will not censor the peaceful expression of opinion on campus. Content-based arbitrary censorship is incompatible with – and is the antithesis of – scholarly inquiry, truth-seeking, the flourishing of ideas, the fostering of ideas, and the pursuit, development and dissemination of knowledge. This understanding of the University as a market-place for the exchange, debate, promotion and repudiation of various ideas without censorship is confirmed by the traditional understanding of what a public university is about, and by the public comments made by Provost Harrison about the University's support for free expression regardless of content [**Tab 22** (paragraphs 26-27) and **Tab 23** (paragraphs 34-35)].

112. The absence of any University policy, bylaw, regulation or rule that authorizes the University or its Campus Security to engage in content-based censorship of speech is further confirmation of the existence of a contractual term that students are entitled to express their views peacefully on campus.

113. Based on the foregoing, it is therefore an express or implied term of the contract between the Applicants and their University that the University will not limit, restrict, or censor the Applicants' expression of opinion on campus. Like all other students, the Applicants enjoy a contractual right to express their opinion peacefully on campus, without censorship.

114. When the University used the Non-Academic Misconduct Policy as a pretext for censoring unpopular expression on campus, it breached the contract between the University and the students. The University's demand that the Applicants hide their signs from view (2008), the University having the Applicants charged with trespassing (2009), the University prosecuting the Applicants for non-academic misconduct (2010), and the University's threat of expulsion if the Applicants continue to express their views without turning their signs inwards (2011), are all violations of the contract which exists between the Applicants and their University.

## J. The University did not exercise its statutory discretion properly

115. In exercising the discretion conferred on it by the *Post-Secondary Learning Act*, the University wields immense social and economic power in society. Exercising "general supervision of student affairs" (*Post-Secondary Learning Act*, section 31), the University serves as the gate-keeper to large numbers of employment positions. Without a university degree, a student cannot become a teacher, doctor, lawyer, engineer, or accountant, to name only five examples. With this public function comes a special responsibility of serving the public and all students fairly, without discrimination based on a student's views, opinions, beliefs or philosophy.

116. In *Roncarelli v. Duplessis*, [1959] SCR 121,[9] the Supreme Court of Canada held that administrative decision-makers must exercise their statutory discretion according to the purpose of the statute, not arbitrarily or based on irrelevant considerations. In *Roncarelli*, the Court held that

[9] Applicants' Book of Authorities, Tab 9

the Commission's discretion under Quebec's *Alcoholic Liquor Act* could not be used to revoke the liquor licence of the restaurant of a Jehovah's Witness because he had assisted his unpopular co-religionists with their legal troubles. At page 140, Rand J stated:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

117. Under section 31 of the *Post-Secondary Learning Act*, the University has the right to establish rules, bylaws, policies, and procedures governing student discipline, such as the Non-Academic Misconduct Policy. Section 31(1)(a) of this *Act* empowers the University to fine, suspend and expel students.

118. While the *Post-Secondary Learning Act* authorizes the University to create and enforce reasonable and content-neutral policies which regulate the time, place and manner of students' expression on campus, this *Act* does not authorize public universities to limit, restrict or censor the peaceful expression of opinion on campus based on the expression's content or popularity. The rules, bylaws and policies promulgated by the University under this *Act* cannot be drafted, interpreted, or applied in a manner inconsistent with the *Charter* or inconsistent with the purposes of the *Act*.

119. Such censorship – whether full or partial – runs contrary to the very purpose of the University as described by its own documents (explained above, in the section on the University's contractual obligations). The University's power to discipline students under section 31 must be exercised according to the purpose of the *Act* as explained by the University's description of its mission, vision, etc. Therefore, the University cannot use student discipline proceedings as a tool

for censoring unpopular, controversial or offensive speech, because doing so violates the purpose of the *Post-Secondary Learning Act* as well as the *Charter*. In short, censorship is an improper exercise of discretion.

120. All of the behaviours prohibited by Section 4.10 of the University of Calgary Non-Academic Misconduct Policy endanger the physical safety or physical property of people on campus: misusing firearms, stealing or destroying property, sexual assault, tampering with fire equipment, setting unauthorized fires, etc. The Applicants' behaviour – erecting a stationary display on campus twice per year and engaging passers-by in conversation – bears no resemblance to any of the behaviours prohibited by Section 4.10. The Applicants' behaviour has not endangered the physical safety or physical property of anyone, nor has the University alleged this.

121. Neither the *Post-Secondary Learning Act* nor the Non-Academic Misconduct Policy created under it allow the University to use "safety and security" as a pretext to restrict, limit or censor speech which some may find offensive. The purpose of the University is to serve as a market-place or forum for the expression, debate, repudiation, and promotion of ideas. There should no "balancing" of the "interests" of students wishing to express their views peacefully on campus, and the "interests" of those who would use or threaten violence in response to speech they find upsetting. The University should not seek to "strike a balance" between the students' exercise of their contractual rights in accordance with the University's purpose and mission on the one hand, and the use of physical force to obstruct the expression of opinion on the other.

122. Yet the University's stated rationale of "safety and security" does exactly this: censoring the expression of unpopular opinions in order to appease those who would respond to unpopular speech with physical obstruction and even conduct which might violate the *Criminal Code*. Censoring unpopular speech, and appeasing would-be perpetrators of violence, are an improper exercise of discretion under the *Post-Secondary Learning Act*.

123. In addition to the principles set out above, the *Alberta Bill of Rights*[10] requires that the *Post-Secondary Learning Act* be construed and applied so as not to infringe freedom of speech, which the *Alberta Bill of Rights* in section 1(d) describes as a human right and fundamental freedom. Section 2 of the *Alberta Bill of Rights* states:

> Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the *Alberta Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.

124. To "construe and apply" legislation is to exercise statutory discretion under it. The University has improperly exercised its discretion under the *Post-Secondary Learning Act* by abrogating, abridging and infringing the freedom of expression protected by section 1(d) of the *Alberta Bill of Rights*.

## K. The *Charter* protects the free expression rights of university students

125. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624,[11] La Forest J. for a unanimous Court held that the *Charter* applied to a hospital when carrying out government policy concerning the provision of health care services. While the *Charter* does not apply to hospitals *per se*, the Court found that the decision not to provide sign language interpreters for deaf patients as a part of the publicly funded health care scheme violated the *Charter*. It was not the impugned legislation that infringed the *Charter*, but the actions of the hospitals and the Medical Services Commission in exercising statutory discretion.

126. In *Pridgen v. University of Calgary*, [2010] A.J. No. 1181,[12] Strekaf J. applied the Supreme Court's reasoning in *Eldridge* to hold that the *Charter* applies to the University of Calgary and its

[10] Applicants' Book of Authorities, Tab 10
[11] Applicants' Book of Authorities, Tab 11
[12] Applicants' Book of Authorities, Tab 12

disciplinary proceedings against students, because the University is implementing specific government policy for the provision of accessible post-secondary education to the public in Alberta. At paragraphs 63 and 67-69, Strekaf J. concluded:

> ... I find that the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta, thus bringing the facts of this case into line with *Eldridge*. The structure of the *PSL Act* reveals that in providing post-secondary education, universities in Alberta carry out a specific government objective. Universities may be autonomous in their day-to-day operations, as both universities and hospitals were found to be when dealing with employment issues involving mandatory retirement, however, they act as the agent for the government in facilitating access to those post-secondary education services contemplated in the *PSL Act*, just as the hospitals in *Eldridge* were found to be acting as the agent for the government in providing medical services under the *Hospital Insurance Act*, R.S.B.C. 1979, c 180 (now R.S.B.C. 1996, c. 204).
>
> In dictating the terms upon which a student may receive an education at a public institution the University is performing a function that is integrally connected to the delivery of post-secondary education as set out by the *PSL Act*. The University operates as a partner in the provision of post- secondary education within Alberta with the province and the other institutions that make up Campus Alberta. The *PSL Act* preamble clearly states that "the Government of Alberta is committed to ensuring that Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsible and flexible post-secondary system" and that "the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities." The Government of Alberta retains responsibility with respect to access to, and participation in, the post-secondary system. The University is the vehicle through which the government offers individuals the opportunity to participate in the post-secondary educational system. When a university committee renders decisions which may impact, curtail or prevent participation in the post-secondary system or which would prevent the opportunity to participate in learning opportunities, it directly impacts the stated policy of providing an accessible educational system as entrusted to it under the *PSL Act*. The nature of these activities attracts *Charter* scrutiny.
>
> While the hiring and firing of employees by a university is non-governmental in nature as seen in *McKinney*, the disciplining of students and the placement of restrictions on a student's ability to exercise his or her freedom of expression in the context of pursuing an education at a public post-secondary institution is altogether different. In order to successfully attend the University, students are compelled to adhere to its rules and policies. The regulation of freedom of expression as a condition of attendance cannot be properly classified as day-to-day operations.
>
> I am satisfied that the University is not a *Charter* free zone. The *Charter* does apply in respect of the disciplinary proceedings taken by the University against the Applicants pursuant to the *PSL Act*. As in *Eldridge*, the source of the alleged *Charter* violation is the conduct of the University as opposed to the legislation itself. While the University is free

> to construct policies dealing with student behaviour which may ultimately impact access to the post-secondary system, the manner in which those policies are interpreted and applied must not offend the rights provided under the *Charter*. In this case, neither the *PSL Act* itself or the University's Policy on its own offend the *Charter*. The issue to be determined is whether the manner in which the Policy was applied infringed the Applicants' *Charter* protected rights.

127. The Alberta Court of Appeal in *Pridgen v. University of Calgary*, 2012 ABCA 139,[13] affirmed the Judgment of Justice Strekaf that a university campus is not a *Charter*-free zone. At paragraph 112, Paperny J.A. held: "In exercising its statutory authority to discipline students for non-academic misconduct, it is incumbent on the Review Committee to interpret and apply the Student Misconduct Policy in light of the students' Charter rights, including their freedom of expression".

128. At paragraph 78, Paperny J.A. held that there are five categories of government or government activities to which the *Charter* applies:

1. Legislative enactments;
2. Government actors by nature;
3. Government actors by virtue of legislative control;
4. Bodies exercising statutory authority; and
5. Non-governmental bodies implementing government objectives.

129. Paperny J.A. held that the *Charter* applied to the University of Calgary through two of these routes, noting that the *Eldridge* analysis would be one such applicable approach. Her Ladyship found that the framework of statutory compulsion was even more applicable to the University's imposition of disciplinary sanctions upon the students. Therefore, the *Charter* is applicable to the University of Calgary either due to

1) the implementation of a government program or objective or
2) the imposition of sanctions pursuant to authority granted under the *PSL Act*.

[13] Applicants' Book of Authorities, Tab 13

130. Like Keith Pridgen and Steven Pridgen in the *Pridgen* decision, the Applicants in this case were accused of non-academic misconduct for doing nothing other than expressing their opinions in a peaceful manner. In both the *Pridgen* case and this Application, the expression took place outside of the classroom, and resulted in disciplinary proceedings against the students. The University's argument that the Applicants endangered the safety of others on campus is not supported by any evidence. There was no evidence before Ms. Houghton or the Appeal Board or the Board of Governors – and there is no credible evidence before this Court – that setting up a stationary display on campus, with its signs facing outwards such that people can see the signs, endangers the safety or security of anyone.

131. The only significant difference between the *Pridgen* case and this Application lies in the content of the Applicants' expression, which was about the moral and philosophical dimensions of a controversial public policy issue, rather than about one of the University's professors. The University may have had some basis for acting to protect the reputation of one of its professors, but the University has no basis for censoring controversial or unpopular speech on campus.

132. As Courts have explained in the two *Pridgen* decisions, the University is implementing a government program or policy as dictated and governed by the *PSL Act*. The University is taking disciplinary action against students, which impacts the students' ability to express their opinions and the students' continued access to higher education and career opportunities. The University's description of itself as a place of scholarly inquiry, dedicated to the pursuit of truth, and its statutory obligation to carry out a government function of providing accessible post-secondary education operate together so as to provide the Applicants with a right under section 2(b) of the *Charter*[14] to engage in the peaceful expression of their moral, political, and philosophical opinion on campus.

[14] Applicants' Book of Authorities, Tab 14

133. Other jurisprudence also supports the proposition that the University of Calgary is not entitled to censor expression on campus which the University itself, or some people on campus, might dislike. In *R. v. Whatcott*, 2012 ABQB 231,[15] the University of Calgary had William Whatcott charged with trespassing for having peacefully distributed flyers on campus. Taking into account the nature and purpose of the University as a forum for the expression of all views, the Court upheld the right of Mr. Whatcott – who was not a student at the University – to express his opinions on campus, in spite of complaints about the content of his flyers.

134. At paragraph 6, Jeffrey J. quoted with approval from the Provincial Court Judgment, which also acquitted Mr. Whatcott of the trespassing charges:

> Mr. Whatcott entered the university property with a purpose to distribute his literature to students, staff and public. His activity was peaceful and presented no harm to the university structures or those who frequented the campus. Traditionally universities have been places for the exchange of ideas. The *constitutio habita* of 1158 guarantee the right of a travelling scholar to unhindered passage in the interest of education. ... Mr. Whatcott's pamphlet is not scholarly, .... The concept of free expression is part of the University of Calgary philosophy; Exhibit 'H' academic foundations - principles to guide university planning at page 1:
>
> > As an academic institution, the University of Calgary carries on a tradition dating back to the Middle Ages. Universities support the societies they serve by helping to conserve the understanding of the past and by discovering new knowledge. They also critique and oppose ideas or practices that their communities value, and history has shown that this critical role can be just as valuable in leading to societal progress as, for example, the role of universities in developing new ideas.
> >
> > Academic freedom and collegial governance are at the heart of the unique opportunity offered by universities, "...the opportunity to give others the personal and intellectual platform they need to advance the culture, to preserve life, and to guarantee a sustainable human future" (Kennedy, 1997, p.viii).
> >
> > We know that our city, province and country provide a context for our future directions, as does our position in the international context. Along with our University's roles as critic, explorer and conscience, we will strive to align our own sense of purpose, priority and potential with society's needs and ambitions. We will advance our civic engagement, or societal contributions, at all levels of the academy through engaged scholarship that is 'predicated on the idea that major advances in knowledge tend to occur when human beings consciously work to solve the central problems confronting their society" (Gibson, 2006, para. 5).
>
> The original complaint, which resulted in the ban, was based on the content of Mr. Whatcott's flyer. This particular flyer [*related to*]: "Distributing graphic anti-abortion leaflets.". ...

[15] Applicants' Book of Authorities, Tab 15

135. At paragraphs 33-34, commenting on the Provincial Court's description of the University, Jeffrey J. added the following:

> [33] This is consistent with a University campus that is censorship-free not *Charter*-free. This is consistent with divergent viewpoints on campus being encouraged, not curtailed by wielding the powers of the state merely to save an attendee from having to contend with, or even just encounter, an alternate perspective. Does anyone actually expect to attend a university campus and encounter only the ideas they already embrace? Are only select viewpoints now permissible on our university campuses? John Stuart Mill in his essay "On Liberty" opined that "he who knows only his own side of the case, knows little of that."
>
> [34] The impugned activity has a direct connection to these additional governmental intentions for the University's existence. In these ways, therefore, the impugned activity falls closer to the core public functions of the University, as was the case in *Eldridge*, than to its private 'mission-neutral' functions, as was the case in *McKinney*. Indeed, those core educational and societally relevant functions are facilitated when a campus community can generate, incubate, advocate, formulate and repudiate a plurality of ideas, not just regurgitate those of a central filtering cabal. Therefore, for these reasons also, the impugned activity attracts *Charter* scrutiny.

## L. The Applicants' *Charter* right to free expression is violated

136. Section 2(b) of the *Charter* protects all non-violent expressive activity: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.[16] The Applicants' expression consists of moral, political and philosophical commentary on a topic of public policy and social concern. The Applicants' expression is rooted in all three of the justifications for freedom of expression, these being summarized in *Irwin Toy* at page 976 as follows:

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom the meaning is conveyed.

137. At pages 968-69 in *Irwin Toy*, the Court held that freedom of expression "was entrenched in our Constitution ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed

[16] Applicants' Book of Authorities, Tab 16

all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."

138. In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139,[17] L'Heureux-Dube J. noted at paragraph 94 that:

> ". . . change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved. … The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very lifeblood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened. … History has repeatedly demonstrated that the first step taken by totalitarian regimes is to muzzle the media and then the individual in order to prevent the dissemination of views and opinions that may be contrary to those of the government."

139. Writing for the majority in R. v. *Keegstra*, [1990] 3 SCR 697,[18] at pages 729-730, Dickson C.J. emphasized that the content of expression should not be a relevant consideration in the interpretation of s. 2(b) of the *Charter*. Any activity which conveys or attempts to convey a meaning has expressive content, and whether the meaning expressed is "invidious and obnoxious is beside the point."

140. The unchallenged evidence before the Board of Governors indicates that the Applicants have not failed to comply with any of the University's rules, regulations, policies or bylaws. The University's demand that the Applicants' signs be "turned inwards" is not based on safety concerns, and is not made pursuant to any reasonable "time, place and manner" regulation. Rather, it is

[17] Applicants' Book of Authorities, Tab 17
[18] Applicants' Book of Authorities, Tab 18

content-based censorship which has both the purpose and the effect of violating the Applicants' section 2(b) *Charter* right.

141. The University argues that its demand does not constitutes censorship because the Applicants, if they complied with the University's demand, would retain their right to distribute small flyers inviting people to leave their planned course of travel and go out of their way to see the Applicants' hidden expression. The University claims that this "reasonable compromise" protects the Applicants' free expression rights.

142. In *Commonwealth, supra*, at paragraph 276, McLachlin J. held that section 2(b) aims to protect "the interest of the individual in effectively communicating his or her message to members of the public." [emphasis added] For citizens without wealth or influence, the ability to communicate a message effectively depends on being able to use signs, posters, banners, and placards, in order to convey meaning through words, images, or both. Even poor or marginalized individuals can communicate effectively with their fellow citizens by holding up signs in public places that are frequented by large numbers of people who pass by in order to travel to various destinations.

143. A group of citizens wishing to protest against global warming, or to demonstrate in support of women's equality rights, would object to having to turn their signs inwards such that no passers-by could see their signs. Such citizens would reject the assertion that their *Charter* section 2(b) rights had not been violated by virtue of having retained a right to distribute small flyers inviting passers-by to leave their chosen path and go out of their way to see the protesters' hidden expression.

144. Freedom of expression is robbed of its meaning, significance and effectiveness when reduced merely to a right to hand out flyers inviting people to depart from their chosen or planned path and go elsewhere to see the message. A demand or requirement to hide your expression such that no passers-by can see your expression is a significant violation of the *Charter*'s section 2(b).

## M. The violation of the Applicants' *Charter* rights is not justified under section 1

145. The Supreme Court of Canada set out the test for the *Charter*'s section 1 regarding "reasonable" and "demonstrably justified" in *R. v. Oakes*, [1986] 1 SCR 103.[19] In *Commonwealth*, *supra*, McLachlin J. (as she then was) at paragraph 270 summarized the test as follows:

> First, the objective which the limit is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right. Second, if such an objective is established, the party invoking s. 1 must show that the means chosen to attain the objective are reasonably and demonstrably justified. It was suggested in *Oakes* that the second condition is met if the Court is satisfied: (1) that the limit is rationally connected to the objective; (2) that the means impairs the right or freedom in question as little as possible; and (3) that the effect of the limit is proportionate to the legislative objective.

146. However, before addressing the "reasonable" and "demonstrably justified" components of the section 1 test, the limit must be "prescribed by law." McLachlin J. in *Commonwealth*, at paragraph 261, stated that "the purpose of restricting section 1 to limits "prescribed by law" is to eliminate from section 1 purview conduct which is purely arbitrary. As Le Dain J. stated in *R. v. Therens*, [1985] 1 S.C.R. 613,[20] at p. 645:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is <u>expressly provided for by statute or regulation</u>, or <u>results by necessary implication from the terms of a statute or regulation or from its operating requirements</u>. The limit may also result from the application of a common law rule." [emphasis added]

147. The University's demand that the Applicants set up their display with signs "facing inwards" so that passers-by cannot see the signs is not "expressly provided for by statute or regulation," and is not based on any University rule, policy, regulation or by-law enacted pursuant to the *Post-Secondary Learning Act*. Further, in light of the fact that neither the Applicants' display nor the Applicants' behaviour poses any danger to safety on campus, the University's demand does not result "by

[19] Applicants' Book of Authorities, Tab 19
[20] Applicants' Book of Authorities, Tab 20

necessary implication from the terms of a statute or regulation or from its operating requirements." The Applicants submit that the University's demand is arbitrary and not prescribed by law.

148. Alternatively, if the University meets this "prescribed by law" requirement, the University's demand is neither "reasonable" nor "demonstrably justified" as required by Section 1.

149. Regarding the first *Oakes* criterion, the unchallenged evidence before the Board of Governors [**Tab 22** and **Tab 23**] indicates that neither the Applicants' display nor the Applicants' behaviour posed any threat to anyone's safety. Accordingly, there is no "pressing and substantial" concern which the University's demand seeks to address.

150. Any real threat – or potential threat – to safety and security on campus came uniquely from some individuals who, in October of 2007, physically blocked, interrupted and interfered with the display. The University made no effort to address this actual threat to safety. Campus Security did not ask the obstructionists to stop their behaviour, did not call the Calgary police for assistance, did not try to ascertain the identity of any of the obstructionists, and did not charge them with non-academic misconduct.

151. The Board of Governors asserts in its decision that "the University attempted to strike a balance between the students' rights and concerns for safety and security" [**Tab 14**]. The unchallenged evidence before the Board of Governors indicates that the University made no attempt to strike any kind of balance, because the University ignored and condoned the actual threat to safety, and instead sought to restrict the Applicants' free expression rights, which posed no threat to safety. In short, there is no rational connection between (1) the security concern caused by the obstructionists and (2) the University's demand that the Applicants turn their signs inwards.

152. The Applicants submit that there should not be any compromise or "balancing" between the legal right of students to express their views peacefully on campus, and the "interests" of those who would use physical force or threaten violence in response to speech they find offensive.

153. By demanding that the Applicants compromise one of their fundamental constitutional freedoms, the University is holding the Applicants responsible for the behaviour of the obstructionists in October of 2007. Using the University's reasoning here, if visible minority students create or increase the risk of hate crimes, this "safety and security" concern should be addressed by demanding that visible minority students reduce their participation in campus activities in order to reduce their chances of being victimized by hate crimes. According to the University's reasoning: women create or increase the risk of sexual assault, and this threat to "safety and security" should be addressed by demanding that women dress more conservatively, and stay indoors after dark.

154. Simply stated, censoring peaceful speech to appease would-be perpetrators of violence is a blame-the-victim approach which is not rationally connected to the goal of addressing "safety and security" concerns. To the contrary, censorship of controversial or unpopular speech undermines the safety and security of all citizens because it rewards those who use physical force or threaten violence, thus encouraging further threats and use of physical force in the future.

155. In the absence of a rational connection between censorship and addressing concerns about safety and security, the second component of the proportionality test (minimal impairment) becomes irrelevant. A demand that is wholly irrational cannot minimally impair a constitutional right.

156. The third component of the proportionality test in *Oakes* requires balancing the benefits of the impugned measure against the harm caused by violating a constitutional freedom. There are at least four harmful consequences that flow from the University's censorship demand. First, it rewards and encourages those who would use physical force or threaten violence in response to speech they find offensive. Second, it undermines the rule of law and legitimizes a "blame-the-victim" attitude in regards to inappropriate or even criminal behaviour. Third, it empowers and emboldens the University to censor arbitrarily not only the Applicants' speech, but also the speech of any other students or groups deemed to be offensive, simply by declaring the existence of unspecified concerns about "safety and security." Fourth – and perhaps most significant – it robs students on campus, and

all of society, of the benefits of free expression: truth-seeking, self-fulfillment, and participation in social and political decision-making.

157. There is no evidence that the University's censorship demand has produced, or would produce in future, any benefits. Therefore, there are no benefits in existence which could outweigh the harm described above.

## N. The Applicants were denied the level of procedural fairness owed to them

158. The Applicants ask this Honourable Court to rest its ruling in this matter on grounds of contract law, the exercise of statutory discretion, and the *Charter*, as set out above.

159. Further and in the alternative, the Applicants submit that the administrative process by which they were prosecuted was seriously flawed in numerous respects, such that the Board of Governors decision finding the Applicants guilty of violating Section 4.10 of the Non-Academic Misconduct Policy cannot be sustained.

160. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817,[21] at paragraphs 20-28, L'Heureux-Dube J. writing for the majority and writing for a unanimous Court on these points, held that a duty of fairness is owed to individuals whenever their "rights, privileges or interests" are affected. The individuals affected should have the opportunity to present their case fully and fairly. Decisions must be made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

161. The *Baker* factors determining the level of procedural fairness in a given set of circumstances include:

(1) the nature of the decision being made. The more the process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.

[21] Applicants' Book of Authorities, Tab 21

(2) the nature of the statutory scheme. Greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.

(3) the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on those persons, the more stringent the procedural protections that will be mandated. Citing from *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667, the Supreme Court of Canada noted in *Baker* (at paragraph 25) that "the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts." For example, Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at page 1113 held that "A high standard of justice is required when the right to continue in one's profession or employment is at stake ... . A disciplinary suspension can have grave and permanent consequences upon a professional career."

(4) the legitimate expectations of the person challenging the decision will affect the content of the duty of fairness owed to the individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. It will generally be unfair for decision-makers to act in contravention of representations as to procedure, or to backtrack on substantive promises, without according significant procedural rights.

(5) the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself.

162. These five factors, set out in *Baker*, can be applied to the present case as follows:

(1) The prosecution of the Applicants for having violated the University's Non-Academic Misconduct Policy, with a finding of guilt resulting in penalties including *expulsion from the University* and thus loss of one's degree and one's entire career, resembles judicial decision-making. This suggests that a high degree of procedural fairness is required, akin to that received by a professional facing the loss of her or his professional credential (and thus their livelihood) in a professional discipline proceeding.

(2) The appeal procedure provided for in the Non-Academic Misconduct Policy is seriously deficient because it excludes standard grounds of appeal that are generally available within the legal system, such as the misapprehension of facts, the failure to consider relevant evidence, unreasonableness, errors of law, and institutional bias resulting from the decision-maker acting as both accuser and

judge. In the absence of a fair and legitimate appeals procedure, the Applicants are entitled to a high level of procedural protection.

(3) When finding the Applicants guilty of committing a "Major Violation,"Ms. Houghton stated: "I am issuing this formal written warning that failure to comply with directives of Campus Security staff in the future will result in more severe sanctions through the Non-Academic Misconduct Policy" [**Tabs 1-B** through **7-B**, second-last paragraph]. The Applicants will eventually be expelled from the University if they continue to exercise their free speech rights and resist the University's censorship demand. Universities are gate-keepers to the legal, teaching, accounting, engineering, medical and other professions. With very few exceptions, professional careers remain closed to those who lack a university degree. Denying the Applicants a university degree would have a more immediate and profound impact on the Applicants' lives than, for example, a court's decision finding the Applicants guilty of impaired driving. Therefore, the Applicants are entitled to a high degree of procedural fairness, because their right to enter a profession or other worthwhile employment is at stake.

(4) Section 1 of the Non-Academic Misconduct Policy states that its goal is to manage and address non-academic misconduct "in a manner that is centralized and follows the principles of natural justice." This substantive promise creates a legitimate expectation in the Applicants that the principles of natural justice will be adhered to, thereby requiring that the Applicants receive a high degree of procedural fairness.

(5) The University has discretion as to the procedures established by its Non-Academic Misconduct Policy. Like all discretion conferred on bodies by statutes, the University's discretion must be exercised in good faith, for a proper purpose and intention. As the Supreme Court of Canada held in *Roncarelli, supra*: discretion is not absolute, untrammelled, arbitrary, and cannot be exercised in respect of capricious or irrelevant purposes; "there is always a perspective within which a statute is intended to operate."

163. Based on the five-part test in *Baker*, the Applicants are entitled to a high degree of procedural fairness, including full disclosure of the case to be met, representation by counsel at the hearing(s), the opportunity to cross-examine the University's witnesses, a decision based on evidence, a decision based on relevant considerations, and a hearing before an impartial and unbiased decision-maker.

164. Instead, the Applicants were denied disclosure of relevant documents, denied the right to counsel, and denied the right to cross-examine witnesses or challenge the credibility of evidence (as the University presented neither witnesses nor other evidence at the hearings). In finding the

Applicants guilty of violating Section 4.10, the University's decision-makers, at all three levels of proceeding, assumed without evidence that the Applicants had endangered the safety of people on campus. All three University decision-makers ignored the relevant consideration as to whether or not the "direction" of Campus Security was "in the legitimate pursuit of his/her duties" as stipulated by section 4.10. The University assumes, without evidence and without authorities, that the "direction" of Campus Security was "in the legitimate pursuit of his/her duties" yet refuses to provide, discuss or consider what the duties of Campus Security are, and whether such duties include censoring the peaceful expression of opinion on campus. The University assumes it can exercise arbitrary power over expression on campus, and makes no effort to justify or even explain the nature or purpose of this arbitrary power.

165. The decision-maker before whom the Applicants appeared, Meghan Houghton, was the same person who accused the Applicants of committing the offence, having informed the Applicants in writing that "The specific violation that I am charging you with is listed in section 4.10 of the Non-Academic Misconduct Policy." Acting as both accuser and judge, in violation of the principle of *nemo judex causa sua*, Meghan Houghton was not an impartial and unbiased decision-maker.

166. All three levels of the University's decision dismiss without analysis the Applicants' arguments in respect of the *Charter*, contractual rights, the proper exercise of statutory discretion, natural justice, and contract arguments raised by the students, asserting without reasons that these arguments are unfounded.

## O. The University cannot penalize unpopular expression with security fees

167. In spite of the unchallenged evidence before the Board of Governors that neither the Applicants' display nor the Applicants' behaviour poses any danger on campus, the University in

September of 2010 began imposing a $500 “security fee” on the Applicants and their club as a condition of setting up their display on campus [**Affidavit of Peter Csillag**, filed July 18, 2011].

168. The sum of $500 is extremely large for university students, who have not yet obtained their degree and have not yet entered a profession which would enable them to earn such amounts.

169. A student club could conceivably raise $500 through organizing a party or other event at which alcohol is served and sold, and this same presence of alcohol might well justify the need for extra security. But no student club can reasonably expect to raise a sum of $500 when its “event” consists of a nothing but a stationary display.

170. Aside from the students’ inability to pay $500, this “security fee” is wrong in principle. Even if University of Calgary students could afford to pay $500 for the privilege of expressing their views on campus through use of a stationary display, the imposition of a “security fee” against unpopular expression on campus represents the same blame-the-victim approach that can be seen in the University’s demand that the Applicants turn their signs inwards to hide them from view.

171. The University’s demand that the Applicants hide their unpopular expression from people passing by shifts responsibility away from those who threaten safety on campus (the October 2007 obstructionists) and instead punishes the Applicants, who have done nothing wrong. In the same way, forcing the Applicants to pay $500 as a condition for expressing their opinions on campus effectively punishes the Applicants for the potential bad behaviour of other people.

172. To the extent that the University fails to teach its students that they have an obligation to refrain from physically blocking, obstructing and interrupting expression they disagree with, it may well be true that those who express unpopular opinions on campus have a statistically greater chance of being assaulted than those who express popular or established opinions. In similar fashion, taxpayers in one neighbourhood may have a statistically greater chance of being victimized by crime than taxpayers living in a different neighbourhood. In the same way, a woman who walks outside

after dark may have a statistically greater chance of being sexually assaulted than a woman who stays indoors after dark.

173. The City of Calgary does not charge higher property taxes to people in high-crime neighbourhoods because this blame-the-victim approach would punish citizens who have done nothing wrong, shifting responsibility from the guilty to the innocent. No government would consider imposing a "security fee" on a woman who chooses to walk outside after dark, because doing so would effectively punish her while ignoring the real source of the problem: criminals and criminal behaviour.

174. The blame-the-victim approach does contain a kernel of truth when it comes to the increased likelihood of harm. The home-owner who happens to live in a neighbourhood with high rates of vandalism and break-and-enters is, in fact, a higher security risk. The woman who walks outside alone after dark is, in fact, more likely to be assaulted than a woman who stays behind locked doors. Yet this truth does not result in the imposition of higher taxes on homes in high-crime neighbourhoods, or the imposition of security fees on women who walk outside after dark. Such taxes and fees are morally and legally wrong because they punish those who have done nothing wrong while ignoring the real problem.

175. The University's imposition of a "security fee" on unpopular expression penalizes students in the same way that higher property taxes would penalize a home-owner in a higher-crime neighbourhood, and in the same way that a "security fee" would penalize a woman walking outside after dark.

176. Further, penalizing unpopular expression on campus violates the express and implied terms of the contract between the University and tuition-paying students. The University holds itself out as a safe place for the expression of all views, including controversial and unpopular ones, without discrimination or censorship. Preventing students from expressing unpopular opinions on campus unless they agree to pay the very large sum of $500 breaches this contract. Even if the student

expressing unpopular views on campus costs the University more money by requiring more security to be present, that still does not entitle the University to charge $500 to express unpopular opinions, because the University, by virtue of its contract with tuition-paying students, is obligated to provide a safe space for the expression of *all* views, not just popular ones. This is a contractual term the University has entered into by its publicly stated commitment to academic freedom and free expression [**Tab D**, Affidavit of Bruce Evelyn] and similar contractual promises on its website.

177. Students who adhere to and express unfashionable opinions pay the same tuition fees as students who adhere to and express popular and established beliefs, just like all citizens pay property taxes regardless of the crime rates in their neighbourhoods, and these taxes pay for policing which is provided for all, regardless of where you live, and regardless of whether you like to walk outside after dark. Even if the statistical likelihood of victimization is greater for the home-owner in the higher-crime neighbourhood and for the student with unpopular views, penalizing either one constitutes a blame-the-victim approach.

178. The University would be justified in charging extra money for extra security for events involving the sale and consumption of alcohol, on grounds that the consumption of alcohol increases the likelihood of intoxicated people engaging in foolish or criminal acts. The consumption of alcohol by university students may be prevalent, but it does not constitute the core of the University's mission, vision and purpose, and therefore the University has no obligation – contractual or otherwise – to create a safe place on campus for drinking. The University can legitimately discriminate against alcohol consumption by imposing extra security fees on those wishing to engage in that activity.

179. In contrast, the University cannot discriminate against unpopular expression on campus, because the University has a legal obligation (pursuant to its contract with students, pursuant to the *Post-Secondary Learning Act*, and pursuant to its own mission and vision documents) to provide a safe place for the expression of all views on campus. The University cannot discriminate against unpopular opinions by charging an extra security fee for their expression.

180. The University's imposition of a $500 "security fee" on the Applicants should be seen in the context of the University's behaviour since 2008: demanding that the Applicants hide their signs from view (2008); charging William Whatcott with trespassing (*R. v. Whatcott, supra*) for having peacefully handed out flyers on campus (2008); charging the Applicants with trespassing for having refused to turn their signs inwards (2009); charging Keith Pridgen and Steven Pridgen with non-academic misconduct (*Pridgen v. University of Calgary, supra*) over innocuous criticism of their professor (2008); threatening the Applicants' counsel with trespassing for being present on campus at his clients' invitation (2008); charging the Applicants with non-academic misconduct (2010); and then imposing a new $500 "security fee" (2010).

181. If the University had a sincere and rational basis for charging the Applicants security fees, it would have started doing so in the Spring of 2006, when the display was set up on campus for the first time, and not in the Fall of 2010, when the display was set up for the tenth time. The new fee is the University's latest move in a longstanding pattern of behaviour that is profoundly disrespectful of free expression.

## Order Sought

The Applicants seek:

(a) an Order quashing the January 13, 2011 decision of the Board of Governors, quashing the August 20, 2010 decision of the Appeal Board and quashing the May 5, 2010 decision of Meghan Houghton;

(b) an Order prohibiting the University of Calgary from creating or promulgating new rules, policies, bylaws, regulations, or procedures which have the purpose or the effect of infringing the Applicants' free expression rights;

(c) an Order restraining the University of Calgary from discriminating against the Applicants by charging, or by threatening to charge, "security fees" in the amount of $500 or $1,000 or any other amount as a condition for the Applicants to be able to express their opinions on campus;

(d) an Order prohibiting the University of Calgary from using student discipline procedures under the *Post-Secondary Learning Act* as a means or method of censoring the peaceful expression of opinion on campus;

(e) a Declaration that the Applicants are entitled to express their views peacefully on campus without censorship by or from the University of Calgary;

(f) a Declaration that the decisions of the Board of Governors, the Appeal Board, and Meghan Houghton violate the Appellants' section 2 *Charter* rights and are not saved under section 1;

(g) a Declaration that the decisions of the Board of Governors, the Appeal Board, and Meghan Houghton violate the Appellants' contractual rights to express their opinions peacefully on campus;

(h) a Declaration that the decisions of the Board of Governors, the Appeal Board, and Meghan Houghton were an improper exercise of discretion under the *Post-Secondary Learning Act*;

(i) a Declaration that the Applicants, by having exercised their right to express their opinions peacefully on campus, are not guilty of violating the University's Non-Academic Misconduct Policy;

(j) a Declaration that the Non-Academic Misconduct Policy does not comply with the principles of natural justice because it expressly excludes legitimate grounds of appeal such as unreasonableness, errors of law, misapprehension of fact, the basing of a decision on irrelevant considerations, and the ignoring of relevant considerations;

(k) a Declaration that the Non-Academic Misconduct Policy, in cases where students are charged with a "Major Violation" and face the possibility of expulsion from University, must provide the accused student with the right to disclosure of relevant documents, the right to counsel, the right to cross-examine witnesses, and the right to an impartial and unbiased decision-maker;

(l) a Declaration that the Respondent University may not use student discipline procedures under the *Post-Secondary Learning Act* as a means or method of censoring the peaceful expression of opinion on campus;

(m) the Costs of this action, taking into account the University's conduct since 2008 as summarized in paragraph 180; and

(n) Such further or other relief as this Court may deem just.

All of which is respectfully submitted.

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