Court of Queen's Bench of Alberta

Citation: Wilson v University of Calgary, 2014 ABQB 190

Date: 20140401
Docket: 1101 04894
Registry: Calgary

Between:

Cameron Wilson, Alanna Campbell, Leah Hallman, Cristina Perri, Peter Csillag, Joanna Strezynksi and John Mcleod

Applicants

- and -

University of Calgary Board of Governors and University of Calgary

Respondents

Reasons for Judgment
of the
Honourable Madam Justice Karen Horner

I. Introduction

[1] The Applicants ("Students") seek judicial review of a decision of the Chair of the Student Discipline Appeal Committee ("Committee") following a finding that they had violated the University's Non-Academic Misconduct Policy. The Chair found that the Applicants had not established their grounds for appeal and refused to convene the Committee to hear the appeal. The Applicants seek an order quashing this decision as well as seeking other forms of injunctive and declaratory relief. The Respondents ("University") oppose this application.

II. History

[2] Each of the Applicants are students at the University of Calgary. They are also members of a group known as Campus Pro-Life ("CPL"), a registered campus club. Commencing in 2006, CPL has organized and manned a bi-annual display which it sets up for a consecutive two-day period at the start of each fall and spring semester. The display is entitled the Genocide Awareness Project ("GAP") and features large signs depicting graphic photos of the Holocaust, the Rwandan Genocide, and racially motivated lynchings, as well as photographs of aborted human foetuses. Parts of the display attempt to draw a comparison between these historical acts of genocide and electing to undergo an abortion. CPL members stand near the display and invite passersby to engage in discussion.

[3] The GAP display is typically erected near MacEwan Hall; an area with high pedestrian traffic. During the first two years of the display, the University erected its own signs leading up to the display stating that "the exhibit's images are extremely graphic and may be offensive to some" and that "the exhibit is protected under the relevant section of the Charter of Rights and Freedoms related to Freedom of Expression."

[4] In the fall of 2007, a group of students opposed to the GAP display erected barriers obstructing the GAP display preventing the images from being viewed by passersby. In response to this occurrence counsel for CPL wrote to the University expressing concern over the incident and requested that the University suggest a go-forward solution. The March 10, 2008 letter reads, in part, as follows [emphasis in original]:

> CPL welcomes debate with those who oppose CPL's views, and does not wish to restrict or curtail the peaceful and non-physical expression of others' viewpoints. CPL supports the right of pro-choice activists to stand across from the GAP exhibit, leaving adequate space for passersby and for people to stop and discuss the GAP display with CPL volunteers.
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> CPL's concern is with the physical blocking of its GAP display by protesters, which is not peaceful and which can easily escalate into higher levels of physical conflict.
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> [...]
>
> Further, this tactic of physical imposing is likely to lead to pushing, shoving or worse…This could have quickly escalated into a major security concern on campus…

[5] The letter ultimately proposed that for the upcoming spring 2008 display, the University provide each party with a designated area which would maintain a reasonable distance between groups with opposing viewpoints.

[6] The University concluded that the appropriate solution was to request that the CPL Students turn their signs inwards, such that fellow students would have to enter the display area in order to view the images. The CPL Students did not abide by this request. A similar request was made – and ignored – in the fall of 2008. In January of 2009, a number of the CPL Students were charged with trespassing. These charges were stayed by the Crown shortly before the trial date. CPL continued to set up its display for two days each semester without incident, including a spring demonstration on April 8, 2010.

[7] During the April 8, 2010 demonstration, Campus Security hand-delivered a written notice ("Notice") to those CPL Students participating in the demonstration, which stated as follows:

> You are on the University of Calgary's private property.
>
> The University intends to maintain good order and minimize the risk of violent confrontations on its private property. The University seeks to protect the safety and security of its students, faculty and staff.
>
> Campus Pro-Life has already informed the University that its displays, together with the reaction to them, will likely trigger violence.
>
> The University is not asking you to stop your protest on private property, even though the University would have that right.
>
> The University merely asks you to turn your display inward. The following types of signs are exceptions that may face outward: those that identify your group, welcome viewers, and identify the protest generally as an anti-abortion display. But signs with the actual content of your display, including pictures, slogans, and discussion (such as comparisons of abortion with the Holocaust, the Rwandan genocide, and activities of the Ku Klux Klan) must face away from walkways, plazas, open fields where people gather, or any other areas in which persons on campus would have little choice but to look at your display.

[8] The Notice went on to state that failure to comply may result in, *inter alia*, the University initiating non-academic misconduct proceedings. Each of the CPL Students expressly refused the request and subsequently refused to leave the demonstration, despite instructions to do so by Campus Security.

[9] Following the April demonstration, each of the CPL Students received a letter from Meghan Houghton, the Associate Vice-Provost (Student Success and Learning Support Services), alleging that by failing to either turn the display inward or leave campus, the CPL Students had violated section 4.10(e) of the University's Non-Academic Misconduct Policy ("Policy"). The relevant section of the Policy states:

> 4.10 Major Violations are actions by a University of Calgary Student or Student group which endanger the safety and/or security of another individual or the University of Calgary community, or that contravene municipal, provincial or federal law. Major violations include, but are not limited to:
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> > [...]
> >
> > e) failure to comply with the direction of a Campus Security Officer or University official in the legitimate pursuit of his/her duties;

[10] The University initiated non-academic misconduct proceedings and hearings took place before the Associate Vice-Provost (Student Success and Learning Support Services). During the hearings, each CPL Student acknowledged that on April 8, 2010, they were provided with a copy of the Notice and asked by Campus Security to turn their signs inward, and that they refused to do so. The CPL Students further acknowledged that following this refusal, they were asked to leave campus; a request which they also refused. Each Student read an identical statement for the record, which, in summary, stated that at the time they were issued the Notice, they believed that

were exercising their right to freedom of expression under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], as well as their contractual rights as students of the University, and that the University was prohibited from arbitrarily discriminating against them based on CPL's philosophy and beliefs. The statement went on to assert that the University condones other campus groups which use graphic and shocking displays as a part of their demonstrations. A number of the Applicant students made enquiries of Ms. Houghton as to how the University defined "legitimate" and argued that by effectively censoring the CPL display, Campus Security could not have been acting in the "legitimate" pursuit of any duties, as per s 4.10(e).

[11] Ms. Houghton found each CPL Student guilty of committing a Major Violation under the Policy based upon their own admission of failing to follow the Notice. The Students were each issued a formal written warning. Her reasons, dated May 5, 2010, stated, in part [emphasis added]:

> You indicated that you were entitled to ignore or refuse to comply with the direction of Campus Security because to have done so, in your personal opinion, would have resulted in the University discriminating against you on the basis of philosophy, religion, view point, belief or other analogous ground. It is not your right to unilaterally decide whether discrimination is occurring. This is the jurisdiction of other bodies and not the subject of this proceeding. The University's operations would be greatly impeded if students or its members could independently and unilaterally decide which directions or authority to comply with and which to ignore.
>
> [...]
>
> You have also stated that you did not believe that University officials were acting in a legitimate or official capacity. You did not lead any evidence in this regard. It is within Campus Security's mandate to oversee campus activities and security. Again, it is not for individual students or members of the University to ignore University direction on the basis that you do not believe that Campus Security officials were acting in a legitimate capacity. Any challenge to that capacity is more appropriately dealt with in other venues.
>
> The Non-Academic Misconduct Policy exists to promote the safety and security of all members of the University of Calgary community. The University views the non-academic misconduct process as a learning experience which results in personal understanding of one's responsibilities and rights within the University environment. To this end, the student conduct process attempts to balance an understanding and knowledge of students and their needs and rights with the expectations of the University and larger community (section 4.2). The University has the right and responsibility to control and manage activities on University lands and grounds. You have agreed that the University has this right. The Non-Academic Misconduct Policy provides that a major violation includes a failure to comply with the direction of a Campus Security Officer or University official in the legitimate pursuit of his/her duties. *You have acknowledged that you intentionally failed to comply with the written direction of Campus Security. On*

> *this basis, I find that Campus Security properly exerted its mandate and exercised its discretion in a reasonable manner*.
>
> I therefore find that you have committed a major violation under the Non-Academic Misconduct Policy. [...]

[12] The CPL Students appealed this decision to the Appeal Board in accordance with the appeals procedure set out in the Policy, by way of a letter dated May 14, 2010. Section 4.41 of the Policy limits the grounds of appeal to one or more of the following: (i) subsequent discovery of relevant evidence; (ii) bias; (iii) failure to follow procedure in a manner which may have affected the outcome of the case; and (iv) the severity of the sanction exceeds the nature of the violation. The Policy expressly notes that dissatisfaction with the sanction imposed does not constitute grounds for an appeal.

[13] The CPL Students alleged bias and the failure to adhere to the proper procedure for a non-academic misconduct hearing. They also raised additional grounds (such as failure to adhere to the principles of natural justice, failure to consider relevant facts, and reliance on unfounded assumptions not supported by the evidence) which were not considered as they did not constitute grounds for appeal under the Policy. A review hearing was held on July 23, 2010, wherein it was held that none of the grounds of appeal had been proven. As such, a motion was passed not to accept the Students' request for an appeal hearing, as there were no adequate grounds to do so.

[14] Specifically, the Appeal Board found that the Students' argument, that Ms. Houghton failed to consider relevant facts in making her finding of non-academic misconduct, did not constitute evidence of bias. It further found as follows:

> You have alleged in the bias section of your request for an appeal that there was no evidence of a risk to safety and security. While the Appeal Board did not consider this an allegation of bias and therefore a ground of appeal, the Appeal Board noted that in your meeting with Ms. Houghton you acknowledged receipt of the notice from Campus Security to follow their instructions. The notice referred to a concern raised by the Campus ProLife group regarding safety and security.
>
> In short, the Appeal Board found that the arguments alleged in your request for appeal do not constitute clear evidence of bias. Many of the allegations set out in your letter requesting the appeal appear to be arguments that you were being censored or that Campus Security lacked the authority to issue a direction as to how displays may be set up on the University of Calgary property. Ms. Houghton addressed this in her original decision.
>
> Ms. Houghton noted that you indicated you did not believe that Campus Security was acting in a legitimate or official capacity but you did not lead any evidence in that regard. Ms. Houghton found that it is within Campus Security's mandate to oversee campus activities and security and that if you wished to challenge the general authority of the Campus Security office that it is best done in another venue. The Appeal Board found that your disagreement with this finding did not constitute grounds for appeal.

[15] The Appeal Board concluded that based upon the above, adequate grounds upon which to hear the Students' appeal had not been established. As such, Ms. Houghton's reasons and corresponding sanction remained undisturbed.

[16] The CPL Students further appealed to the University's Board of Governors pursuant to section 31(1)(a) of the *Post-secondary Learning Act*, SA 2003, c P-19.5 ("*PSLA*" or "*Act*") requesting that the Board of Governors 'reverse and quash' Ms. Houghton's decision. Section 31(1) provides:

> 31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may
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> > (a) subject to a right of appeal to the board [defined as Board of Governors], discipline students attending the university, and the power to discipline includes the power
> >
> > > (i) to fine students,
> > >
> > > (ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and
> > >
> > > (iii) to expel students from the university;
> >
> > (b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper;
> >
> > (c) give to a student organization of the university the powers to govern the conduct of students it represents that the general faculties council considers proper.

[17] In their written submissions to the Board of Governors, the Students claimed that the Houghton and/or Appeal Board decisions: (i) violated their *Charter* right to freedom of expression; (ii) were tainted by both institutional bias as well as the personal bias of Ms. Houghton; (iii) failed to address the Students' reasonable expectations based on past demonstrations, as well as upon the University's tolerance of graphic demonstrations by other student groups; (iv) were unreasonable as they were not based upon evidence of a threat to safety and security; (v) were unreasonable as they assumed, without evidence or authority, that Campus Security was acting in the "legitimate" pursuit of their duties; and (vi) breached the principles of natural justice.

[18] The Board of Governors delegated its authority to hear the appeal to the Committee. Student discipline appeals before the Committee are a two-step process: if an appellant student, on the record, establishes grounds for his or her appeal, the Committee is convened. In a letter dated January 13, 2011, Mr. Hickie, Chair of the Committee, advised that the record did not disclose any reasons that warranted convening the Committee for further consideration of the appeal.

[19] Although Mr. Hickie acknowledged a number of the grounds put forward by the Students (including: (i) that the earlier decisions failed to explain how the Students' refusal to abide by the

Notice endangered the safety and security of those on campus; and (ii) that the Houghton/Appeal Board decisions were patently unreasonable, unsupported by the evidence, and wrong in law) he limited his reasons to a review of the following grounds: bias, new evidence, unfairness/natural justice, and the application of the *Charter* and *Alberta Bill of Rights*, RSA 2000, c A-14 [*Alberta Bill of Rights*].

[20] In addressing the issue of bias, Mr. Hickie concluded that given the breadth of representatives on the Appeal Board, as well as the unanimous decision reached, there was no evidence of bias by the Appeal Board. He also concluded that the restriction on having a solicitor present during the hearing before Ms. Houghton and the inability to cross-examine witnesses did not result in bias – especially as credibility was not in issue and the facts were not in dispute.

[21] In addressing whether any new evidence had subsequently been discovered, Mr. Hickie found that any question of withholding documents from the Students had already been brought forward following Ms. Houghton's decision, and that this argument did not constitute new evidence. He further found that the Students' concerns over Ms. Houghton's "roles and actions" did not constitute "new evidence".

[22] Mr. Hickie went on to find that the Policy had been followed by both Ms. Houghton and the Appeal Board, and that there was no evidence on the record that the principles of natural justice had not been adhered to. Finally, in addressing the Students' argument that their *Charter* rights had been violated, Mr. Hickie concluded that the University attempted to strike a balance between the Students' rights and concerns for safety and security.

[23] Based upon the above, he concluded that the record did not warrant convening the Committee for further consideration of the Students' appeal. The Students seek judicial review of this decision.

III. Forum

[24] Prior to dealing with the merits of this application, I must first address a preliminary argument raised by the Respondents. The University takes the position that the Students are attempting to attack the underlying Notice and that they are precluded from doing so by operation of the *Rules of Court*. The University argues that if the Applicants were going to challenge the Notice they should have followed the directions of Campus Security and then brought a judicial review application challenging the underlying directive. The Students' Originating Application seeking judicial review of Mr. Hickie's reasons was filed on April 13, 2011. The University argues that if the Students wished to challenge the underlying directive, they should have done so within six months of the impugned decision or act, as per (then) rule 753.11(1) of the *Alberta Rules of Court*, AR 390/68.

[25] I agree with the University that one of the courses of action available to the Students was to comply with the Notice and then grieve the matter through the office of the Ombudsman or the Students' Union. However, the CPL Students chose not to comply with the Notice. The University then chose to initiate non-academic misconduct proceedings. Once the University opted to commence an investigation and hearing under the Policy, the procedures established thereunder came into play.

[26] The University argues that it was not open for the Students to breach the Policy and then seek to impugn the underlying directive. It argues that the record before the various disciplinary

proceedings was limited to whether or not the Policy had been breached and that the legitimacy of the Notice was never properly challenged. In its written argument, the University proclaims that while it would have been willing to defend the underlying directive behind the Notice, this line of argument would "confuse" the decision currently under review. It states that no record existed in relation to the underlying directive, and that the evidentiary basis and rationale behind the directive was not before Ms. Houghton, the Appeal Board, or Mr. Hickie.

[27] With respect, I cannot accept the University's argument.

[28] Prior to the hearing before Ms. Houghton the Students requested copies of any documents describing the duties and procedures of Campus Security as well as any policies providing the basis for Campus Security to issue the Notice. These requests were refused. During the hearing, the Students each read a statement to the effect that the University was not entitled to rely on an invalid Notice. A number of Students expressly made queries as to how "legitimacy" was defined. Ms. Houghton did not address these enquiries in her reasons.

[29] While Ms. Houghton's reasons state that the disciplinary hearing was not the correct forum to question the validity of the Notice, they go on to direct the Students (who, as per the Policy, were not represented by legal counsel) to pursue any appeal according to the Policy (i.e. to the Appeal Board).

[30] The Students believed that Ms. Houghton erred by finding that they had committed non-academic misconduct as defined in the Policy. They sought an appeal of this decision from the Appeal Board, alleging, in part, that Ms. Houghton's decision was biased as it was not based upon any evidence of a threat to safety or security, nor did it address the legitimacy of the Campus Security's demand.

[31] I do not agree that the existence of an alternate route for redress (such as a complaint to the Student Ombuds Office) precludes an appeal to the Appeal Board or subsequent appeal to the Board of Governors. Nor do I accept that the only appropriate course of action was to apply for judicial review of the underlying directive. While I agree that the Students cannot challenge the decision of the University to draft and serve the Notice, they can challenge the finding that they acted in breach of the Policy as it relates to their failure to abide by the demands contained in the Notice.

[32] Indeed, the law is clear that absent specific exceptions parties can proceed to court only after all adequate remedial recourses in the administrative process have been exhausted. As recently stated by McDonald JA in *Pridgen v University of Calgary*, 2012 ABCA 139 at paras 166 – 169, 524 AR 251 [*Pridgen CA*], aff'g 2010 ABQB 644, 497 AR 219 [*Pridgen QB*]:

> A fundamental principle of administrative law is that the statutory scheme established by a Legislature or Parliament must be used; it is not discretionary, and courts ought not usurp the functions entrusted to statutory delegates. Administrative delegates ensure the expeditious and proper functioning of the schemes of which they are a part. It is unnecessary to discuss the benefits of such schemes, other than to observe that they are an essential element of Canada's regulatory scheme and without them the judicial system would be overwhelmed.
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> The traditional common law discretion to refuse relief on judicial review includes the existence of adequate alternative remedies: see for example *Harelkin v University of Regina,* [1979] 2 SCR 561. This Court has repeatedly cited *Harelkin*

> and confirmed that "[j]udicial review is discretionary and an application for judicial review should be declined if an adequate statutory right of appeal exists": *Foster v Alberta (Transportation and Safety Board)*, 2006 ABCA 282 at para 14, see also *Merchant v Law Society of Alberta*, 2008 ABCA 363; *KCP Innovative Services Inc v Alberta* (Securities Commission), 2009 ABCA 102.
>
> The discretion to refuse relief on judicial review when an alternate remedy is available may have been elevated to a question of jurisdiction. In *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3, 122 DLR (4th) 129, the Court said that "[e]xcept in special circumstances, it is the practice of the courts to decline jurisdiction in favour of the statutory appeal procedure - this is the 'adequate alternative remedy' principle.": see Foster. A useful overview of the jurisprudence, the principles and their purpose is found in *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at para 30 - 33, which is reproduced as Appendix A to this judgment.
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> As mentioned above, procedural rules also inform the judicial review process. At the relevant time these were found in Part 56.1 of the Alberta Rules of Court, Alta Reg 390/68. The rules authorized courts to grant the following relief on applications for judicial review: "an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus; and "a declaration or injunction": r 753.04(1). The other permitted remedies included a setting aside order (r. 735.05), directing a reconsideration and determination (r. 735.06), or correcting technical defects (r. 735.07). The list is likely exhaustive when there is no statutory right of appeal or language in the constating statute granting the court additional jurisdiction.

[33] As referenced above, the majority of the Court in *Harelkin v University of Regina*, [1979] 2 SCR 561 at 595-596 [footnote added], stated as follows:

> Sections 78(1)(c) and 33(1)(e)[1] are in my view inspired by the general intent of the Legislature that intestine grievances preferably be resolved internally by the means provided in the Act, the university thus being given the chance to correct its own errors, consonantly with the traditional autonomy of universities as well as with expeditiousness and low cost for the public and the members of the university. While of course not amounting to privative clauses, provisions like ss. 55, 66, 33(1)(e) and 78(1)(c) are a clear signal to the courts that they should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors with its own institutional means. In using restraint, the courts do not refuse to enforce statutory duties imposed upon the governing bodies of the university. They simply

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[1] Section 78(1)(c) of the *University of Regina Act* provides that the university council shall:

> (c) appoint a committee to hear and decide upon, subject to an appeal to the senate, all applications and memorials by students or others in connection with any faculty of the university;

Section 33(1)(e) of the *Act* provides that the senate shall:

> (e) appoint a committee to hear and decide upon appeals by students and others from decisions of the council;

> exercise their discretion in such a way as to implement the general intent of the Legislature. […]

[34] In this instance, the Legislature has provided that the University is to manage student affairs through its general faculties council. In particular, the *PSLA* states that matters of student discipline are to be determined by the general faculties council "subject to a right of appeal to the board": s 31(1)(a).

[35] Under the Policy, the Associate Vice-Provost (Ms. Houghton) is tasked with hearing allegations of misconduct and making a decision at first instance. A student may appeal this initial decision to an appeal hearing officer or Appeal Board who will determine whether the grounds for appeal (as defined in the Policy) will be accepted. The Policy goes on to state that the decision of the Appeal Board is final, subject to the student's right of appeal to the Board of Governors. As the Policy then read, this final right of appeal was limited to instances where the sanction imposed was one of suspension, expulsion or monetary fine (s 4.45).

[36] In *Pridgen QB*, this Court found that the Board of Governors was in breach of its statutory duty in refusing to hear the students' appeals from a finding that they had breached the non-academic misconduct policy. The Court held that s 31(1) of the *PSLA* clearly provides a statutorily mandated right of appeal to the Board from any discipline imposed by the general faculties council: *Pridgen QB* at para 91. Because this statutory right of appeal exists, this Court should not have entertained an earlier application for judicial review of the underlying directive, contrary to what is urged by the University in its argument before me. The Legislature's clear intent is to have students exhaust their right of appeal within the administrative hierarchy provided for in the *PSLA*.

[37] In this case, the fact that the Students may have had recourse to the Ombuds Office does not detract from their statutorily mandated right to appeal a finding that they had committed non-academic misconduct to the Board of Governors. The Students were found to have committed non-academic misconduct and were sanctioned. They disagree with this finding on a number of grounds, including an argument that the acts which they committed do not constitute non-academic misconduct as defined by the Policy. Whether their challenge to this finding of non-academic misconduct engages an examination of an underlying directive or not, this is squarely a matter of student discipline and thus falls under the purview of the Board of Governors. Absent exceptional circumstances, an application for judicial review should only be made after the administrative regime provided for by the Legislature has been exhausted.

[38] While I agree that this Court is not the correct forum in which to challenge the decision of University administration to issue the impugned Notice, the review brought by the Students relates to whether, in failing to abide by the Notice and turn their signs inward, they committed an act of non-academic misconduct (specifically a "Major Violation") as defined in the Policy. The issue boils down to a determination of whether the Policy was breached.

[39] In refusing to convene the Committee, Mr. Hickie concluded that the Students had failed to establish any grounds that might merit an appeal. This finding is the proper subject for judicial review.

[40] However, that said, the Students are not entitled to have their cake and eat it too. The Students chose to proceed through the process outlined above. Upon being informed that the Committee would not convene, they filed an Originating Application seeking judicial review of,

inter alia, Mr. Hickie's affirmation of the disciplinary sanction and refusal to convene the Committee. This judicial review hearing is not the correct forum in which to challenge the decision of the University's administration to issue the Notice. It is the correct forum in which to review the decision not to convene the Committee to hear the Students' appeal from the finding that they had committed non-academic misconduct by failing to adhere to the Policy. Therefore this is not a judicial review of the University's decision to issue the Notice. It is a judicial review of Mr. Hickie's decision. While the two issues are inter-related, they are not the same.

IV. Issues

[41] The numerous grounds of appeal alleged by the Students can be distilled down to the following:

1. Were the CPL Students' rights to procedural fairness breached?
2. Was Mr. Hickie's ruling reasonable?
    a) Limitation of grounds of appeal considered
    b) Application of the *Charter* and the *Alberta Bill of Rights*
    c) Application of contractual rights
3. Imposition of Security Fees

V. Findings

1. Were the CPL Students' Rights to Procedural Fairness Breached?

[42] In their written submissions to the Board of Governors the Students alleged that their rights to procedural fairness and natural justice had been breached and requested that the Board reverse and quash the finding that they had committed non-academic misconduct, or alternatively to order a rehearing. The Students alleged both institutional and personal bias in respect of the original hearing, as well as a denial of the right to be represented by legal counsel, the right to cross-examine witnesses, a right to disclosure of documents, and the right to fully and fairly present their case. I shall address the Students' argument that the appeal structure provided for in the Policy itself breaches the principles of natural justice later in this decision.

[43] Mr. Hickie found that the Students had failed to establish any breach of natural justice or procedural fairness. In particular, he determined that the Students' right to natural justice had not been breached by not having counsel present, nor by the denial of an ability to cross-examine witnesses. He further found that the "concerns with the processes of the Vice Provost's roles and actions" (which I understand from the record to mean the institutional bias arguments raised in response to Ms. Houghton allegedly acting as both investigator and decision-maker) had been addressed by the Appeal Board and did not constitute new evidence.

[44] The Applicants allege that given the nature of the hearing, they were entitled to a high degree of procedural fairness. They submit that because the administrative process governing the hearing was seriously flawed, Mr. Hickie's finding cannot be sustained. The University counters that the level of fairness requested by the Students is not warranted in this type of proceeding and is not provided for under the Policy.

[45] The duty placed upon a tribunal to follow certain procedural requirements when reaching a decision was described by the majority in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 79 [*Dunsmuir*] as follows:

> Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[46] More recently, in *Canada (*Attorney *General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, the Supreme Court stated, at para 40:

> In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if ... administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion".

[47] While fairness must be reviewed within the context in which the issue arises, the duty to comply with the rules of natural justice extends to all administrative bodies. Determining whether a tribunal has met this duty requires an assessment of the procedures and safeguards required in the particular situation. This determination is done on the correctness standard, as described by Slatter JA in *Nortel Networks Inc v Calgary (City)*, 2008 ABCA 370 at para 32, 440 AR 325:

> The *Pushpanathan* analysis does not apply to issues of procedural fairness or natural justice. The fairness of the proceedings is not measured based on whether they are "correct" or "reasonable" in the *Pushpanathan/Dunsmuir* sense. Rather these issues are reviewed based on whether the proceedings met the level of fairness required by law: *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.) at para. 74; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.) at paras. 100-103; *McLeod v. Alberta (Securities Commission)*, 2006 ABCA 231, 61 Alta. L.R. (4th) 201, 391 A.R. 121 (Alta. C.A.) at para. 31; *Ha v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195 (F.C.A.) at paras. 42-45. Because the court decides whether the fairness standard has been met without affording deference, in that sense fairness is reviewed for "correctness": *Boardwalk Reit LLP* at para. 174.

See also: *Lana v University of Alberta*, 2013 ABCA 327 at para 6; *InterPipeline Fund v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 208 at para 27, 533 AR 331; *Anderson v Alberta Securities Commission*, 2008 ABCA 184 at para 30, 437 AR 55; *Allsop v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2011 ABCA 323 at para 21, 29 Admin LR (5th) 321.

[48] The content of procedural fairness owed by a tribunal varies with circumstances and the legislative and administrative context. The Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, provided guidance on how to determine this content by identifying a number of elements to consider, including, but not limited to: (i) the nature of the decision being made and the process followed in making it; (ii) the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: paras 23-27.

[49] In the case at bar, section 31of the *PSLA* evidences the Legislature's intent to provide the University with broad supervisory powers over student affairs, including student discipline. The wording of the *PSLA*, which provides for "general" supervision over students, suggests that the University has been afforded a high level of discretion in dealing with student disciplinary matters. The procedures chosen by the University in the context of disciplinary hearings therefore ought to be deferred to. Each of the offices of the Associate Vice-Provost (Student Success and Learning Support Services), the Vice-Provost (Students) Appeal Board and the Committee, possess a relative expertise in matters of student governance and discipline.

[50] In addition, the *PSLA* provides that the general faculties council may determine standards and policies respecting the admission of persons to a university as students: s 26(1)(n). The Policy in issue was approved by the general faculties council and implemented through the Vice-Provost (Students) Office.

[51] In this instance, the Policy provides a right to appeal the decision of the Associate Vice-Provost to an appeal hearing officer or an Appeal Board, albeit on the limited grounds enumerated in section 4.41. As previously stated, the *PSLA* provides a further and final right of appeal to the Board of Governors, as does s 4.45 of the Policy.

[52] I agree with the University that the above-mentioned factors support its argument that the procedures chosen in the context of disciplinary hearings ought to be afforded significant weight in determining the context of the duty of fairness owed to the CPL Students. I note also that the Policy was developed in consultation with faculty, staff, and student representatives: s 4.3.

[53] At the same time, it must be remembered that the decision in question is disciplinary in nature. Although in this instance the sanction imposed against the students was limited to a formal written warning Ms. Houghton's decision stated 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." I note that section 4.31 of the Policy provides for various sanctions, up to and including a fine, suspension and expulsion.

[54] There is no doubt that expulsion from a university may have a major impact upon a student. Counsel for the Applicants relied on *Kane v University of British Columbia*, [1980] 1 SCR 1105 [*Kane*], in arguing that expulsion from university is comparable to professional discipline or suspension in the working world. In *Kane*, Dickson J, as he then was, held at 1113 that:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake. *Abbott v.* Sullivan [1952] 1 K.B. 189], at p. 198; *Russell v. Duke of Norfolk. supra*, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

[55] While the University stresses that the sanction was merely a written warning, this ignores the fact that the CPL Students were exposed to the possibility of expulsion, and that the possibility of "more serious" sanctions were mentioned in Ms. Houghton's decision. Indeed, in *Khan v University of Ottawa* (1997), 34 OR (3d) 535 at 541 (CA), the majority of the Ontario Court of Appeal noted the severity of the situation in which a student was made to repeat a semester after unsuccessfully appealing a failing grade:

> In my view, a university student threatened with the loss of an academic year by a failing grade is also entitled to a high standard of justice. The effect of a failed year may be very serious for a university student. It will certainly delay if not end the career for which the student was studying. It may render valueless any previous academic success. In some cases it may foreclose further university education entirely: see C.L. Chewter, "Justice in the University: Legal Avenues for Students" (1994) 3 Dalhousie J. Leg. Studies 105 at p. 113.

[56] At the time of the sanction, each of the Applicants was pursuing studies in various University faculties. I note from the affidavits of Ms. Campbell and Mr. Wilson that both were engaged in full time studies. Being a student, was, in essence, their "career", and this career was at stake given the potential consequences attached to a major Policy violation. I agree with the Applicants that a university degree is a prerequisite to employment in many professions and that the denial of the ability to pursue a university education can have a profound effect on one's future.

[57] I also agree that the CPL Students' legitimate expectations as to both the substantive and procedural protections to be afforded to them were grounded in the Policy itself. Of note, section 1 reads, in part:

> The goal of this policy is to provide a clear and transparent process for managing and addressing non-academic misconduct and to do so in a manner that is centralized and follows the principles of natural justice.

[58] Section 4.4 outlines the principles of the Policy, stating:

> …This policy is bound by the principles of procedural fairness and natural justice. Allegations of violations of this policy will be dealt with through clear communication that the behavior is prohibited, notice of allegations, reasons for sanctions, notice of procedures, the opportunity to be heard, notice of rationale for any decision, and the right to appeal within a clearly defined appeal structure.

[59] It is against this backdrop that the content of the duty owed to the Applicants must be determined. Specifically, this Court must decide whether Mr. Hickie was correct in his determination that the following principles of natural justice had been adhered to.

(a) The Right to an Unbiased Decision Maker

[60] The Applicants allege that the Associate Vice-Provost, Ms. Houghton, acted as both the accuser and the judge, in violation of the *nemo judex in causa sua* principle. The University

submits that no evidence was lead establishing that Ms. Houghton's decision was tainted, and that if such a defect existed, it would have been cured by the latter appeals in any event.

[61] It is clear that the Policy envisions Ms. Houghton exercising overlapping functions in her role. The Policy defines Associate Vice-Provost (Student Success and Learning Support Services) as "the person who will receive, review and hear allegations of misconduct and make determinations and/or recommendations under this policy."

[62] The Policy provides that Major Violations be referred to the Associate Vice-Provost (Student Success and Learning Support Services) within three days of the alleged incident by either the University official/designate in whose jurisdiction the incident occurs, or by the Department of Campus Security. In this instance, the referral came from the latter (s 4.25). The Policy further provides that the Associate Vice-Provost (Student Success and Learning Support Services) may either dismiss the matter or may arrange for a hearing with the student and, if satisfied that the violation has been committed, impose a sanction.

[63] The test for institutional bias was stated by Gonthier J for the majority in *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para 44 [*Régie*] as follows:

> The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension of bias in a substantial number of cases.

See also *Bell Canada v Canadian Telephone Employees Assn*, 2003 SCC 36 at para 17, [2003] 1 SCR 884.

[64] Of note, in *Régie*, Gonthier J emphasized that it is the reasonable apprehension of the informed person that we must consider, and not the proven or presumed existence of an actual conflict of interest: para 54. The test is not whether Ms. Houghton's decision was tainted by bias; it is whether a reasonable apprehension of bias exists given the structure of the decision-making body.

[65] In this instance Ms. Houghton "charged" the Applicants with the violation in issue in her April 14, 2010 letter. She then conducted the hearings, received statements from each of the Applicants, and made a finding that they had violated the Policy.

[66] The Students argued bias before both the Appeal Board and before Mr. Hickie. The Appeal Board concluded that the Policy expressly provides that Ms. Houghton's office is to hear and determine complaints. The Appeal Board also found that the Policy is not set up to have a 'prosecutor' and that Ms. Houghton did not act in this capacity. Mr. Hickie's treatment of this ground is less clear, as his only direct review of bias is limited to whether bias existed on the part of the Appeal Board. His reasons address institutional bias on the limited ground of whether this argument constituted new evidence before him. Although somewhat vague, his reasons when read as a whole seemingly adopt the Appeal Board's conclusion regarding institutional bias.

[67] While I agree with the Appeal Board that the Policy does not establish the position of a 'prosecutor' in the traditional sense, it is clear that Ms. Houghton considered the charges, ultimately presented the case against the Applicants to them, and allowed them an opportunity to respond. I agree with the Applicants that this mixed role is *prima facie* problematic.

[68] As the Supreme Court stated in *Brosseau v Alberta (Securities Commission)*, [1989] 1 SCR 301 at 309:

> The maxim *nemo judex in causa sua debet esse* underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge in his own cause. In this case, it is contended that the Chairman, in acting as both investigator and adjudicator in the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted in law because the taint of bias would destroy the integrity of proceedings conducted in such a manner.

[69] As with most principles, there are exceptions. One exception to the *nemo judex* principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.

[70] The Applicants have not challenged the constitutional validity of the *PSLA*. Therefore this Court must determine whether the overlap of the functions of the Associate Vice-Provost (Student Success and Learning Support Services) has been authorized by this statute.

[71] I find that it has. As discussed above, the *PSLA* affords a high level of discretion to the general faculties council in dealing with student disciplinary matters. It also provides for delegation of its power to discipline students (s 31(2)). While the *PSLA* does not expressly establish the Office of the Associate Vice-Provost and delineate its authority, the Legislature clearly delegated the ultimate structure of the disciplinary process to the general faculties council.

[72] The broad powers conferred upon the general faculties council with respect to matters dealing with student discipline under s 31(1)(a), coupled with the express right of delegation under s 31(1)(b), and the express ability to create student policies under s 26(1)(n), demonstrate the Legislature's intent to grant wide discretion to the general faculties council, and allow the council to structure the University's internal student disciplinary process as it deems appropriate. Courts engaged in judicial review of administrative decisions must defer to the Legislative intent in assessing the degree of independence required of the tribunal in question: *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 22, [2001] 2 SCR 781.

[73] Here, the intent of the Legislature was to grant the University wide discretion over student disciplinary issues. It was therefore open to the general faculties council to create an overlap of the function of the Office of the Vice-Provost (Student Success and Learning Support Services), as it deemed appropriate in order to facilitate non-academic misconduct hearings at first instance. The Applicants were not denied procedural fairness in this regard. I note also that any individual bias displayed by the office-holder would establish a ground of appeal under the Policy.

(b) The Right to Counsel

[74] The Applicants argue that the University has failed to provide the requisite level of fairness by denying the right to counsel during the hearing before Ms. Houghton. In his reasons, Mr. Hickie acknowledged that while the Students were not allowed to have counsel present, they were allowed to have an advisor. He concluded that the denial of counsel did not result in a

denial of natural justice. The University similarly argues that the level of procedural fairness required did not extend to the right to counsel in the circumstances.

[75] The Policy expressly prohibits a student from bringing counsel to a hearing. Section 4.16 states that:

> A Student who is subject to this policy because a complaint has been filed against him/her is encouraged to seek advice from an Advisor in all matters related to non-academic misconduct, and may be accompanied by an Advisor to any Hearing related to non-academic misconduct. Except in exceptional circumstances…a Student may not bring a parent or guardian as an Advisor to a Hearing. In addition, as the process for handling non-academic misconduct is an administrative process and is not a criminal process, Advisors may not include legal counsel except when a student is charged with a criminal offense [sic] arising from the same incident.

[76] The Policy defines "Advisor" as:

> A person who attends a Hearing with a Student to act as a support person to him/her during the Hearing. The Advisor does not represent the Student, nor is the Advisor considered a party to the hearing. An advisor includes, but is not limited to, the University Ombudsman, the SU Students Rights Advisor, a peer, a representative of the Students' Union or Graduate Students' Association, or a Student and Enrolment Services Peer Helper.

[77] Each of the CPL Students attended the hearing before Ms. Houghton accompanied by an Advisor. The University Ombudsman also attended the hearings. I note that written submissions by the Applicants' counsel were received by both the Appeal Board and Mr. Hickie prior to their respective decisions. Affidavit evidence from two of the CPL Students (Mr. Wilson and Ms. Campbell) was provided to Mr. Hickie.

[78] The right to counsel is not absolute. The fundamental question is whether the Applicants had been given an adequate opportunity to present their case and to meet the University's case against them.

[79] In *M(S)S v Company of the Cross*, 2002 ABQB 661, 319 AR 271 [*Company of the Cross*], this Court addressed the right of a student to representation during an appeal hearing following his expulsion from school. Macklin J reviewed a number of authorities, many of which are distinguishable in that the plaintiff student was a minor and/or there was a need for an opportunity to test the evidence or word of the pupil's accusers by means of cross-examination. The Applicants at bar are not minors, nor do the allegations involve issues of credibility.

[80] The Policy provides for notice of the alleged offence, notice of procedures, and the opportunity to be heard. The April 14, 2010 correspondence from Ms. Houghton clearly outlines the details of the alleged offence, as well as which section of the Policy the Applicants are being charged with violating. A hearing date was specified and the Applicants were reminded of their right to seek advice from an Advisor. The letter expressly states that "parents, guardians, and legal representatives are not considered suitable Advisors for this case and are not welcome at this hearing."

[81] I agree with Mr. Hickie's conclusion that the denial of the right to counsel in this instance did not result in the denial of the right to natural justice. Each of the Applicants were given the

opportunity to respond to the allegations of misconduct, and each took advantage of this opportunity by reading a prepared statement outlining their position for the record. Each student acknowledged receiving the Notice and refusing to comply.

[82] The facts of this case do not support a finding that the Students' right to counsel had been violated. This is not an instance where the talents of a lawyer were required in order to ensure adequate presentation of the Applicants' position. The facts were not in dispute. There were no witnesses called by either side. The nature of the proceedings was meant to be informal. Again, the *PSLA* provides for considerable latitude in establishing procedures in addressing student discipline. These procedures should be respected by the courts: see *JO v Strathcona-Tweedsmuir School*, 2010 ABQB 559 at paras 29 and 33, 504 AR 117.

(c) The Right to Cross-Examine Witnesses

[83] The Students further claim that the denial of their right to cross-examine any witnesses (of which there were none) violates their right to procedural fairness and natural justice. In finding that no violation had been established, Mr. Hickie concluded "I am not convinced that cross examination would have changed the outcome of the hearing, given that credibility was not in issue and the facts were not in dispute."

[84] His conclusion is correct given the circumstances of this case. Similar to the right to counsel, the right to cross-examine witnesses is not absolute. As succinctly stated in David Jones & Anne de Villars, *Principles of Administrative Law*, 5th ed (Toronto: Carswell, 2009) at 301-302 [*Jones & de Villars*]:

> The right to cross-examination, like the right to an oral hearing, depends on a variety of circumstances. Clearly it may be required by statute, but where the statute is silent and the tribunal is the governor of its own procedure, the common law is reluctant to impose courtroom procedures and technical rules of evidence...Neither the right to call witnesses, nor the right to cross-examine witnesses is unlimited. A tribunal can reasonably limit both. However, cross-examination may be a necessary element of procedural fairness where important issues of credibility are raised, or where there is no other effective means of refuting the allegations or arguments of the other side.

[85] The ability to cross-examine witnesses was not required in order for the Applicants to meet the case against them in this instance. As noted above, there were no credibility issues and none of the material facts were in dispute.

(d) The Right to Disclosure

[86] Lastly, the Applicants allege that the University failed to adhere to the principles of procedural fairness by failing to provide relevant disclosure. By a letter dated April 27, 2010, counsel for the Applicants requested copies of all relevant University documents which enumerate and describe the duties and procedures of Campus Security prior to the hearing before Ms. Houghton. These were not provided. As discussed above, during the hearing a number of the Applicants made enquiries as to how issues of security and the "legitimate pursuit" of Campus Security's duties were defined.

[87] Mr. Hickie found that the University did not act unfairly in failing to disclose such documents. Specifically, he found that "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." As such, he found that any concern over document disclosure no longer existed by the time the appeal before the Appeal Board was heard.

[88] Fairness generally requires that all information relied upon by the tribunal when making its decision be disclosed to the individual: *Jones & de Villars* at 266. In this case, the Applicants had been physically provided with a copy of the Notice by Campus Security. They were further notified that they could access the full Policy on-line and were provided with a link to this posting. While the University did not provide documentation outlining the role of Campus Security, the Applicants nonetheless put forward an argument that however "legitimacy" was defined, Campus Security could not have been acting legitimately as the demands in the Notice contravened their *Charter*-protected right to freedom of expression, as well as their contractual rights as students at the University.

[89] I find that the documents sought by the Applicants were relevant to the issues to be determined at the hearing and may have affected their ability to fully answer the case against them. As such, Mr. Hickie erred in finding that the requested documents should not have been disclosed. However, I further find that the Applicants suffered little prejudice as a result of this lack of disclosure in that they addressed the "legitimacy" of the demand in any event. In addition, Ms. Houghton did not rely upon any documentation delineating Campus Security's duties in her reasons as she did not believe it to be relevant.

[90] While I recognize this to be a breach, the failure of the University to introduce any evidence establishing a concern over campus safety/legitimacy is best addressed when reviewing Mr. Hickie's decision to endorse the prior finding of non-academic misconduct. As such, I shall address the appropriate remedy later on in this decision.

[91] Aside from my finding that Mr. Hickie erred in determining that the Students were not entitled to disclosure of these documents (which is addressed below in conjunction with my review of his written reasons) I find that Mr. Hickie was correct in concluding that the rules of natural justice and procedural fairness were not breached.

2. Was Mr. Hickie's Ruling Reasonable?

(a) Limitation of Grounds of Appeal Considered

i. Standard of Review

[92] The parties disagree on whether the balance of Mr. Hickie's reasons are reviewable on the standard of reasonableness or correctness. The Applicants rely on *Dunsmuir* in arguing that Mr. Hickie's decision should be reviewed on the correctness standard. I disagree. The majority in *Dunsmuir* states that questions of fact, discretion and policy, as well as questions where the legal issues cannot be easily separated from the factual issues attract a standard of reasonableness: para 51.

[93] *Dunsmuir* instructs us that prior to undertaking a standard of review analysis afresh, courts should first ascertain whether the jurisprudence has already determined, in a satisfactory manner, the degree of deference to be accorded to a particular category of question: para 62.

[94] In *Pridgen QB*, Strekaf J determined that the question of whether a disciplinary tribunal erred in concluding that a student's conduct constituted non-academic misconduct (as defined

under the then-existing policy) involved questions of mixed fact and law and was reviewable on a standard of reasonableness, having regard to the *Dunsmuir* criteria: para 107. The use of the reasonableness standard was affirmed on appeal: *Pridgen CA* at paras 52, 155, and 178.

[95] In *SDL v University of Alberta*, 2012 ABQB 244, 531 AR 218, a student sought judicial review of a decision of the University Appeal Board which found that the student had violated the University's Code of Student Behaviour. In holding that the appropriate standard of review was reasonableness, Belzil J noted that the courts have "recognized the need to show deference on the issue of student discipline": para 46. He also relied on the following passage from *Pacheco v Dalhousie University*, 2005 NSSC 222 at para 20, 238 NSR (2d) 1, where that Court found:

> Student discipline and student affairs generally are within the unique ambit of expertise exercised by University bodies. As pointed out by the respondent, procedural fairness is a significant consideration in these proceedings and the University has ensured that the membership of both the Discipline Committee and the Board contain members of the Faculty of Law. I accept that a considerable degree of deference should be shown to the Board and the Discipline Committee in matters of student conduct and discipline.

[96] The above jurisprudence has established that the appropriate standard of review on questions of student misconduct is one of reasonableness. The courts are to accord a substantial degree of deference to decisions involving issues of student discipline, as required by this standard.

[97] In this instance, any review of the reasonableness of Mr. Hickie's findings must also take into consideration his decision to limit the grounds that he considered for appeal. The decision to limit the grounds for review is a part of the overall reasonableness of his decision.

[98] In their written submission to the Board of Governors, the Students included grounds of appeal beyond those provided for in the Policy. As discussed, section 4.41 of the Policy limits the right of appeal from the Office of the Associate Vice-Provost (Student Success and Learning Support Services) to the Appeal Board to four grounds. The parties disagree as to whether the appeal before Mr. Hickie was properly limited to the grounds provided in the Policy.

[99] An analogous situation arose in *Pridgen*, where the Board of Governors refused to hear an appeal where the sanction imposed was probation. The Board took the position that an appeal was only available in instances where the discipline imposed was either a fine, suspension or expulsion, as per its internal guidelines. Strekaf J found that the Board's argument was not consistent with a plain reading of section 31(1) of the *PSLA*, which "clearly provides a statutorily mandated right of appeal to the board of governors of a university from any discipline imposed by the general faculties council..." (*Pridgen QB* at para 91). In concluding that the Board was in breach of its statutory duty to hear the appeal, she noted that "if the [general faculties council] has the statutory authority to impose a form of discipline, the exercise of such authority is subject to a right of appeal to the board of governors, by virtue of section 31(1)(a)" (*Pridgen QB* at para 91). The guidelines were found to be immaterial to the extent that they conflicted with the legislation.

[100] On appeal, McDonald JA found that the reasonableness standard applied to the question of whether the Board of Governors erred in refusing to hear the students' appeal: *Pridgen CA* at

para 155. While in *Pridgen QB*, the Board refused to hear the appeal at all, by analogy the same standard would apply in instances where the Board limits the grounds on which it will hear an appeal. *Dunsmuir* instructs us that where the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question, a full analysis is not required: para 62. The standard of review for questions of whether the Board erred in failing to hear (or in this instance, failing to fully hear) an appeal has already been determined. As such, Mr. Hickie's decision to limit the grounds of appeal that he would consider is reviewable on the reasonableness standard.

[101] Whether a decision is "reasonable" was discussed by the Supreme Court in *Dunsmuir*. The majority defined this concept as follows, at para 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[102] This Court must therefore review both Mr. Hickie's decision to limit the grounds for appeal that he would consider in determining whether to convene the Committee, as well as his confirmation of the finding that the CPL Students had committed non-academic misconduct, on the reasonableness standard.

ii. Grounds of Appeal to the Committee

[103] As for the first issue, the University takes the position that the Students' appeal to both the Appeal Board and the Board of Governors was properly limited to the grounds contained in section 4.41 of the Policy. This section states:

> The grounds for appeal are one or more of the following:
>
> - Relevant evidence that emerges which was not available at the time of the original decision; or
> - There was clear evidence of bias in the Hearing or original decision; or
> - The non-academic misconduct procedures were not followed and the outcome of the case might have been substantially affected by this failure; or
> - The severity of the sanction imposed exceeds the nature of the violation identified by the appellant.

[104] As noted above, the Students raised the following grounds for appeal before the Board of Governors: (i) violation of their Charter rights; (ii) bias; (iii) unfairness in that the Houghton and

Appeal Board decisions were patently unreasonable yet allowed to stand; and (iv) breaches of natural justice, including an argument that section 4.41 of the Policy excludes appeals on the grounds of patent unreasonableness, a failure to consider evidence, a failure to consider relevant law, and a lack of fairness in the Policy procedures.

[105] In his reasons, Mr. Hickie acknowledges each of these grounds for appeal. Specifically, he notes the Students' argument that neither Ms. Houghton nor the Appeal Board addressed the issue of how the refusal to comply with the Notice endangered the safety and security of those on campus. He also acknowledges the Students' argument that Campus Security was not acting in the legitimate course of their duties by censoring freedom of expression.

[106] Mr. Hickie does not directly address the issue of whether the Board of Governors is limited to the restricted grounds of appeal contained in section 4.41 of the Policy. His reasons on this issue are as follows (at page 2):

> [Counsel for the Students] notes that in the section entitled, "Breaches of natural justice," that unfortunately Section 4.41 of the Non-Academic Misconduct Policy limits appeals to only four grounds...[Counsel] notes that the grounds for appeal exclude appeals based on patent unreasonableness, failure to consider relevant evidence, failure to consider and apply the law, and lack of fairness in the Non-Academic Misconduct Policy procedures themselves.
>
> [Counsel] argues that the Non-Academic Misconduct Policy procedures themselves breach natural justice by allowing decisions to stand even when those decisions are patently unreasonable, unsupported by evidence and wrong in law. The specific breaches of natural justice quoted were...the right to a decision based on evidence and facts, the right to have their appeal heard by the Appeal Board and to have their grounds fully argued before the Appeal Board...

[107] While Mr. Hickie does not expressly state that the grounds of appeal before him are similarly limited, his reasons, when read as a whole, demonstrate that he confined himself to limited grounds in determining whether to convene the Committee. For the following reasons, I find that his decision to do so was unreasonable.

[108] The Policy itself is unclear in its wording as to whether the four grounds of appeal provided for in s 4.41 are even applicable to an appeal from the Appeal Board to the Board of Governors/the Committee. It is clear that the Policy expressly provides the Appeal Board is to limit itself to hearing an appeal on these four limited grounds. Indeed, the wording of s 4.42 of the Policy states [emphasis added]:

> The appeal hearing officer or Appeal Board determine whether *grounds for appeal* will be accepted. If *grounds for appeal* are accepted, appeals shall be heard as follows; [...]

[109] In contrast, section 4.45 of the Policy, which provides for an appeal from the Appeal Board to the Committee is not limited in this express fashion. Rather, it states that:

> The decision of the appeal hearing officer or Appeal Board is final, subject to a Student's right to appeal to the Student Discipline Appeal Committee of the Board of Governors. [...]

[110] Thus, despite the University's argument to the contrary, the *prima facie* wording of the Policy does not suggest that an appeal to the Committee is limited to the above-mentioned grounds. The grammatical variation between the two Policy sections concerning the same subject (i.e.: appeals) is indicative that a different meaning is intended. While the presumption of consistent expression is a tool used in statutory interpretation, its principle is equally applicable here. In addition, because the consequences of a finding of non-academic misconduct may be very serious (including suspension or expulsion) any uncertainty or ambiguity of meaning should be construed in favour of the Students as opposed to the University. In this instance, such interpretation would result in a reading of section 4.45 of the Policy as giving a wider – as opposed to restricted – right of appeal to the Committee.

[111] When read as a whole, the Policy does not support an argument for a limited appeal before the Committee. The purpose of the "appeal" section is to provide a structured process by which one may appeal a finding of non-academic misconduct, with a final right of appeal to the Board of Governors. The plain wording of the Policy does not restrict an appeal to the Board of Governors to any set grounds.

[112] In reviewing Mr. Hickie's reasons, I note that Mr. Hickie makes no mention of section 4.45 of the Policy, nor does he indicate how or why he limits the grounds of appeal in the manner he does. I note the existence of a document entitled "The Board of Governors Student Discipline Appeal Committee Principles and Guidelines" (revised December 1, 2010: the "Guidelines") published on the University's website. This document states, at para 5.1 that:

> The Board adheres to the following principles governing the considering of student discipline appeals:
>
> > Sound principles of administrative decision-making shall be followed. The Board reserves the right to deal with student discipline appeals based on grounds of lack of jurisdiction, unfairness, bias or breaches of natural justice.

[113] The wording of para 5.1 does not read as though the Board of Governors is limited to those four grounds, only that such grounds would be included in any review. As neither side introduced the Guidelines into evidence I shall not rely this document. I mention it only to demonstrate a likely source of the grounds of review listed by Mr. Hickie at page one of his reasons. While there is a correlation between the grounds provided in these Guidelines, the Policy, and those grounds ultimately accepted by Mr. Hickie, it is difficult to discern exactly which grounds he decided to consider in determining whether to convene the Committee.

[114] In addition, Mr. Hickie's reasons do not disclose whether he accounted for the operation of s 31(1)(a) of the *PSLA* in determining only certain of the grounds raised by the Students could be considered. Of note is the fact that the Students based their appeal to the Board of Governors solely on section 31(1) of the *PSLA*, as opposed to section 4.45 of the Policy.

[115] The *Act* is clear that the general faculties council has the ability to create policies. Indeed, the university calendar created under this authority includes the Policy. These powers are contained in s 26(1) of the *PLSA*, which reads:

> Powers of general faculties council

> 26(1) Subject to the authority of the board, a general faculties council is responsible for the academic affairs of the university and, without restricting the generality of the foregoing, has the authority to:
>
> [...]
>
> (g) provide for the preparation and publication of the university calendar; [...]
>
> (n) determine standards and policies respecting the admission of persons to the university as students; [...]

[116] I note that the Policy in issue received approval authority from the general faculties counsel. While the University is clearly free to put (non-statutory) policies in place to govern the student discipline process, the Legislature has expressly stated that any disciplinary regime established by the general faculties council is subject to a right of appeal to the Board of Governors. The *Act* is silent regarding the process to be followed once a right of appeal to the Board of Governors has been exhausted.

[117] As section 31(1)(a) of the *PSLA* expressly states that this disciplinary power is subject to a right of appeal to the Board of Governors, there is no room in the express wording of the *Act* for an argument that the right of appeal might be fettered by a policy created by the general faculties council in relation to its ability to address student disciplinary issues. Even assuming that the restricted grounds of appeal purported to apply to the Board of Governors under section 4.45 of the Policy, such limitations could not be upheld in light of the wording of the *PSLA*.

[118] In oral argument, counsel for the University argued that the general faculties council is "master of its own procedure when it comes to discipline" and that given the powers granted to it under the *PSLA*, it can set whatever grounds of appeal it deems appropriate before both the Appeal Board and the Board of Governors. This argument cannot be sustained.

[119] While the general faculties council may be "master of *its own* procedure" it cannot create policies that restrict an otherwise unfettered right of appeal mandated by the Legislature. Here, the *Act* clearly states that any disciplinary measures taken are subject to a right of appeal to the Board of Governors. In the case at bar, the University has chosen to limit the grounds upon which the initial decision of the Associate Vice-Provost (Student Success and Learning Support Services) can be appealed to the Appeal Board to the four grounds contained in section 4.41. Of note, the reasonableness or correctness of the decision is not a ground of appeal. While as an autonomous body, the University is free to govern its internal appeal structure as it sees fit, it cannot preclude an unfettered right to appeal to the Board of Governors, as mandated in the legislation.

[120] As noted by Slatter J (as he then was) in *Skyline Roofing Ltd v Alberta (Workers' Compensation Board)*, 2001 ABQB 624 at para 76, 292 AR 86, "both informal policies and policies authorized by statute must be consistent with the underlying statute, unless a specific power is given to enact policies beyond the scope of the statue." Further on, at para 81 he stated, "if a statute, a regulation and a policy conflict, the statute would prevail over the regulation, and probably the regulation would prevail over the policy." In the case at bar, any attempt to apply a policy that restricts the right of appeal to four very narrow grounds is inconsistent with the wording of the *Act*, which provides for an unfettered right of appeal.

[121] Mr. Hickie's reasons fail to include any consideration of the wording of section 31(1) of the *PSLA* in relation to his decision to limit the grounds for appeal. He discloses neither the basis for these limitations, nor whether such limitations can be upheld in light of the plain wording of the *Act*. The process adopted by Mr. Hickie in articulating his reasons for restricting the grounds he was willing to consider is not apparent to the reader. He fails to explain the rationale or justification for this decision. His decision to limit the grounds that he would consider in addressing the Students' appeal is not one which is defensible in respect of the facts and the law.

[122] Indeed, at certain points in his reasons, Mr. Hickie appeared to acknowledge that as chairman of the Committee he was not bound by the limited grounds of appeal. For example, he addressed the argument that the Appeal Board erred in law in failing to consider the application of the *Charter*, which involves a question of law clearly outside of the four grounds of appeal provided for in section 4.41, or in the Guidelines. However, Mr. Hickie also identified – yet failed to address – a number of other arguments raised by the Applicants that did not constitute one of the limited grounds for review under the Policy/Guidelines. There is no indication in his reasons as to why he chose to address certain "additional" grounds raised and not others.

[123] I do, however, find that Mr. Hickie's reasonably concluded that the Policy limited the grounds of review before the Appeal Board. Again, while his reasons do not expressly state as such, when read as a whole, this conclusion may be drawn. His finding that there was no breach of natural justice given the limited grounds before the Appeal Board was reasonable (even correct) given the wording of the Policy and the wording of the *Act*.

[124] The general faculties council may establish any process that it wishes to address instances of student misconduct (within the confines of the *PSLA*). The Applicants have not established that the limited grounds of appeal provided for in the Policy offend the rules of natural justice. These limited grounds pertain only to the Appeal Board and are a part of an internal disciplinary structure created by the general faculties council. There exists a further, unfettered right to the Board of Governors, as well as the ability to apply for judicial review of its decision.

[125] As such, while Mr. Hickie's finding that the Policy properly limited the grounds of appeal before the Appeal Board was reasonable, his decision to similarly fetter the appeal before the Committee was not.

iii. Decision not to convene the Committee

[126] I now turn to whether Mr. Hickie's finding that the record did not warrant convening the Committee for further consideration of the Students' appeal was reasonable. Again, this analysis is inexorably linked to his decision to limit the grounds he would consider.

[127] In determining whether a finding of academic misconduct is one of the possible, reasonable conclusions that may have been reached on the evidence, regard must be had to the definition of non-academic misconduct as per the Policy. For ease of reference, I have reproduced the applicable paragraph below:

> Major Violations
>
> 4.10 Major Violations are actions by a University of Calgary Student or Student Group which endanger the safety and/or security of another individual or the University of Calgary community, or that contravene municipal, provincial or federal law. Major violations include, but are not limited to:

> […]
>
> e) failure to comply with the direction of a Campus Security Officer or University official in the legitimate pursuit of his/her duties;

[128] The Students submit that in order to be found guilty of having committed non-academic misconduct as defined by the Policy a student must endanger the safety or security of an individual or the campus community. The University has not argued, nor does the record suggest, that the Students acted in contravention of any municipal, provincial or federal law.

[129] The Students argue that absent any evidence of a threat to safety they cannot be found to have breached the Policy. They submit that section 4.10 of the Policy does not apply to a situation involving a passive, stationary display surrounded by a security fence. They point to the remaining examples of actions which constitute a Major Violation under section 4.10 in support of this position. The other listed instances of Major Violations include: contravention of alcohol policies or legislation; possession or sale of narcotics; possession of a firearm; destruction of property; hazing; sexual assault; fraud; vandalism; theft; engaging in behaviour involving a substantial disruption to the University's operation; intimidation or threats; tampering with emergency equipment; setting fires; unauthorized use of University facilities; trespassing; distributing or displaying pornography; and failing to follow risk management procedures.

[130] The Students argue that each of these examples involve actions which threaten the physical safety or property of another. They argue that the unchallenged evidence before Mr. Hickie is that the GAP display – with the signs facing outward – posed no threat to safety or security.

[131] The Students argue that subsection "(e)" of the Policy cannot be read alone. While they acknowledge disobeying a directive from Campus Security, they argue that a finding of misconduct cannot be grounded on this fact alone. Rather, they submit that in order to be found guilty of non-academic misconduct, there must be evidence that Campus Security was acting legitimately and that the Students were engaged in an action that endangered campus safety. That is, section 4.10 is to be read conjunctively with "(e)".

[132] The record indicates that the only evidence as to a safety concern is contained in the Notice, which reiterates concerns voiced by the Students' counsel following the fall 2007 incident. Again, for ease of reference, the Notice reads, in part:

> The University intends to maintain good order and minimize the risk of violent confrontations on its private property. The University seeks to protect the safety and security of its students, faculty and staff.
>
> Campus Pro-Life has already informed the University that its displays, together with the reaction to them, is likely to trigger violence.

[133] The University argues that the Students knowingly disobeyed the Notice and that the Students failed to advance any evidence to contradict or dispute the safety concerns raised in the Notice. It argues that in light of the concerns articulated in the Notice, Ms. Houghton properly ruled that Campus Security was acting within its mandate, and that Mr. Hickie's failure to contravene the Committee to hear a full appeal of this decision was reasonable.

[134] The University further submits that safety concerns existed at the relevant time, as expanded upon in the affidavit of Bruce Evelyn. I note that this affidavit was executed subsequent to Mr. Hickie's reasons and cannot be relied upon to 'bolster' any claims of threats to security not otherwise on the record. I state this having read the July 29, 2011 Order of Jeffrey J addressing the admissibility of this (and other) subsequent evidence.

[135] In her reasons, Ms. Houghton states that the University is entitled to set reasonable limits on all groups operating on campus "particularly where there are issues of safety and security." She further found that the Students had failed to lead any evidence that Campus Security was not acting in the legitimate pursuit of their duties when they made the demand pursuant to the Notice.

[136] She concludes that a Major Violation includes a failure to comply with a direction of Campus Security and that, because the Students acknowledged that they intentionally failed to comply with the Notice, Campus Security properly exerted its mandate and exercised its discretion in a reasonable manner.

[137] In appealing Ms. Houghton's decision the Students argued that her finding was not based upon any evidence regarding a threat to safety or security. The Appeal Board concluded that because this allegation was not one of the grounds of appeal under the Policy it was not a proper ground before it. However, it went on to mention that the Notice referenced a concern that had been raised regarding safety and security.

[138] As a part of their written argument labelled "unfairness" before Mr. Hickie, the Students state that the decisions of both Ms. Houghton and the Appeal Board are "unfair" because they are patently unreasonable as they are based on unsupported assumptions that the GAP display poses a threat to safety.

[139] In his reasons, Mr. Hickie acknowledges the Students' argument that both Ms. Houghton and the Appeal Board erred by failing to explain how their refusal to comply with the Notice endangered the safety and security of those on campus, as well as failing to address their argument that the demand in the Notice amounted to censorship, meaning that Campus Security was therefore not acting in the legitimate course of their duties in requesting that the display be turned inwards.

[140] While Mr. Hickie notes these arguments, he fails to directly address them in his reasons. His reasons dealing with "unfairness" are limited to whether the Policy was followed during the hearing and whether the principles of natural justice were adhered to. There is nothing to indicate why or on which grounds he disposed of the CPL Students' argument that the previous findings of misconduct were patently unreasonable on the facts. His reasons are entirely void of any such consideration. On this basis his decision is unreasonable in that it lacks justification, transparency and intelligibility within the decision-making process.

[141] In so finding, I am mindful of the instruction given to reviewing courts by our Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Labrador Nurses' Union*], where Abella J for the Court wrote, at paras 15-17:

> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para.

> 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[142] While "patent" unreasonableness no longer exists as an independent ground of review post-*Dunsmuir*, the Students squarely placed the issue of the reasonableness of Ms. Houghton's findings before Mr. Hickie, and his failure to address this ground renders his decision unreasonable.

(b) Application of the *Charter* and the *Alberta Bill of Rights*

[143] The Students first raised the argument that the GAP display was protected by the *Charter* right to freedom of expression during their hearing before Ms. Houghton. Ms. Houghton did not directly address the Students' *Charter* argument, although she did note the objective of promoting safety and security or campus alongside the fact that students were not asked to discontinue their protest altogether. She concluded that any argument raised by the Students that a refusal to follow Campus Security's direction due to a belief that it discriminated against them on the basis of "philosophy, religion, view point, belief or other analogous ground" was not properly before her.

[144] In their appeal before the Appeal Board, the Students again raised the argument that they were exercising their right to freedom of expression in erecting the GAP display and that Ms. Houghton's decision failed to consider this factor in her decision. While the Appeal Board did not directly address the Students' *Charter* argument, it did note that the University did not request that the GAP display be discontinued, only that it be set up with the signs facing inwards. The Appeal Board agreed with Ms. Houghton that any arguments based on censorship or illegitimacy of the Notice were best dealt with in other venues. It further stated that the Notice referred to a concern regarding safety and security.

[145] In their appeal to the Board of Governors, the Students argued that the request to turn their signs inward violated their section 2(b) *Charter* right to freedom of expression and could

not be justified under section 1. They also argued that their section 15 right to equality had been similarly violated.

[146] In addressing the Students' *Charter* arguments, Mr. Hickie held as follows:

> Application of the Law/Charter
>
> [Counsel for the Students] notes in his section entitled, "Relevant Law" that various legal concerns need to be addressed. Issues pertaining to Charter of Rights and the Alberta Bill of Rights were not addressed he argues.
>
> If, in fact, the discipline of students at the University of Calgary is subject to the Charter, a matter currently under appeal, I find that the facts presented (which are not in dispute) do not raise an issue that the University acted unreasonably in attempting to balance the interests of all involved in this matter. The right to freedom of expression is not absolute. The facts as presented show that the University attempted to strike a balance between the students' rights and concerns for safety and security. In any event these facts (and this balance) were thoroughly considered by the Appeal Board. [...]

[147] Counsel for the University argued that the issue of whether the *Charter* applies to instances of disciplinary proceedings under the *PSLA* has not been settled in this province. It is clear that Justices Paperny and McDonald took differing approaches to the application of the *Charter* to the facts in *Pridgen CA*. Paperny JA found that the *Charter* applies to a disciplinary proceeding undertaken by a university, and that the university had failed to take into account the students' right to freedom of expression in that instance: *Pridgen CA* at para 128. McDonald JA found that because the matter could have been decided solely on administrative law grounds, there was no need to resort to a *Charter* analysis: *Pridgen CA* at para 176.

[148] O'Ferrall JA found that while the issue in *Pridgen CA* was not whether the university was a "*Charter*-free zone" the disciplinary decision was unreasonable because no consideration was given to the students' right to freedom of expression and association. He went on, at paras 179 and 183 to find that a ruling on the application of the *Charter* was unnecessary and perhaps undesirable because the issue of the *Charter* infringement was not explored by the general faculties council at first instance (in the case at bar it was raised at all three hearings). This is not the same as finding that the *Charter* is not applicable. In fact, O'Ferrall JA went on to state that the failure of the general faculties council to engage in an analysis weighing the students' right to freedom of speech and association against considerations such as academic freedom and fostering a respectful learning environment was, in itself, enough to justify setting aside the general faculty council's decision: *Pridgen CA* at para 183. I do not read these three sets of reasons as together casting doubt upon the requirement to undertake a consideration as to the effect that disciplinary action has on a student's *Charter*-protected rights in the present case.

[149] In any event, the University submits that if the *Charter* applies to student disciplinary proceedings, to the extent that the Applicants have a protected right to freedom of expression which has been engaged by the misconduct proceedings, Mr. Hickie's reasons properly balanced such rights against the University's statutory objectives under the *PSLA*, and were therefore reasonable.

[150] In *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], Abella J for the Court addressed how best to protect *Charter* guarantees and the values they reflect in the context

of administrative decisions. She held that in assessing whether an adjudicated administrative decision violates the *Charter*, the courts are to examine whether the decision-maker disproportionately, and therefore unreasonably, limited a *Charter*-protected right: *Doré* at para 6. In determining the proper approach to be used when reviewing an administrative law decision in which a *Charter* right is in issue, she held, at para 36 of *Doré*, that:

> …the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual…When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us that should attract deference…

[151] The proper approach to an analysis based on the reasonableness standard was described as follows, at para 7 of *Doré*:

> …the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[152] Justice Abella went on to describe the proper approach for an administrator to take in applying *Charter* values in the exercise of statutory discretion. First, the decision maker should consider the statutory objectives. They should then ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This second step requires one to engage in a proportionality exercise of balancing statutory objectives against the severity of any infringement: *Doré* at paras 55-56.

[153] As the reviewing court, I must therefore determine whether Mr. Hickie's finding that the facts indicate that the University attempted to strike a balance between the Students' rights, and concerns for safety and security, was reasonable. I find that it was not.

[154] Mr. Hickie is correct in stating that the freedom of expressions is not absolute. This right must be balanced against other important public interests: See *R v National Post*, 2010 SCC 16 at para 5, [2010] 1 SCR 477; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 64, [2013] 1 SCR 467. Promotion of safety and security on campus would constitute such an interest.

[155] Indeed, Mr. Hickie identifies the provision of a safe and secure environment for students as the desired statutory objective. I accept that part of this grant of general supervision under the *PSLA* may include the promotion of safety and security on campus. This objective is confirmed in the Policy, section 4.2 of which reads:

> The Non-Academic Misconduct Policy exists to promote the safety and security of all members of the University of Calgary community...

[156] The provision of safety and security on campus is a legitimate statutory objective, as identified by Mr. Hickie. The competing *Charter* value in this instance is the right to freedom of expression. This entails the Students' right to express their beliefs about abortion and the pro-life

movement as they have in the past, using the GAP display with the signs facing outwards, visible to passers-by.

[157] The expressive value in such displays was commented on by the British Columbia Court of Appeal in *R v Watson*, 2008 BCCA 340 at paras 26-27, 298 DLR (4th) 317:

> Beliefs about the meaning and value of human life are fundamental to political thought and religious belief. Those beliefs find expression in the debate on abortion. Professor Dworkin has said this about the importance of those convictions to most people:
>
> > [To people who are religious in the traditional way] [t]he connection between their faith and their opinions about abortion is not contingent but constitutive: their convictions about abortion are shadows of more general foundational convictions about why human life itself is important, convictions at work in all aspects of their lives. ... People who are not religious in the conventional way also have general, instinctive convictions about whether, why and how any human life -- their own, for example -- has intrinsic value. No one can lead even a mildly reflective life without expressing such convictions. These convictions surface, for almost everyone, at exactly the same critical moments in life -- in decisions about reproduction and death and war. [footnote omitted]
>
> It follows that the importance of communicating those ideas and beliefs lies at the "very heart of freedom of expression".

[158] I cannot accept Mr. Hickie's finding that the facts "do not raise an issue" as to whether the University properly balanced the relevant *Charter* values with the statutory objectives. I disagree that the underlying facts and corresponding balance were "thoroughly" regarded by the Appeal Board. The Appeal Board's consideration of the severity of the interference with the Students' *Charter*-protected interests is limited to the fact that University did not ban the GAP display, but rather requested the Students' to turn their signs inwards. Neither the Appeal Board's nor Mr. Hickie's decisions address the effect that this request might have on the ability of the Students' to realistically express their thoughts and beliefs. Mr. Hickie's conclusion that there was a reasonable attempt to balance these interests does not fall within a range of possible, acceptable outcomes.

[159] With respect, his failure to properly consider the effects of this request may stem from the assertion in the Notice that such effect would be minimal. The Notice states that the University is "merely" requesting the students turn any signs with the actual content of their display inward. Again, with respect, there is nothing "mere" or trivial about such a demand. Rather, the effects of this request on the ability of the Students to freely express their beliefs should have been further considered in order to satisfy any proportionality exercise. There is no discussion as to whether turning one's sign inward is the best way to protect the *Charter* values in issue in view of the statutory objectives. As stated by the Court in *Doré* at para 4: "…the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it".

[160] On the facts of this case, the only evidence on record as to the possibility of a threat to campus safety due to the existence of the GAP display comes from the March 10, 2008 letter drafted by the Students' counsel which outlines the events that occurred in the fall of 2007. The only specific reference to the possibility of a safety issue contained in the Notice reads: "Campus Pro-Life has already informed the university that its displays, together with the reaction to them, will likely trigger violence." *Doré* instructs that in performing the reasonableness analysis, proportionality is achieved by ensuring the decision interferes with the relevant *Charter* guarantee "no more than is necessary". Here, the only evidence as to a threat to safety stems from the fall 2007 incident, in which other students physically blocked the GAP display. There is no indication whether alternate measures, with a lesser effect on the Students' *Charter* rights, were considered.

[161] Moreover, the decision is unreasonable in that it fails to demonstrate an established link between the desired statutory objective and the *Charter*-infringing action. I accept that, given the strongly-held convictions of both pro-life and pro-choice advocates, tension between these two groups may run high. Indeed, this was demonstrated in the fall of 2007 when a group of students attempted to block the GAP display. However, there was no evidence before either Ms. Houghton, the Appeal Board, or Mr. Hickie as to exactly what it was about the GAP display that may cause a threat to the safety and security of those on campus. Was it the location of the display? The images used? Or was it merely the presence of a pro-life demonstration, no matter what content was used to express their beliefs?

[162] There is nothing on the record which assists in answering these questions. As such, there is no indication that having the images turned inwards will somehow alleviate any safety concerns. Mr. Hickie's conclusion that this demand struck a balance between the Students' rights and the University's safety concerns does not fall within the range of acceptable and rational solutions and is not reasonable. It was not reasonable for Mr. Hickie to conclude that there existed a rational connection between the *Charter*-infringing request and the provision of a safe campus.

[163] The University holds itself out to be an institution which facilitates scholarly inquiry. Members of the University community expect to be able to engage in the exchange of ideas and open discourse. Mr. Hickie's reasons fail to demonstrate that he took into account the nature and purpose of a university as a forum for the expression of differing views. Nor do they demonstrate that any prior attempt to balance *Charter* values by interfering "no more than necessary" was reasonably undertaken. Neither Ms. Houghton's nor the Appeal Boards' decisions demonstrate that due regard has been given to the importance of the expressive rights and Mr. Hickie's conclusion to the contrary is unreasonable.

[164] I turn next to the Students' argument before Mr. Hickie that the action taken by the University infringed upon their right to freedom of speech and assembly set out under the *Alberta Bill of Rights*. The *Alberta Bill of Rights* recognizes freedom of speech and association as fundamental freedoms and states that no provincial laws (in this instance the *PSLA*) may be construed in a manner which negatively affects these (and other) rights: *Alberta Bill of Rights* at sections 1 and 2. The Students' raised this argument before Mr. Hickie in arguing that the demand in the Notice amounted to censorship. It was not expressly raised before either Ms. Houghton or the Appeal Board, although an argument about censorship was made before each.

[165] The University takes the position that the rights under the legislation are not unfettered and that any competing interests were properly balanced, using an approach based on *Doré*. The University submits that Mr. Hickie's decision is therefore "reasonable in the circumstances."

[166] Mr. Hickie's reasons are unclear as to whether his discussion entitled "Application of the Law/Charter" addresses both the *Charter* arguments concurrently with the *Alberta Bill of Rights* arguments, or simply the *Charter* arguments alone. If it is the former, I find his conclusion that there was an appropriate balancing of interests to be unreasonable, for the same reasons as discussed above. If it is the latter, there is no indication as to why Mr. Hickie concluded that the Committee did not have to be convened to address this ground of appeal. Again, keeping in mind the Supreme Court's instructions in *Labrador Nurses' Union*, there is nothing that a reviewing court can look at to determine whether the conclusion falls within a range of acceptable outcomes.

(c) Application of Contractual Rights

[167] The Students individually raised the argument that the University's request to turn their signs inward violated their contractual rights as a part of their prepared statement that they read into the record before Ms. Houghton. Ms. Houghton did not address this argument in her reasons.

[168] In their letter to the Appeal Board, the Students' asserted that Ms. Houghton's decision should be reversed, *inter alia*, because she failed to address or take into consideration the Students' contractual rights to express their views on campus. The Appeal Board did not address this ground of appeal in its reasons.

[169] In their argument before Mr. Hickie, the Students submitted that there is an express or implied contract between the University and tuition-paying students which allows for the peaceful expression of views on campus. While Mr. Hickie acknowledges the contractual argument as a ground of appeal, he does not address this argument in his reasons.

[170] The parties agree that the relationship between student and university is contractual. As noted by this Court in *Yen v Alberta (Ministry of Advanced Education and Technology)*, 2010 ABQB 380 at para 43, 495 AR 292:

> ...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.

See also *Young v Bella*, 2006 SCC 3 at para 31, [2006] 1 SCR 108.

[171] The University argues that, because the Non-Academic Misconduct Policy constitutes part of the contract with the Students, the Students breached their contractual obligation in failing to adhere to the Notice. It ultimately submits that the University properly balanced the often-competing interests of students on campus and that as such, it acted reasonably and properly in its fulfillment of its contractual duties. It concludes:

> There is no basis under contract law to impugn the decision of the Board of Governors, which decision was completely in harmony with the governing

> legislation and the procedures expressly set forth in the University's contract with its students, as set forth in the Calendar.

[172] The Students, on the other hand, submit that the contract includes statements made by the University in its Mandate, Statement of Academic freedom and the like, which all relate to the freedom to seek the truth and to express ideas on campus.

[173] Of note is the fact that a policy did exist at the relevant time (dated March 25, 2010), entitled "Use of University Facilities for Non-Academic Purposes" which was produced as a part of questioning on Bruce Evelyn's affidavit sworn July 15, 2011. This policy addresses the use of University property for non-academic demonstrations and public displays. As this production post-dates Mr. Hickie's reasons, I will not rely on it. I mention it only to the extent that it, too, may form a part of any contract between the University and its students.

[174] Again, there is no way of knowing how or why Mr. Hickie determined this issue. His reasons do not address either parties' arguments other than to note that the Students contractual right to demonstrate was raised as a ground. There are no reasons that a reviewing court can look at to determine whether the conclusion falls within a range of acceptable outcomes. Mr. Hickie's findings are therefore unreasonable on this ground as well.

3. Imposition of Security Fees

[175] The Students also request an order restraining the University from charging a $500 "security fee" as a condition of setting up the GAP display. This practice began in September of 2010 and does not form any part of the disciplinary hearings giving rise to this judicial review. I agree with the University that the Students' request for a remedy concerning the issue of security fees is not properly before this Court.

VI. Conclusion

[176] The Students take the position that Ms. Houghton's finding is fundamentally flawed because it is based solely on the fact that they acknowledged disobeying the Notice issued by Campus Security. They argue that her decision ignores important contextual elements that constitute the definition of "non-academic misconduct" including whether the existence of the GAP display threatened campus safety, and whether Campus Security was acting legitimately in issuing the Notice. They claim she further erred in failing to address the Students' *Charter* and contractual rights. There is clearly some merit to the Students' arguments on these points.

[177] Given the limited right to appeal to the Appeal Board under the Policy, these alleged errors remained largely unaddressed prior to the hearing before Mr. Hickie. As discussed above, although Mr. Hickie acknowledged the Students' various grounds of appeal, he did not directly address them in his argument, due to his implicit but unstated (and unreasonable) decision to limit the grounds he would accept. In addressing the *Charter* and the *Alberta Bill of Rights* argument, he failed to enter into any balancing/proportionality analysis, nor did he examine whether the request to turn the signs inwards minimally interfered with these rights. In essence, he precluded any meaningful review of whether the Students' actions amounted to misconduct under the Policy by failing to convene the committee. His decision – aside from the analysis as to procedural fairness – is unreasonable.

[178] The errors committed by Mr. Hickie, which ultimately resulted in his refusal to convene the Committee, denied the Students their legislative right to be heard before the Board of

Governors (or in this case, its delegate). Had the Committee been convened, it would have been able to engage in an analysis weighing the Students' right to freedom of speech and association against considerations such as academic freedom and the provision of a safe learning environment. Mr. Hickie's error cost the Students the ability to argue their case in this forum.

[179] This case is unique in that concurrent with these proceedings, students at the University who are involved in the Campus-Pro Life group have continued to erect the GAP display bi-annually. I understand that the display has been erected, as usual, each year following Ms. Houghton's finding that such conduct amounted to a Major Violation of the Policy. The continuing resurrection of the issues accompanying this display persuades me that the Board of Governors should be afforded the opportunity to fully review the finding that the Students engaged in non-academic misconduct as defined by the Policy.

VII. Remedy

[180] The Students seek a variety of remedies from this Court, many of which are not properly before it. It would be premature at this juncture to make any of the declarations sought in relation to the Students' ongoing and future right to erect the GAP display on University property. Nor would it be proper to grant an order prohibiting the University from creating new policies, or to grant an interlocutory injunction restraining the University from denying the Students the use of their historical space on campus to erect the display. The Originating Application is for judicial review of Mr. Hickie's decision.

[181] For the reasons given above, Mr. Hickie's finding that the record did not disclose any grounds that would warrant a convening of the Committee for further consideration is unreasonable and is set aside. The Committee shall convene as soon as reasonably practical to hear the Students' appeal on the grounds raised in counsel's submissions to the Board of Governors dated October 29, 2010 (tab 13 of the record).

VIII. Costs

[182] If the parties are unable to agree on how costs should be addressed, they may provide written submissions within 30 days.

Heard on the 17th day of April 2013.
Dated at Calgary, Alberta this 1st day of April, 2014.

K.M. Horner
J.C.Q.B.A.

Appearances:

J.V. Carpay
C. Crosson (Student-at-law)
for the Applicants

P.T. Linder, Q.C.
J.L. McCready
M. Vernon
for the Respondents