COURT OF APPEAL OF ALBERTA

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APPELLANTS:	UALBERTA PRO-LIFE, AMBERLEE NICOL and CAMERON WILSON
STATUS ON APPEAL:	APPELLANTS
RESPONDENT	THE GOVERNORS OF THE UNIVERSITY OF ALBERTA
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DOCUMENT:	**REPLY FACTUM OF THE APPELLANTS**

Appeal of the Judgement of
The Honourable Madam Justice Bonnie L. Bokenfohr
Dated the 11th day of October, 2017
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REPLY FACTUM OF THE APPELLANTS

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I. OVERVIEW

1. This is a reply to the Factum of the Respondent. This Reply Factum adopts and utilizes the defined terms in the Appellants' Appeal Factum.

2. In regard to the Complaint Decision, the Appellants herein reply to the contention that they have raised new issues on appeal, namely issues of breach of contract[1] and bad faith,[2] and that the Appellants claim a monopoly in the "market-place of ideas".[3]

3. In regard to the Security for Costs Decision, the Appellants reply to the assertion of the University that the Appellants intend controversy, and therefore that it is reasonable to require them to pay for the controversy they create. The Appellants also respond to the assertions of the University in its Appeal Factum that the findings in *Lobo v. Carleton University*[4] and *BC Civil Liberties Association v. University of Victoria*[5] are determinative of this case.

II. COMPLAINT DECISION

A. Breach of contract

4. The general rule is that a new issue may not be raised on appeal.[6] The exception to this rule was noted by the Ontario Court of Appeal in *Wasauksing First Nation v. Wasausink Lands Inc.* (2004)[7]: "An appellate court may depart from this ordinary rule and entertain a new issue where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so."[8]

5. The issue of the contractual relationship between the Appellants and the University, however, is not a new issue. The Originating Application filed in commencement of this case states the following:

> The Applicants are tuition-paying students of the University who already pay for the upholding of the rule of law on campus. The commitments the University made in the *COSB*, in other policies and in the February 27, 2015, statement by then-University President are implied terms of the contract between the University and the Applicants, which the Applicants are reasonably entitled to rely on.[9]

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[1] The Respondent claims that the Appellants did not raise breach of contract before the lower court – Respondent's Appeal Factum, para. 45. This is clearly incorrect.
[2] *Ibid.*
[3] Appeal Factum of the Respondent, para. 43.
[4] 2012 ONCA 498 [*Lobo*]
[5] 2016 BCCA 162 [*BCLA*]
[6] *Lamb v. Kincaid (1907)*, 38 S.C.R. 516, at p. 539.
[7] 184 O.A.C. 84 [*Wasausink Lands*]
[8] *Wasausink Lands,* para. 102.
[9] Originating Application, para. 48.

7. Additionally, as noted in *Quan v. Cusson*,[10] where there is considerable overlap between collateral, related issues, a new issue is not introduced. There is considerable overlap between whether the Code itself provides standing to a student to challenge the dismissal of the Complaint on the grounds that it was unreasonable or unfair, and the issue of whether the implied contract between the University and students incorporating the Code as a term provides that standing in cases where the University fails to uphold the rights it represents to students that they have.

8. Similarly, "issues that are rooted in or are components of an existing issue are also not 'new issues'"[11], and can be raised by the appellate court itself, if necessary.[12] "Appellate courts may draw counsel's attention to issues that must be addressed in order to properly analyze the issues raised by the parties."[13]

9. In this case, however, the record evidences that the Appellants raised the issue of the contractual nature of the relationship between the University and its students as a factor to be considered in the reasonableness analysis. Submissions were made at the lower court in regard to tuition paid by students and the resulting obligation of the University to students to uphold the rule of law,[14] the establishment of equal rights as between students in a community of scholars (committed to rational and intellectual discourse, not governed by emotion[15]) and the requirement that all complaints must be investigated by UAPS, absent one of the four exceptions in section 30.5.2(6) of the Code.[16] The foregoing submissions, and others, point not just to the governance of the Code, but also to the overarching contractual nature of the relationship between the University and the students who attend it, with the Code as one of the implied terms of the contract.

10. This point was expanded on in oral argument at the lower court regarding the Respondent's reliance on *Mitten v. College of Alberta Psychologists*[17] and *Friends of the Old Man Rivers Society*[18]. There is a logical, and it is submitted, a legal difference between the standing of a member of the public who complains to a professional body about a regulated professional, and the standing of a tuition-paying student who complains about being harmed by the misconduct of

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[10] [2009] 3 SCR 712 [*Quan*], para. 39.
[11] *R. v. Mian*, [2014] 2 SCR 689 [*Mian*]
[12] *Ibid*, para. 33.
[13] *Ibid.*
[14] Factum of the Applicants at the lower court, paras. 111, 114.
[15] Factum of the Applicants at the lower court, paras. 107; Appeal Record p. 12, lines 12-31, pp. 13 and 14.
[16] UAPS may only decline to proceed with a complaint in one of four scenarios outlined herein. UAPS relied on 30.5.2(6)(b): "that no University rule had been broken". See Extracts of Key Evidence [EKE] p. A220, s. 30.5.2(6) of the Code.
[17] 2010 ABCA 159 [*Mitten*]
[18] *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107

another student in a community of scholars who supposedly all have equal free speech and associational rights *vis a vis* each other that the University has covenanted to uphold.[19] A public complainant who files a grievance against a professional person is not a party to the contractual relationship that exists between the professionals and their regulatory body.

11. While the Respondent and the lower court attempt to characterize the Code as merely a "disciplinary document",[20] this is incomplete. According to the explanatory note from University Governance in regard to the Code:

> The *Post-Secondary Learning Act* gives General Faculties Council (GFC) responsibility, subject to the authority of the Board of Governors, over "academic affairs" (section 26(1)) and "general supervision of student affairs" (section 31), including authority concerning "student discipline."[21]

12. The Code, therefore, is not only a document focused on student discipline – it is a document which establishes the "general supervision of student affairs." Secondly, GFC is not only *authorized* to oversee the "general supervision of student affairs", it is *responsible* for such supervision.

13. The Code says that the University is "defined as a community" wherein students have certain rights, such as freedom of speech, assembly and association.[22] It is clear that students enter that community through a contract with the University, and no other way.[23] If the equal protections that students supposedly have to "pursue the truth and advance knowledge", and freedom to "learn, speak, associate, write and publish"[24] do not create any positive rights when the University fails to uphold them, then the contractual representations to the students that they have such rights is a falsehood.[25] According to the University, even if it is grossly derelict in upholding students' rights there is no recourse for students unless there has been some procedural anomaly.

B. Bad faith

14. It is respectfully submitted that there is also no merit to the Respondent's suggestion that bad faith was not argued before the lower court. The Appellants have made numerous submissions about the failure of the Respondent, at all stages of these proceedings, to act in good faith, calling the reasons of the Respondent for refusing to proceed with the Complaint "disingenuous", "not in

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[19] See EKE p. A192, s. 30.1 of the Code.
[20] Appeal Record p. 21, line 11.
[21] EKE p. A190: Note from University Governance.
[22] EKE p. A192, Code s. 30.1.
[23] The contractual and communal nature of the relationship between a student and a university creates "mutual rights and responsibilities" - *Young v. Bella*, [2006] 1 SCR 108, para. 31.
[24] *Ibid.*
[25] Appeal Record, p. 24.

good faith", and "an abuse of discretion".[26] Counsel for the University *himself* noted to the lower court that he understood the Applicants to be alleging bad faith.[27] The lower court Justice noted that it was her understanding that the Appellants were alleging that the investigation was not conducted in good faith.[28] The Appellants characterized the "irreconcilable differences" between the logic in the first and second decision as issues of a failure to act in good faith, as well as an abuse of power.[29] It is the Appellants' respectful submission that the issue of the failure of the Respondent to act in good faith (and therefore that it acted in bad faith) was sufficiently canvassed at the lower court for it to be raised as an issue on appeal.

C. Whether the Appellants claim a monopoly over the marketplace of ideas

15. The Respondent in its Appeal Factum makes the argument that the Appellants want a monopoly in the marketplace of ideas on the subject of abortion.[30] This is inaccurate and controverted by the evidence.

16. In its March 2, 2015 letter to UAPS, on the eve of the 2015 Event, counsel representing the Appellants stated that Go-Life "welcomes respectful debate on campus, and has no desire to limit or restrict the peaceful expression of opinions that oppose" the club's message, but rather "fully and unequivocally supports the legal right of all persons to express their views in a peaceful manner on campus."[31] This respect for opposing views was one-sided, however: it was not shared by the Blockaders.

17. The University defends the students that defied it in setting up a blockade of the Display. Counsel of the University at the lower court went so far as to argue that "the intent to block is itself expressive", and therefore protected by the Code.[32] This flawed logic underpins the arguments of the Respondent throughout this case, as well as the Judgment of the lower court, and belies the contention that it is the Appellants who seek a monopoly on public expression regarding abortion.

18. The Appellants have consistently evidenced that they do not object to opposing viewpoints being raised.[33] The Appellants reject the contention that they want a monopoly on public discourse. Such a characterization is consistent with the intent and conduct of the Blockaders, not the

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[26] EKE p. A6, A8, A9, A10.
[27] Appeal Record, p. 88, lines 21 and 22.
[28] Appeal Record, p. 101, lines 27-29.
[29] Appeal Record, pp. 18, 113, 114, 141 lines 17-29.
[30] Appeal Factum of the Respondent, para. 43.
[31] EKE p. A13
[32] Appeal Record, p. 81, lines 10-12. [emphasis added]
[33] See, for example, paras. 23, 25-29 and 51 of the Factum of the Applicants at the lower court. See also Appeal Record at pages 43-48.

Appellants, who were authorized to be present and conduct the 2015 Event, and do not object to public debate.

III. SECURITY DECISION

A. Deference

20. In its Appeal Factum, the Respondent contends the Security Decision was reasonable, and that this Honourable Appellate Court should defer to the judgment of the Dean of Students, Robin Everall, due to her administrative proximity to the Code.[34]

21. It is doubtless true that the Dean of Students is closest to the administrative functioning of the Code. In *Doré v. Barreau du Québec*,[35] however, the Supreme Court noted that reasonableness is still a contextual inquiry, and that the court should consider "the particular kind of decision making involved, and all relevant factors" in deciding if a decision was reasonable.[36] No deference should be given to the University if an analysis of its decisions discloses critical flaws.

22. The two decisions in this case are linked.[37] The context of the Security Decision is very much intertwined with the 2015 Event and the Complaint Decision. It is apparent that Dr. Everall's analysis of what occurred in 2015 informed her thought process in making the Security Decision. A serious flaw in the analysis of events in 2015 would also have a significant impact on the Security Decision which could well render it unreasonable.

23. A number of what the Appellants submit are critical errors in Dean Everall's analysis are highlighted in the Appeal Factum of the Appellants, as well as more comprehensively in their Factum at the lower court and in the Appeal Record. In this Reply Factum, however, the Appellants would direct attention to two contextual issues which are highlighted in the Respondent's Appeal factum.

24 As the Respondent notes in its Appeal Factum,[38] Dean Everall found that "the purpose or effect of the Event is to evoke a vigorous and emotional response from passers-by [sic]".[39] The Appellants rejected this assertion at the lower court,[40] as they do here, and point out that the evidence does not disclose any issue from any "passerby" when they encountered the Display.

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[34] Appeal Factum of the Respondent, para. 109.
[35] [2012] 1 SCR 395 [Doré]
[36] Doré, *para.* 54.
[37] The lower court found that the 2016 proposed event was virtually identical to the 2015 Event, and that "UAPS' experience with the 2015 Event informed their assessment of what would be required to provide appropriate security for the proposed 2016 event" – Judgment at para. 59.
[38] Appeal Factum of the Respondent, para. 117.
[39] EKE at p. A244.
[40] Factum of Applicants at the lower court, para. 108.

Rather, the record evidences that issues arose solely as a result of the Blockaders, who planned a coordinated barrier of the 2015 Event to prevent the viewing of the expression thereon.

24. Further, however, the conclusion of Dean Everall that the purpose of the Display is "to evoke a vigorous and emotional response" from passersby is essential to the University's subsequent excusing of the conduct of the Blockaders. This is reflected in the University's Appeal Factum.

25. The University frames the foundation for its justification for the imposition of the Security Fee on the basis that the Appellants "specifically" seek a "public controversy",[41] and by asserting that the Display is "designed to be controversial"[42]. Hence, since the Appellants create and invite controversy it is therefore entirely justifiable that they bear the financial cost of the trouble they cause. According to the University, the expression of the Appellants causes trouble: the Display causes students to become emotional and lose control. In the end, the Appellants get what they are asking for, and they must bear the cost of the security risk they create.

26. This is an error in logic and fact which shifts the balance against deferring to the University re: the Security Decision. It is classic victim blaming. It is, as was pointed out to the lower court, no different than justifying the conduct of a rapist on the basis that his victim incited him by her clothing. After all, he couldn't really help himself, could he? According to the University, neither could the Blockaders: they simply lost control, and understandably so.

27. There is a second contextual error in the Security Decision which should shift the balance against deference. The University defends the manner in which UAPS performed at the 2015 Event and states that similar security precautions are in order for any subsequent similar events.[43]

28. At the 2015 Event, the Appellants were surrounded by a mob of students and their display blocked. Neither UAPS nor EPS moved to prevent or interfere with the students who were intent on blocking the expression of the Appellants. In 2016, the University requires the Appellants to pay for essentially the same UAPS and EPS' services. The University makes no representation that security will prevent a second blockade. Rather, the University now defends blockades of authorized student expression, claiming that blockades are "freedom of expression". The Appellants can only conclude that any subsequent blockade of any of its events would also be condoned by the University as acceptable.

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[41] *Ibid*, para. 119.
[42] Appeal Factum of the Respondent, para. 117.
[43] See for example, Security Assessment at EKE p. A329, A330; Letter of Dean Everall of February 24, 2016, p. A247.

29. The only significant difference between the 2015 Event and the 2016 proposed event, is that the University now requires the Appellants to pay for the privilege of having UAPS stand by while their event is blockaded. No deference is due such logic.

B. *BCCLA* and *Lobo*

30. The University relies on *BCCLA* and *Lobo* to justify the Security Decision.

31. The difference between those cases and the case at bar is that here, the Display was officially authorized by the University. According to then-President Samarasekera, the Appellants had the "same rights and privileges as other student groups."[44] In noting people's concerns and complaints about the at-that-time upcoming 2015 Event, Dr. Samarasekera defended the decision to authorize the 2015 Event in Quad, stating that the University "supports freedom of expression, including academic freedom."[45] She invited the campus "community to partake in a true exchange of ideas, and to do so in a respectful and civil manner."[46] These elements are absent from the cases the Respondent relies on.

32. Further, the lower court found that it would also be reasonable for the University to compel the Blockaders to bear part of the security cost.[47] Not only is this factor not present in either *BCCLA* or *Lobo*, it is incorrect for the court to have found that it is as equally reasonable to impose a security fee on an authorized party peacefully expressing itself, as it is to impose a penalty fee or security costs for unauthorized parties who are disturbing the peace and attempting to prevent the authorized Display from being seen.

33. In a supposed community of scholars, in pursuit of the furtherance of intellect and reason, it is respectfully submitted that it is unreasonable to impose the Security Fee on the Appellants as a prerequisite to the peaceful communication of ideas.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF AUGUST, 2018

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[44] **EKE, p. A12**
[45] *Ibid.*
[46] *Ibid.*
[47] Judgment, para. 68. The lower court made no mention in the Judgment of the submissions of the Applicants that any security fee should have been recovered by the imposition of fees under the Code on those who were in breach – see Appeal Record at pp. 120, 121; pp. 136-140, an entirely more just and reasonable response.