In the Court of Appeal of Alberta

Citation: UAlberta Pro-Life v Governors of the University of Alberta, 2020 ABCA 1

Date: 20200106
Docket: 1703-0283-AC
Registry: Edmonton

Between:

UAlberta Pro-Life, Amberlee Nicol and Cameron Wilson

Appellants
(Applicants)

- and -

The Governors of the University of Alberta

Respondent
(Respondent)

- and -

The British Columbia Civil Liberties Association

Intervenor
(Not Party to Application)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment of the Honourable Mr. Justice Watson

Memorandum of Judgment of the Honourable Madam Justice Crighton
Concurring in the Result
and Concurred in by the Honourable Mr. Justice Martin

Appeal from the Decision by
The Honourable Madam Justice B.L. Bokenfohr
Dated the 11th day of October, 2017
(2017 ABQB 610, Docket: 1603 07352)

Memorandum of Judgment
of the Honourable Mr. Justice Watson

I. Introduction

[1] The two appeals before the Court revolve primarily around difficult questions concerning the ability of a large university, here the University of Alberta, to set conditions which affect the exercise of freedom of expression under s 2(b) of the *Canadian Charter of Rights and Freedoms* on the campus. The appellant student group, UAlberta Pro-Life ("Pro-Life"), and the appellants Amberlee Nicol ("Nicol") and Cameron Wilson ("Wilson") opposed human abortion. Pro-Life was itself a registered student group recognized by the University. In these reasons the submissions of the appellants will generally be referred to for convenience as the submissions of Pro-Life.

[2] The appeals are from two judicial review rulings comprised together within reasons of a chambers judge at 2017 ABQB 610, 31 Admin LR (6th) 152 (the "Reasons").

[3] On March 3 and 4, 2015, with the permission of the University, Pro-Life held an anti-abortion event with large photo displays in the main "Quad" (open area) of the University north campus in Edmonton. The event on both dates attracted a counter-demonstration in the form of "many University students, faculty, staff, and the general public attended, standing side by side holding signs and banners blocking the displays. They also cheered and chanted to protest the UAlberta Pro-Life display": Reasons at para 1.

[4] The first appeal relates to a complaint by Pro-Life made to the relevant University authority that the obstructing demonstrators breached the *University Code of Student Behaviour (*the *"Code")*. Pro-Life, Nicol and Wilson contended that the organizers and attendees of the counter demonstration should be disciplined. After an investigation, the decision makers for the University, initially Bill Spinks, the Director of the University Alberta Protective Services (UAPS) and then on appeal the Discipline Officer, Chris Hackett, decided not to take any disciplinary action against persons said to be implicated in this counter demonstration. The chambers judge denied judicial review of that decision (the "Complaint Decision").

[5] The second appeal relates to a request by Pro-Life to the relevant University levels of authority for permission to hold a similar event in early 2016 in the Quad location. Ultimately the University determined that Pro-Life would be allowed to do so but only upon the condition that Pro-Life agreed to defray the cost of security for the event, which was calculated to be about $17,500 with $9,000 to be posted in advance of the event by Pro-Life. Pro-Life said the cost was prohibitive and amounted to denial of their exercise of freedom of expression. The chambers judge denied judicial review of that decision also (the "Security Costs Decision").

[6] There is no issue on appeal about the decisions of the relevant decision makers for the University involved in each appeal being properly attributed to the University. In other words, the decision makers in each instance are not being treated as free-lancers or autonomous. Accordingly, if the University is subject to judicial review including for breach of the *Charter*, the University takes responsibility for the Complaint Decision and the Security Costs Decision. Although the University is represented on appeal by its Board of Governors, it is referred to in these reasons as the University.

II. Circumstances

[7] As noted, Pro-Life was at the material time a registered student group recognized by the University. The appellants, Nicol and Wilson, were students at the University in 2015 and 2016 as well as the President and Vice-President Finance of Pro-Life, respectively.

[8] On March 3 and 4, 2015, Pro-Life held an event in the "Quad"; a large, high-traffic, public open area in the middle of the University north campus. The event, for which Pro-Life sought and obtained approval from the University, included "large stationary displays of approximately 700 square feet with photographs of whole and dismembered human fetuses at various stages of development": Reasons at para 1. Photos of these "displays" are located at AEKE at A408-415.

[9] The then President of the University, Dr Indira Samarasekeram, had issued a public statement on February 27, 2015 about the pending Pro-Life event, that the University would "always start from a position that supports a right to freedom of expression. It is our duty to foster and facilitate discussion and debate in an environment that is a safe space for all students." She went on to add that "UAlberta Pro-Life is a registered student group on campus and, as such, has the same rights and privileges as other student groups. That includes access to the same spaces as any other student group." She concluded by advising that:

> A safe and respectful campus community is always a high priority. The university does not condone activity that violates the Student Group Procedures or the Code of Student Behaviour. Any complaints will be investigated by UAPS, according to our existing policies and procedures." (Reasons at para 48).

[10] The Pro-Life event was met by a large number of protestors, including University students, faculty, staff, and members of the general public. Many of those protestors stood "side by side holding signs and banners blocking the displays", forming a "human barrier significantly obstructing the UAlberta Pro-Life display from the time it was erected on each day to the time it was taken down": Reasons at paras 1, 5.

[11] Requests by UAPS officers to have protestors move to a designated space were ignored: Reasons at para 6. Pro-Life acknowledges that this effort by UAPS was "to its credit" in order to allow the others "to engage in legitimate, peaceful, non-obstructive expression of their own": AF

at para 3(l). Pro-Life nonetheless invokes the *Student Group Procedures* [EKE at A225-A231] as setting the rules for advocacy events. Pro-Life also cites this aspect of the *Code*:

> ... Nothing in this Code shall be interpreted in such a way as to prohibit the activities or to violate the principles that are set out in the first paragraph of this section. Nothing in this Code shall be construed to prohibit peaceful assemblies and demonstrations, or lawful picketing, or to inhibit free speech. ... [EKE A192]

[12] Videos purporting to capture portions of the events of March 3 and 4, 2015 are found at EKE at A173 and A177. Photos of same are found at EKE at A34-48, A179-183, A396-407. A number of the protestors objected to the Pro-Life event on the basis that the displays were not conducive to maintaining "safe spaces" on University campus.

[13] Nicol and Wilson filed a complaint with UAPS on March 11, 2015 alleging that a number of the counter protesters violated the *Code*: EKE at A190-240. The *Code* includes this policy statement (referenced in the quote of the *Code* in para [11] of these reasons):

> The University is defined by tradition as a community of people dedicated to the pursuit of truth and advancement of knowledge, and as a place where there is freedom to teach, freedom to engage in research, freedom to create, freedom to learn, freedom to study, freedom to speak, freedom to associate, freedom to write and to publish. There is a concomitant obligation upon all members of the University community to respect these freedoms when they are exercised by others. For these freedoms to exist, it is essential to maintain an atmosphere in which the safety, the security, and the inherent dignity of each member of the community are recognized. [EKE at A192]

[14] The complaint by Nicol and Wilson, which singled out specific individuals based in part on their Facebook posts, was investigated over a number of months: EKE at A74-171. In a letter dated November 30, 2015, the Director of UAPS, Bill Spinks, indicated that the University would not be proceeding any further with the complaint: EKE at A63-65.

[15] An appeal from that decision was launched by letter dated December 18, 2015 (EKE at A4-11), however the appeal was denied by Discipline Officer Chris Hackett in a letter dated February 4, 2016: EKE at A1-3. In his decision, the Discipline Officer concluded pursuant to Section 30.5.2(6)(b) of the *Code* that no University rule had been broken: the protestors neither prevented the appellants from speaking nor prevented anyone from accessing the group's materials. It is this Complaint Decision which was the subject of judicial review. A key part of the Complaint Decision was as follows:

> ... We respect the rights of all parties to offer information to an audience and then leave it to the audience to choose whether they will access it and how they will be affected by it. So long as they do not harm people or property, disrupt essential

> University business, or prevent other parties from speaking at all, the parties should be allowed to argue.
>
> The protesters competed with Go-Life [sic] for attention but they did not prevent them from speaking. They did make it more difficult for people to see the displays and challenged people not to speak to the Go-Life volunteers but they did not prevent them from doing so, regardless of the rhetoric on both sides. ... [EKE A2].

[16] Pro-Life sought permission to hold a similar anti-abortion event in 2016. It applied on January 11, 2016: EKE at A258-264. Pro-Life provided pictures of the displays it sought to use for the event on February 4, 2016: EKE at A311-319.

[17] On January 21, 2016, the University's Student Event Risk Management Coordinator asked Pro-Life to send UAPS a completed security assessment form pursuant to section 5, paragraph 6 of the *Student Groups Procedure*: EKE at A309. Under protest on February 3, 2016, Pro-Life submitted a document to that effect: EKE at A249-255. Pro-Life expressed this as "under protest" on the basis that it was "not required to pay for security because our opinion is controversial": EKE at A292-294. An "Event Security Assessment" was completed by UAPS on February 12, 2016; it estimated the total cost of security for the event at $17,500: EKE at A271-282. This estimate appears to have been grounded in the 2015 experience.

[18] By an e-mail dated February 12, 2016, it was conveyed to Pro-Life that the Dean of Students had approved the event subject to a number of conditions: EKE at A256-257. One of those conditions was that Pro-Life pay the cost of providing security for the event in the amount of $17,500, with a deposit of $9,000 due by February 19, 2016. Such costs were said to be the responsibility of the group in light of section 5, paragraph 6 of the *Student Groups Procedure*.

[19] The specific amount was said to be based on the security assessment, which suggested that peace officers from UAPS and police officers from EPS would be required in light of the public safety risks involved in the group's 2015 event. The e-mail went on to offer an alternative option of holding the event in an indoor location like a classroom, which was thought to reduce the level of security required.

[20] By letter dated February 19, 2016, the appellants sought a reconsideration of this decision as provided for by section 5, paragraph 8 of the *Student Groups Procedure*: EKE at A266-268. They specifically asked that the requirement to pay $17,500 for security be reconsidered because it "imposes an insurmountable and unjustifiable hurdle that prevents the Club's freedom of expression": EKE at A268.

[21] Upon reconsideration, Dean of Students Dr. Robin Everall, upheld the condition imposing a security fee in an eight-page letter dated February 24, 2016 ("Security Costs Decision"): EKE A241-248. This was the second decision subject to judicial review before the chambers judge.

[22] In the Security Costs Decision, Dr. Everall addressed a number of the appellants' concerns, including that of freedom of expression. While taking no issue with the event as a "legitimate form of expression" (page 5), the letter concluded it was nonetheless appropriate for Pro-Life to bear the costs since they "arise" from an event "designed to engage others in controversial matter" (page 7). As to freedom of expression, the Dean stated at page 6 of the letter as follows:

> The central issue appears to be the fact that the Group is prevented from expressing its views on campus *through this particular large-scale 2-day Event because* it has not raised the funds necessary to cover the cost of that Event. To the extent that the Group's position is that it should have the right to express its views on campus *by any means that the group chooses,* regardless of the risks to property or public safety occasioned by those means and that another party should bear the costs of implementing security measures, it is not accepted. To the extent that there is a limitation on the Group's expression, it arises directly from an undisputed, carefully analyzed and articulated safety risk based on past experience. That public safety risk can only be mitigated through security measures, and UAPS has provided an analysis of the scale of those resources needed to accomplish that mitigation strategy. Given limited resources, potential demands by many Student Groups, and the fact that the Group has been approved for other events at which it has been in a position to express its opinions, the Cost Condition is justified... [italics in original]

[23] On April 26, 2016, the appellants filed an Originating Application seeking judicial review of both the Complaint Decision and the Security Costs Decision [AR P1-13]. As noted, the chambers judge denied judicial review of both decisions and the two appeals followed.

III. Preliminary Procedural Comments

[24] As a practical matter, both of the appeals touch on matters which are essentially moot, albeit in the sense that there is no practical remedy beyond a form of declaratory relief that could be granted by this Court in relation to either of the two appeals. That does not mean, *ipso jure*, that judicial review was not or is not available. But it recognizes the practical limits of any decision on judicial review. Lack of practical utility can be a barrier even to the grant of a declaration of law: see ***Daniels v Canada (Indian Affairs and Northern Development)***, 2016 SCC 12 at paras 11-12, 15, 20 and 53-56, [2016] 1 SCR 99.

[25] Further, there remains a live debate between the university and the supporters or members of the student group in question which seems likely to arise again in the future. There is, accordingly, a form of adversarial context albeit contingent. The parties are not dis-entitled to seek a legal statement about what happened. Moreover, the parties on appeal have a genuine legal interest in such guidance as we are able to provide. The University in its reply factum to the intervention factum of the British Columbia Civil Liberties Association suggests that the Court should refuse to address certain *Charter* issues due to mootness. Although the point is taken, the

issue is squarely before the Court and it is only that the available remedy cannot re-assemble the ice cube that makes this moot, in part.

[26] Indeed, BCCLA cited a commentator for criticism of the failure of this Court to come to grips with the *Charter* question in the earlier case of ***Pridgen v University of Calgary***, 2012 ABCA 139, 524 AR 251: see Colin Feasby, "*Failing Students by Taking a Pass on the Charter in Pridgen v University of Calgary*" Constitutional Forum Constitutionelle, Vol 22:1 (2013).

[27] The appeal cases have been thoroughly argued. The appeals raise matters of Constitutional and societal interest for which guidance from this Court would be useful. But the Court may do so *only* to the extent that it is able to do so properly: compare ***R v Poulin***, 2019 SCC 47 at paras 19-25, [2019] SCJ No 47 (QL) and ***R v Myers***, 2019 SCC 18 at para 14, 375 CCC (3d) 293 citing ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 at pp 358-363. Hopefully the result will be as Megarry J put it in ***Cordell v Second Clanfield Properties***, [1969] 2 Ch 9 at p 16, translating Hankford J in 1409: "... le ley per bon disputacion serra bien conus" (Today as of old, by good disputing shall the law be well known.)

[28] Judicial review is not a broad appellate remedy against decisions of institutional decision makers. It is subject to the rules of justiciability and of state involvement: see ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall***, 2018 SCC 26 at para 14, [2018] 1 SCR 750. In the *Charter* context, the availability of judicial review is also subject to s 32 of the *Charter*, a matter debated before this Court: see below.

[29] Where judicial review applies, this Court is, in effect, to step into the shoes of the chambers judge when it comes to reviewing the determination made by the decision maker: ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36 at para 46, [2013] 2 SCR 559; ***Buterman v Greater St. Albert Roman Catholic Separate School District No. 734***, 2017 ABCA 196 at paras 23-24, 54 Alta LR (6th) 256; ***Stewart v Elk Valley Coal Corporation***, 2015 ABCA 225 at para 79, 386 DLR (4th) 383, affirmed 2017 SCC 30, [2017] 1 SCR 591. Consequently, the decisions of the University authorities are as much the focus of the appeals as is the decision of the chambers judge.

[30] The standard of review as to the *definitional* scope of a *Charter* right or the *definitional* scope of s 32 of the *Charter* must be correctness. These are transcendent questions of law not resting within the enabling legislation of any specific decision maker. As noted in ***Elk Valley***, the decision maker works from "settled law". In the specific instance of ***Elk Valley***, the decision maker from the Human Rights Tribunal in question was required to proceed from "the application of settled principles on workplace disability discrimination". By comparison, for issues of fact or discretion, the reviewing court is to "tread lightly".

[31] On occasion, a decision under review may be conclusory in whole or part in the sense of not being escorted by explanations or rationalizations which fully come to grips with all the necessary legal issues. Insufficiency of reasons by the decision maker does not in its own right

destroy the validity of the decision made: compare ***Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)***, 2018 ABCA 154 at paras 27, 36-42, 67 Alta LR (6th) 230, motion for leave to appeal discontinued [2018] SCCA No. 257 (QL) (SCC No 38185) (***"CCBR1"***).

[32] In the absence of complete reasoning (as distinct from the absence of any 'reason' for the decision, a distinction noted by ***CCBR1***) a judicial review court may consider the evidence and arguments before the decision maker along with the facts found by the decision maker and what reasons are given by the decision maker in evaluating both the legality and the reasonableness of the decision: see *eg* ***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62 at para 12, [2011] 3 SCR 708; ***CCBR1***; see also ***Law Society of British Columbia v Trinity Western University***, 2018 SCC 32 at para 29, [2018] 2 SCR 293 (***"TWU1"***).

[33] But the ability of the judicial review court to read interstitially into what reasons the decision maker gave does not, however, permit the judicial review court to compose its own reasons on the matter at hand: ***Delta Airlines Inc. v Lukács***, 2018 SCC 2 at paras 23 to 29, [2018] 1 SCR 6; ***Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority***, 2018 BCCA 344 at paras 52, 59, 426 DLR (4th) 333 (***"CCBR2"***).

[34] Another preliminary procedural matter as to the first appeal concerns the contentions for Pro-Life that there was a form of contractual obligation of the University to Pro Life and to its members to enforce the *Code*, or an obligation based upon representation or reasonable expectation and also that the Complaint Decision was rendered in bad faith. The University objects to the introduction of these new arguments on appeal. This is discussed where that topic arises below.

[35] Finally, it must be emphasized that the policy upon which the University sought to impose the payment of security costs by Pro-Life as a condition for holding its event – set out in the Student Groups Procedure – has not itself been challenged either below or before this Court. Rather, the argument focused around whether the exercise of that policy was required to be *Charter* compliant and, further, whether the Security Costs Decision was exercised in a Charter compliant manner in the circumstances. It is to these arguments that these reasons address. Nothing in these reasons should be understood as commenting on whether the policy itself is, or must be, *Charter* complaint.

[36] It appropriate to now turn the grounds of appeal as set out by the appellants.

IV. The Complaint Decision

[37] Pro-Life expresses the first ground of appeal as to the Complaint decision as follows:

> **The Appellants have standing to challenge the merits of the decision by University of Alberta DO Chris Hackett not to charge the Blockaders.**

[38] The chambers judge rejected this position. She pointed out the positions of Nicol and Wilson as complainants under the *Code* at paras 17 to 19 of her Reasons as follows:

> 17 Complainants have the following rights:
>
> - to initiate proceedings;
> - to have the Director decide whether to proceed with the complaint;
> - to be notified of the Director's decision;
> - to appeal to the Discipline Officer the Director's decision to not proceed with and/or investigate a complaint; and
> - if the Discipline Officer decides that the decision of the Director was appropriate, the right to a written decision with reasons from the Discipline Officer.
>
> 18 If a complainant has been physically injured, discriminated against or harassed, or claims to have had property damaged or stolen, such a complainant has the following rights:
>
> - to be consulted before any informal resolution;
> - to provide evidence of injury or damage for which restitution may be an appropriate remedy;
> - to be informed to the time and location of any hearing; and
> - to be consulted as to whether they should be a witness at the hearing.
>
> 19 The Code specifically provides that if the complaint is dismissed, no further proceedings shall be taken respecting the complaint.

[39] The chambers judge went on to compare with rights of Nicol and Wilson, as complainants, with the rights of the *targets* of the complaints under the *Code* which included more requirements for fair process. There is no Constitutional attack upon the *Code* before this Court. On the face of the *Code*, they appear to be an attempt by the University to balance the position of complainants and targets of the complaints. There is no doubt that these types of regulatory schemes implemented by Universities have a high degree of public significance as well as significance for students at the University in this specific case.

[40] Evaluation of fairness and sufficiency of a process raises ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817 at paras 21 - 28 and ***Canada (Attorney General) v Mavi***, 2011 SCC 30, [2011] 2 SCR 504. As noted in ***Mavi***, at para 42, the non-exhaustive list of the five ***Baker*** lines of inquiry have as a "simple overarching requirement" that of "fairness" and the "just exercise of power".

[41] That approach in ***Mavi*** is helpful for Rule 17 of the *Code*. It is neither necessary nor appropriate for present purposes for us to opine on whether we might regard *further* involvement by complainants in the decision making here to be appropriate. The chambers judge ultimately ruled that Nicol and Wilson did not have any standing to challenge the Complaint Decision within the scope of judicial review. The chambers judge said:

> 21 The status afforded complainants under the Code is similar to the status afforded complainants in professional discipline matters. The role of a complainant in professional regulatory matters and their standing to seek judicial review has been addressed by the Alberta Court of Appeal in *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107, *Mitten v. College of Alberta Psychologists*, 2010 ABCA 159, and *Warman v Law Society of Alberta*, 2015 ABCA 368. These cases all confirm that a complainant's standing is limited to issues of procedural fairness. Complainants are not entitled to seek review of the reasonableness of the decision on the merits.

[42] The chambers judge went on to quote from the dissenting judgment in ***Warman v Law Society of Alberta***, 2015 ABCA 368 at paras 35 to 39, 609 AR 83 where Wakeling JA pointed out, *inter alia*, that the complainant's interest in a complaint to a regulatory body to see that the rules are carried out according to their terms is an interest shared with the public at large. It was, he wrote, not an individual duty to a complainant simply because the complainant is 'interested' in the decision. The scope of judicial review, as pointed out by the majority in ***Warman***, is that "a party who has a statutory right to appeal a decision dismissing a complaint has standing to seek judicial review *if the appeal process* is conducted in a fundamentally unfair manner" [Emphasis added].

[43] Although Pro-Life complains that the process was unfair, the unfairness alleged seems to be derived from what Pro-Life submits is an unacceptable and unreasonable decision. I am not persuaded by that reasoning. There was no basis for the chambers judge to find fundamental unfairness in *the appeal process*. Unfairness in the appeal process would presumably involve some apparent clear disregard of essential elements to be followed in the appeal process. That sort of disregard is not proven merely because the conclusion at the end of the process differs from what the complainant sought.

[44] The larger context in which discretionary decisions to 'not prosecute' are made is illuminating on whether this species of regulatory non-prosecution is facially unreasonable merely

because, so Pro-Life says, the prosecution is possible. In any such case the governing statute or regulation may direct how such decisions are to be made, and who has standing to participate. The context of the following comparator situations is also in each instance distinguishable. Nonetheless, they manifest a long-standing policy concerning prosecutions and the role of prosecution and investigative agencies.

[45] The decision in ***R v Beaudry***, 2007 SCC 5 at para 45, [2007] 1 SCR 190 delineates the distinction between police and Crown attorneys from the point of initiating prosecutions. ***Beaudry*** observed that, even under the *Criminal Code*, merely because a police officer might have a power to demand a motorist to provide a breath sample and thus effectively initiate a prosecution did not mean the officer had a duty to make the demand. Discretion is inherent in the system.

[46] A decision not to prosecute is not, in other contexts, judicially reviewable on a *post-facto* inaccuracy thesis such as Pro-Life ventures here. Lord Brown in ***R (on application of Corner House Research at al) v Director of the Serious Fraud Office***, [2008] UKHL 60 at para 67 dealing with a Director's decision not to prosecute said: "It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision *based upon his arguable misunderstanding* of that obligation and then itself decide the point of international law at issue." [Emphasis added]

[47] The *Code* provisions interpreted by the chambers judge did not make prosecution compulsory: compare ***Burgiss v Canada (Attorney General)***, 2013 ONCA 16 at para 2, [2013] OJ No 1229 (QL). The *Code* provides for exercises of discretion akin to those in other prosecutorial spheres: ***Dalla Lana v University of Alberta***, 2013 ABCA 327 at paras 9-17, 561 AR 70. ***Dalla Lana*** was discussing the rights of targets and not complainants, but did add:

> 11 A complainant who believes that a student has breached the provisions respecting "inappropriate behaviour towards a member of the university community" may initiate a formal complaint to the Director of Campus Security Service: Code section 30.5.2(3). The Code also sets out the procedure to be followed thereafter including referral to a discipline officer who may investigate. If the discipline officer decides that an offence has been committed, he or she may impose a sanction. The discipline officer's decision may be appealed to the UAB: section 30.5.8 (10). The UAB has the authority to "determine whether or not an offence has been committed and to confirm, vary or quash sanctions imposed:" section 30.6.2(1).

[48] It fits rather than transgresses the *Code* for the prosecutorial authority to conclude that a case for prosecution was not warranted whether or not there might be available evidence: Rule 30.5.2(6) and Rule 30.5.2(8)(a) of the *Code* [EKE at A220-221]. Moreover, even if there was flagrant misconduct on the part of a decision maker, the judicial review court could, at best, refer the matter back to a different decision maker of co-ordinate jurisdiction. The judicial review court could not essentially take over the prosecution or even push the University to conduct one:

compare ***Hebron v University of Saskatchewan***, 2015 SKCA 91 at para 66, 388 DLR (4th) 437, leave denied (2016) [2015] SCCA No 440 (QL) (SCC No 36697).

[49] In the larger context, the fact that the rules set out in the *Code* here would be more expansive on the rights of a target than on the rights of a complainant is not unusual.

[50] The *Code* does not mandate prosecutions. Discretion is recognized in other penal law contexts: see eg ***Kostuch v Alberta (Attorney General)*** (1995), 174 AR 109, [1995] AJ No 866 (CA) (QL), leave denied [1995] SCCA No 512 (QL) where the Attorney General by counsel intervened in a private prosecution initiated by a private individual and stopped the prosecution. Doing so was not flagrant impropriety in the decision of the Attorney General.

[51] Pro-Life argues it has been singled out. In ***R v Armstrong***, 2012 BCCA 242 at paras 31-39, 350 DLR (4th) 457, leave denied [2012] SCCA No 352 (QL) (SCC No 34957) it was argued for fishers charged with violating certain fishing laws that the federal Crown had effectively granted 'dispensation' to aboriginal fishers who were also in violation of the fishing laws. Drawing from ***R v Catagas*** (1977), 38 CCC (2d) 296 (MBCA), it was contended in ***Armstrong*** that the decision to decline to prosecute was a 'dispensation' of the law on an improper class or category basis such as brought on the execution of Charles I and the English Civil War. But unlike the argument in ***Armstrong***, there is no basis to conclude that the decision here was grounded in an improper class or category premise. There is a single decision, explained by reasons. Whether or not it is was reached on correct analysis of law or is a proper precedent for the future is a different matter.

[52] There was also no basis for Pro-Life to find this was a case akin to a "proleptic grant of immunity from prosecution" for this and future cases by those who disagree with Pro-Life: compare ***R (Pretty) v Director of Public Prosecutions***, [2002] 1 AC 800 at para 39. As pointed out by Lord Hughes in ***R (on the application of Nicklinson v Ministry of Justice***, [2014] UKSC 38 at paras 271-272, it is within the discretion of a prosecutor to decide that a specific prosecution is not in the public interest, even if the facts which might justify the prosecution, arguably, exist.

[53] More generally in the UK, there is a tradition called the 'Shawcross principle' drawn from comments of the then Attorney General Lord Shawcross in 1951 that it should never be a rule that every offence had to be prosecuted: see ***Smedleys Ltd v Breed***, [1974] AC 839 at 856 (UKHL) (per Viscount Dilhorne also referring back to Shawcross and a similar comment of Lord Simon in 1925).

[54] Having regard to this substantial line of authority, it is difficult to see any flaw in the statement of finality described as part of the relevant rules contained in the *Code* which, as cited by the chambers judge at para 19 of her reasons, provides that "if the complaint is dismissed, no further proceedings shall be taken respecting the complaint".

[55] Pro-Life's position is not entirely clear as to confronting the chambers judge's determination of 'no standing' squarely on the point of deference within the decision maker's margin of appreciation. Rather, Pro-Life focuses more on the argument that the *Code* is part of "the University's contractual obligation to all fee-paying student [sic] that the University will enforce the Code in order to protect their basic rights": AF at para 11.

[56] In this regard, Pro-Life cites ***Young v Bella***, 2006 SCC 3 at para 31, [2006] 1 SCR 108. But that quotation from ***Young v Bella*** deals with proximity for the purposes of a claim sounding in negligence. Quite apart from the University's objections to elements of the Pro-Life argument for even bringing up ***Young v Bella***, we do not find ***Young v Bella*** to be relevant here.

[57] Pro-Life also moves to characterize the *Code* as involving "representations": AF at para 13. That suggestion seems to be a variant on a 'reasonable expectations' argument. But reasonable expectations deal with process, not with substantive rights, and does not fetter the discretion of a statutory decision-maker: ***Moreau-Berube v New Brunswick (Judicial Council)***, 2002 SCC 11 at para 78, [2002] 1 SCR 249.

[58] Pro-Life also asserts that the University "by failing to pursue the Complaint, turned a blind eye to a premeditated act of obstruction": AF at para 14. This statement appears to raise a claim of bad faith. This is ironic since earlier in their Factum, Pro-Life was willing to give credit to UAPS for their efforts at the 2015 event to steer the objecting side over to an area whereby both competing opinions could be expressed. The Pro-Life hypothesis of bad faith is slain by the cruel reality that there is no evidence of bad faith either then nor when the discipline officer exercised his discretion relative to the Complaint Decision.

[59] It was noted long ago in the context of administrative decision making that bad faith could compromise the outcome: see ***Kruse v Johnson***, [1898] 2 QB 91 at pp 99-100; see also ***Sharp v Wakefield***, [1891] AC 173 at p 179. In ***Sharp v Wakefield***, Lord Halsbury LC had referred to ***Rooke's Case***, [1572] EngR 141; (1598) 5 Co Rep 99b at 100a [77 ER 209 at 210] of 1598, in which it was stated that the discretion of commissioners of sewers "ought to be limited and bound with the rule of reason and law".

[60] But the fact that the earlier cases like ***Kruse*** tended to assemble concepts does not mean bad faith is demonstrated by irregular outcomes. Much of ***Kruse*** evolved into the reasonableness concept expressed in the classic '*Wednesbury*' principle: see ***Associated Provincial Picture Houses Limited v Wednesbury Corporation*** [1948] 1 KB 223. The concept of bad faith is an independent challenge to a decision and involves a different line of inquiry. The mere suggestion of unreasonableness is not tantamount to, nor inexorable evidence of, bad faith. Bad faith has its own distinct and more demanding test.

[61] The test for pleading and showing bad faith is neither casual nor low: compare ***Entreprises Sibeca Inc v Frelighsburg (Municipality)***, 2004 SCC 61 at paras 25 to 27, [2004] 3 SCR 304; compare also Brown J (dissenting on the merits) in ***West Fraser Mills Ltd v British Columbia***

(Workers' Compensation Appeal Tribunal), 2018 SCC 22 at para 118, [2018] 1 SCR 635; see also ***Council of Independent Community Pharmacy Owners v Newfoundland and Labrador***, 2017 NLCA 45 at paras 17-18, 2017 CarswellNfld 324.

[62] More directly, Pro-Life does not appear to have challenged the appeal process as being *itself* conducted in violation of procedural fairness. Mindful of the test in ***Warman***, the chambers judge concluded the appeal procedure here to have been fair, stating at para 33.

> 33 In summary, the Applicants' standing is limited to issues of procedural fairness before the Discipline Officer. The Applicants are not challenging the fairness of the appeal procedure. Even if they had, I find that the appeal process was fair.

[63] In its Factum, Pro-Life also uses sharp language to criticize the chambers judge's ruling, suggesting that her decision was that "the University can, effectively, disregard substantive enforcement of the *Code* and thereby determined that the University may ignore the rule of law and the contractual obligations of the student-university relationship". It is difficult to be patient with such hyperbole. The decision of the chambers judge did nothing of the sort alleged.

[64] The effect of her decision was to find that she did not have a basis upon which to evaluate whether the *Code* was reasonably addressed by the Discipline Officer as the decision maker. Absent a successful attack on the limitations under the *Code*, it was not open to the chambers judge to confect her own authority to re-write the rules and penetrate more deeply into the merits of the decision not to prosecute.

[65] Pro-Life also criticizes the chambers judge's decision for allegedly minimizing the conduct of the "Obstructers" and for finding the interest of Nicol and Wilson in the prosecution decision was not greater than the interest of anyone in operation of the regime: AF at paras 17-20. This critique of the fact finding by the chambers judge is unwarranted. That a chambers judge might choose to use somewhat more delicate terminology than an appellant may have thought appropriately aggressive is not a compelling argument in semantics let alone merit to suggest error. There is no palpable and overriding error in the fact finding.

[66] Furthermore, this argument for Pro-Life seems to contend that the chambers judge should have found the find the 'obstructers' guilty of violating the *Code*. Language in Pro-Life's written submission reads like a trial submission. Courts should be reluctant to make such findings of regulatory guilt in a civil context, particularly without a trial, and for good reasons: compare ***Reese v Edmonton (City)***, 2011 ABCA 238 at paras 29-33, 335 DLR (4th) 600, leave denied (2012) [2011] SCCA No 447 (QL) (SCC No 34454). It is not a typical incident of judicial review for a judge to declare anyone guilty of an offence.

[67] Pro-Life also argues the flip side of this point with its contention that the reaction to their event was because Pro-Life's position was unpopular. As discussed below as to the Security Costs

Decision, a key purpose of the guarantee of expression freedom is to protect against majoritarian suppression of expression and likewise to reject the heckler's veto to expression and to avoid misuse of 'event fees' and so forth to selectively bar expression in light of its unpopular content. But there is no reason to think that the point that Pro-Life faced organized resistance eluded the chambers judge.

[68] Before closing on this ground, it is necessary to address the objection by the University to the introduction into the submissions of Pro-Life of 'new grounds on appeal'. In particular, the new grounds include or seem to include, as noted above, claims in contract, perhaps claims in misrepresentation and / or reasonable expectations, and claims in bad faith.

[69] Because I find no merit in these additional arguments on this record as outlined above, it might be unnecessary to take up the University's objection: compare ***Schulte v Alberta (Workers' Compensation Appeals Commission)***, 2016 ABCA 304 at para 3, 41 Alta LR (6th) 209. Nonetheless, I believe that it is necessary to address the question of new grounds on judicial review. It is necessary to underline the requirements of orderly process in matters of this importance. Pro Life should not be granted permission to argue these points.

[70] There is a large body of case law that discourages consideration of new arguments either on appeal or on judicial review: see *eg* ***Ontario (Energy Board) v Ontario Power Generation Inc.***, 2015 SCC 44 at para 64, [2015] 3 SCR 147 (where the tribunal itself raised new arguments); ***Quan v Cusson***, 2009 SCC 62 at para 36, [2009] 3 SCR 712; ***Brace v Williams***, 2016 ABCA 384 at para 7, [2016] AJ No 1259 (QL); ***Sunshine Transit Service v Manitoba (Taxicab Board)***, 2014 MBCA 33 at paras 22, 26-30, 64 MVR (6th) 120; ***Alberta (Minister of Infrastructure) v Nilsson***, 2002 ABCA 283 at para 172, 320 AR 88.

[71] The concern about belated raising of new arguments is particularly acute in cases of judicial review: ***Ontario Power Generation***. In ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,*** 2011 SCC 61 at para 22, [2011] 3 SCR 654, Rothstein J referred to ***Canadian Pacific Ltd v Matsqui Indian Band***, [1995] 1 SCR 3 at para 30, and observed at para 23, that the discretionary nature of judicial review should not be exercised in favour of an applicant "where the issue could have been but was not raised before the tribunal." Legislatures entrust the determination of specific legal issues to administrative tribunals: ***Alberta Teachers*** at para 24.

[72] Pro-Life has to justify the advancement of new grounds on appeal: ***Guindon v The Queen***, 2015 SCC 41 at para 23, [2015] 3 SCR 3; ***Ernst v Alberta Energy Regulator***, 2017 SCC 1 at paras 22, 65, 99-113, [2017] 1 SCR 3.

[73] The broad concern about taking on additional grounds in judicial review is that to do so is directly injurious to the very nature of judicial review and to the administrative law generally. Judicial review is not just an interim step of a rolling dialogue. There are also a variety of case-specific reasons not to venture outside the lanes of an appeal in judicial review.

[74] For example, while Pro-Life suggests that its Originating Application referred to an entitlement of tuition paying students to rely on the "upholding of the rule of law on campus", that falls well short of elaborating what, precisely, the term of the 'contract' was and how that 'contract' term asserted had a juridical status capable of modifying the relevant *Code* rules.

[75] Beyond that – and while there was discussion of the community of students in submissions of counsel below – there was no specifics as to how the alleged 'contract' term could have compelled the University to prosecute merely because a complainant insisted. As colourfully put by Côté JA in ***Hill v Hill***, 2013 ABCA 137 at para 61, 553 AR 16, leave denied [2013] SCCA No 272 (QL) (SCC No 35435):

> 61 Sometimes the courts give a litigant an indulgence to cure some slip or accident (on stiff terms), but not even that is alleged here. "I and my new lawyers are better than my previous lawyers" is not enough. Nor is "I've changed my mind." Nor is "let's play double or nothing".

[76] In addition, and on a case specific basis, Pro-Life, in its reply factum against the University's challenge to the new grounds being entertained, ascribes to the University a sort of procedural obstructionism attributing to the University the position that "even if it is grossly derelict in upholding students' rights there is no recourse for students unless there has been some procedural anomaly" [ARF at para 13]. With respect, this is not even an argument about a contractual right, let alone a justification for allowing a contract or misrepresentation or reasonable expectation or bad faith argument as a new ground on appeal. It is just rhetoric.

[77] Similarly, Pro-Life suggests in reply that, by taking a legal position in objection to the new grounds, the University was also accusing Pro-Life of trying to monopolize the forum for expression purposes: ARF at paras 15-18. This submission is also no warrant for extending the scope of grounds.

[78] On allowing additional grounds on appeal or judicial review, there is also the question of fairness to the University. In ***North Western Salt Company Limited v Electrolytic Alkali Company Limited***, [1914] AC 461 (HL) at 476-477, Lord Moulton characterised the underlying principle as follows:

> ... [O]ur judicial procedure is based on the principle that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the Court, and it would indeed be strange to hold that this wholesome rule should be relaxed when he is charged with something so grave as acting against the common weal.

See also ***Saadati v Moorhead***, 2017 SCC 28 at para 9, [2017] 1 SCR 543 and ***Davis v Manitoba***, 2019 MBCA 78 at paras 16-18, [2019] 8 WWR 567.

[79] Fairness required a fair opportunity for the University to be notified of and to respond to specific grounds given with sufficiently particularity: see ***Guindon*** at para 23:

> ... There is no assumption of an absence of prejudice. The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties."

The University is right, in my view, that it would be prejudiced by these arguments and that exceptional permission to entertain these new issues is not justified.

[80] In closing on this ground of appeal, it may be noted – also in *obiter* and without the Court coming to a final resolution of any points hereinafter mentioned – that even if the new Pro-Life submissions on contract or bad faith had been before the chambers judge, she would have faced the question whether they were private law issues that did not properly belong within the scope of judicial review in the first place: ***Wall*** at paras 12-13.

[81] Further, the 'contractual right' claim for Pro Life would raise before the chambers judge whether the handling of student discipline *involving someone other than the complainant* might be properly characterized as a matter of discretion within the administrative or operational jurisdiction of the University allied with its academic jurisdiction. On that premise, the threshold of s 32 of the *Charter* or the involvement of state action for judicial review is, at least arguably, absent.

[82] On academic matters, there is a "broad margin of discretion enjoyed by the university and its professors": ***Jaffer v York University***, 2010 ONCA 654 at para 56, 268 OAC 338, leave denied (2011) [2010] SCCA No 402 (QL) (SCC No 33938); see also ***Maughan v University of British Columbia***, 2009 BCCA 447 at paras 49 - 58, 277 BCAC 64. For a 'contract' that inserts the *Charter* into the relationship of a student or professional with the University there would normally have to be some indicia of an intent to create legal relations and some sort of consensus about legal context and enforcement. This would, arguably, be a matter of fact associated with private law and not subject to judicial review: ***Maughan***.

[83] To the extent that counsel for the University mentioned the topic of 'contract' in the debate before the chambers judge – a matter of procedural occurrence raised by Pro-Life on the hearing of the appeal – this did not constitute a concession before the chambers judge that there was a live debate at that level as to all theories offered by Pro-Life said to support finding that the University was required to execute the *Code of Student Behaviour* against other people as demanded by the complainants [AR Transcript at pp 65-69]. Counsel talk many things in argument. It would need a case of greater clarity than this to convert submissions of counsel into some sort of disqualifying estoppel against raising a process objection later.

[84] Nor is it dispositive for the purposes of making the new ground[s] permissible on this appeal that there was some sort of concession as in ***Wilson v University of Calgary***, 2014 ABQB 190 at paras 167 - 174, 586 AR 349 as to the existence of a contractual relationship between the

students who were being *targeted* for allegedly violating a student behaviour code on the one hand and the University on the other hand.

[85] The Complaint Decision here was likewise not dealing with the same situation as in ***Pridgen*** where Pridgen was the *target* of discipline. Once again, there appears to have been discussion of contractual rights of targets in ***Pridgen***. Had new grounds been raised before the chambers judge, there would not necessarily have been a frictionless glide to a finding of jurisdiction to consider those arguments as a proper part of *this* judicial review.

[86] As a result, and additional to the reality of there being an inadequate record to address those points and there being unfairness to the university, there is another reason to refuse to permit the new grounds on appeal, namely that the chambers judge might not have acquiesced to addressing them within the context of judicial review or she might have found herself unable to do so within the framework of judicial review. On a later appeal from her decision, her reasoning to decline jurisdiction would be a vital part of the *lis* in this Court.

[87] All in all, the first ground of appeal relating to the Complaint Decision fails.

[88] The second ground of appeal as to the Complaint Decision is phrased by Pro-Life as follows:

> **The University's Code of Student Behaviour, which protects the rights of every student to express opinions peacefully and without obstruction, creates positive rights that can be enforced by the Appellants against the Respondent**

[89] The use of the language of "positive rights" in this context seems to presage some of the debate as to the Security Costs Decision where the question of freedom of expression under s 2(b) of the *Charter* is discussed below. This language pre-supposes that the University is an emanate or agent of the state for the purposes of s 32 of the *Charter* and, relatedly, subject to judicial review for its ruling respecting conditions of the proposed 2016 event. Further, it also pre-supposes that any such duty of the university respecting freedom of expression on university property under the *Charter* has merely a negative character (non-interference with the ability to exercise the freedom) or whether it is also inclusive of a positive duty as well (a duty to facilitate it to ensure equal access to the ability to exercise the freedom).

[90] Regardless of the subject matter of the expression, the topic of recognizing a positive duty as to freedom of expression raises Constitutional controversies in its own right: see *eg* ***Baier v Alberta***, 2007 SCC 31, [2007] 2 SCR 673; ***Dunmore v Ontario (Attorney General)***), 2001 SCC 94, [2001] 3 SCR 1016; ***Greater Vancouver Transportation Authority v Canadian Federation of Students -- British Columbia Component***, 2009 SCC 31, [2009] 2 SCR 295 and more recently ***Toronto (City) v Ontario (Attorney General)***, 2019 ONCA 732, 146 OR (3d) 705. This topic is covered more directly in the discussion of the Security Costs Decision.

[91] In its invocation of a concept of positive *Charter* rights, the argument presented for Pro-Life under this second ground of appeal for the Complaint Decision really appears to be an argument that the University was required to insulate and protect Pro-Life and its student advocates from interference in their expression. Pro-Life seems to contend that the University had a positive duty to control expression by persons of a contrary point of view and that as part of that obligation the University should prosecute 'obstructers' where there is an arguable case of improper interference with Pro-Life's freedom of expression: AF at paras 23-29.

[92] This argument is essentially a different form of the first ground of appeal. The reference to a "positive" duty to Pro-Life amounts to an assertion of a positive duty to prosecute *Code* enforcement. Against the Complaint Decision appeal, however, the existence of such a duty is not made out for reasons heretofore expressed. It might also be noted in passing that the ground of appeal of Pro-Life on the first appeal did not appear to itemize breach of freedom of expression under s 2(b) of the *Charter* as itself an adjective by which to determine unreasonableness of the Complaint Decision: AR at P2. The second ground of appeal fails.

[93] The third ground of appeal as to the Complaint Decision is worded as follows:

> **The Respondent act [sic] in bad faith when it repeatedly declared to the offending students at the 2015 Event that they were in breach of the Code, and thereafter refused to charge them.**

[94] One internal assumption in this ground of appeal appears to be that the representatives of UAPS and the Discipline Officer were, in effect, the same person and could therefore not think differently about the situation. That is not how the *Code* is laid out.

[95] While, as noted above, the University appears to accept that the decisions of the UAPS Director and the Discipline Officer were decisions on behalf of the University, that is not the same thing as saying that the officials on scene could make statements binding on later conclusions of either of those two subsequent decision makers. To treat the field officers and the Director and Discipline Officer as one entity conflates the roles. Indeed, it does so in in a way which is comparable to the approach that was rejected by the Supreme Court in ***Beaudry***.

[96] In any event, the University's Factum more accurately captures the situation where it says:

> [54] The statements made by UAPS officers during the March 2015 event and the President also do not change the analysis of the Discipline Officer's decision. What matters is that <u>his decision</u> was reasonable in the circumstances as he is the only one authorized under the Code to make the relevant determination.
>
> [55] Nevertheless, the previous statements are consistent. The Appellants assert that UAPS warned the counter-demonstrators "to cease their obstruction of the Display" or "to cease their conduct" or "that they were in breach of the Code" and

> assert that then-President Samarasekera "warned" that obstruction would be a breach of the Code. These assertions are incorrect. Rather, the notice read to the counter-demonstrators by UAPS asked only that the counterdemonstrators conduct their counter-demonstration in a designated area across from Pro-Life's demonstration and the then-President's statement noted only that complaints would be investigated by UAPS according to the applicable policies Code actions were instituted against the counter-demonstrators. Their actions were investigated, though ultimately dismissed. [Underlining in original. Footnotes not included]

[97] The real objection embedded in this ground appears to arise from the decision of the Discipline Officer where he concluded:

> As Director Spinks noted, the introduction to the COSB [Code of Student Behaviour] makes it clear that all parties, both the students in the Go-Life group and the protestors, have a right to free speech. Go-Life and the protestors disagreed on both the fundamental arguments being expressed and on the appropriate mechanisms for engaging in that debate. Both parties expressed their opinions. All of the participants were therefore engaging in acts which the COSB specifically permits - demonstrating and/or protesting. Free speech may be pursued aggressively and differences of opinion may be profound, loud, and emotional. Two or more groups who disagree may well compete for listeners' attention and they are free to address both the other party's reasoning and the way that they have presented their information.
>
> Free speech is not a clean process where people will always take turns and treat each other with deference. We have to expect that profound disagreements over controversial topics may be loud and vigorous. It follows that the University should tread lightly in applying disciplinary processes when people are engaging in a conflict of ideas. We respect the rights of all parties to offer information to an audience and then leave it to the audience to choose whether they will access it and how they will be affected by it. So long as they do not harm people or property, disrupt essential University business, or prevent other parties from speaking at all, the parties should be allowed to argue.
>
> The protestors competed with Go-Life for attention but they did not prevent them from speaking. They did make it more difficult for people to see the displays and challenged people not to speak to the Go-Life volunteers but they did not prevent them from doing so, regardless of the rhetoric on both sides. There is evidence in the material supplied to me by Mr. Cameron in the appeal and in the investigation by UAPS that anyone interested in accessing Go-life material and wishing to talk to their volunteers could do so. Ms. Nicol described, in her statement to UAPS, one of the protestors carrying a sign discouraging people from speaking to the Go-Life

> volunteers and intimated that the protestor was unsuccessful. Ms. Nicol's statement indicates two things. First, it shows that Go-Life volunteers were speaking to people who attended the installation and second, that protestors were attempting to persuade people not to interact with Go-Life materials, not physically preventing them from doing so. UAPS officers reported escorting at least one person to the displays who expressed concern about crossing the protest, meaning that even those concerned about the protestors had a mechanism to access Go-Life material. The photographs supplied by Mr. Cameron show that enough of the displays were visible so that passersby would know what information Go-Life was offering and could therefore make an informed choice whether to view it in its entirety or not.
>
> My review of the evidence provided to me by Mr. Cameron and UAPS suggests that the decision of Director Spinks not to proceed with COSB charges is reasonable and appropriate given the circumstances. 1 am therefore denying the appeal and, pursuant to Section 30.5.2(8) a, no further proceedings will be taken respecting this complaint under the COSB. (EKE at A1-A3]

[98] There is nothing of bad faith or victim blaming in this. The Discipline Officer was entitled to be taken at his word that he considered the material provided. His statement of the standard of review that he applied to the Director's decision is not challenged. His reasons are clear. It does not matter whether the chambers judge might have concluded that the actions of the counter protestors were more effective in blocking the presentation of Pro-Life than the Discipline Officer thought. Indeed, one might have thought that the gathering of crowds of persons to the location might have increased the size of the audience out of curiosity if for no other reason.

[99] As a judicial review judge, her role on the review was to decide "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", not whether the conclusion of the Discipline Officer was the one that she would have reached: compare ***Imperial Oil Limited v Calgary (City)***, 2014 ABCA 231 at para 34, 580 AR 125, citing ***Canada (Citizenship and Immigration) v Khosa,*** 2009 SCC 12 at para 59, [2009] 1 SCR 339; ***Wilson v Atomic Energy of Canada Limited***, 2016 SCC 29 at paras 21, 33-39, 80, [2016] 1 SCR 770. This she did. There is no error in her doing so.

[100] The third ground of appeal fails.

[101] There being no successful grounds, the appeal from the Complaint Decision is dismissed. Costs of this appeal will be addressed at the end of these reasons.

V. The Security Costs Decision

[102] The first ground of appeal in relation to this appeal is expressed as follows:

The Canadian Charter of Rights and Freedoms applies to the exercise of speech by students at the University of Alberta.

[103] The chambers judge did not directly address this submission in her Reasons. She wrote:

> 45 The legal arguments put forward and the issues engaged when considering whether the *Charter* applied or whether the common law required the University to consider freedom of expression are incredibly interesting. The fact is, however, that the University did consider freedom of expression in making its decision. While I acknowledge that the issue of whether a University is required to consider freedom of expression, regardless of whether the *Charter* applies, is a legal question that is ripe for exploration and decision, it is not an issue that this court must answer today.
>
> 46 Review of the decision will, therefore, proceed on the basis that the University voluntarily assumed responsibility for considering freedom of expression in this instance.

[104] Unlike the chambers judge, I find it inevitable to answer this question.

[105] The University is an institution of higher learning which was first legally established in the first legislative session of the new Province, with Premier Alexander Rutherford as a principal supporter: *An Act to Establish and Incorporate a University for the Province of Alberta,* SA 1906 c 42. Section 4 of the *Act* designated *the Lieutenant Governor* as the "Visitor" of the University.

[106] The Visitor role calls to memory ***Philips v Bury*** (1694), 1 ER 24 at p 26, where the Bishop of Exeter was designed a Visitor and was charged *inter alia* to ensure "Virtue and Learning be nourished". The case also noted that a College "is to Educate them in Learning". In other words, the historic role of the Visitor has been for centuries very much that of an ombudsman, and inquirer and a judge of performance of university affairs by its operational masters. From its starting point, then, the University and its purposes were a subject of great significance to *the Crown* when it enacted the University into existence under s 93 of the *Constitution Act, 1867.*

[107] The intervener, British Columbia Civil Liberties Association contends that the ability of provinces to establish institutions of higher learning was a key part of the many compromises that created Canada, citing ***Adler v Ontario,*** [1996] 3 SCR 609 at paras 29-31. Similarly, the BCCLA cites James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* for the following:

> Enriched education of the First Nations was the shared intent and the most fundamental purpose of the treaties. It was considered the foundation and engine of the Treaty economy. Education was associated with the future and prosperity... Recognizing the right of education and instruction in the treaties is what gives coherence to the Treaty economy.

[108] Interestingly, that originating (University) *Act* also specified that:

> 43 The university shall be strictly non-sectarian in principle and no religious dogma or creed shall be taught and no religious test required of any student or other person.
>
> 44 The senate shall make all provisions for the education of women in the university in such manner as it deem most fitting, provided however that no woman shall by reason of her sex be deprived of any advantage or privilege accorded to male students of the university.

[109] In other words, from its very inception, the University was committed by government policy with deep Constitutional roots to a broad scope of education with surveillance by the Crown (at an increasingly greater distance over the decades). In the modern era, by its own current website, the University is dedicated to higher education and to human innovation, which of course involves the broadest possible dissemination / expression of what the University discerns. On its website the University quotes its 12th president, Dr Indira Samarasekera, for having said that the University should be "a cauldron of new discoveries and new ideas." Arguably, the within appeal provides a particular example of the "cauldron" aspect of the pursuit of human enlightenment on the grounds of the University.

[110] Like any other major institution, the University must be administratively focused on proper and effective expenditure of the funds it receives and administers while at the same time being foundationally focused on free passage of edification, opinion and information from persons possessing freedom of expression to persons possessing a freedom to listen. That passage of information is not always formal. It may even be a matter of unintentional communication or of undesired listening. But enlightenment is, arguably, the *raison d'etre* of a University. The University emphasized its need to spend its money wisely and where most needed, and, indeed, that position was found very persuasive by the chambers judge. But cost alone cannot be decisive. Charter rights and freedoms all 'cost money'.

[111] The main physical context of this appeal is also noteworthy. It is the Quad, which is a sizeable area of the north campus where students, faculty, staff and visitors move about. It is a classic forum for expression or for listening arguably comparable to the groves of academe at the time of Plato referred to in the Epistles of the 1st-century ad Roman poet Horace, '*Atque inter silvas Academi quaerere verum* [And seek for truth in the groves of Academe].'.

[112] Generally speaking, judicial notice could be taken (although the evidence certainly made out the fact) that the Quad is "well suited" to exercise of freedom of expression: compare ***Committee for the Commonwealth of Canada v Canada***, [1991] 1 SCR 139 at para 12. It was so used in 2015 and proposed to be so used in 2016. The principal relevance of this fact is that, if the University is subject to the *Charter*, it would not seem open to the University to argue that the Quad is not a *Charter* protected location within the University as discussed in ***Montréal (City) v***

2952-1366 Québec Inc, 2005 SCC 62 at paras 64, 73-77, [2005] 3 SCR 141, and ***Committee for the Commonwealth of Canada***.

[113] "*Quaecumque vera*" is also the motto of the University of Alberta. The University website states that the words are derived from the Latin Vulgate version of the Bible, the *Epistle of St. Paul to the Philippians*, Chapter 4, Verse 8 from which the words "*quaecumque sunt vera*" are drawn and which are presently translated as "whatsoever things are true". The words appear as well in the last line of the University grace, "*constantius sequamur quaecumque vera*" meaning, also according to the definition on the University's website "let us pursue more steadfastly whatsoever things are true". This motto *quaecumque vera* is literally carved in concrete on the campus and is etched into the script on the face of many university documents.

[114] The very word "university" also bespeaks the character of such an academic institution as well as the purpose of its environs and campus. While the direct definition of the term "university" in most dictionaries tends to the practical identification of its qualities as a place of study and research and learning, the relationship of the word to the foundational word "universe" connotes something even more majestic, heroic, and lasting. The "universe", as described by the *Oxford English Dictionary* means "all existing things; creation".

[115] A university campus, accordingly, should be hospitable to a pursuit of the truth about all things without a prescribed pre-definition of truth before the pursuit begins. That is particularly so for open areas where students, faculty and visitors mingle. As Thomas Jefferson pointed out in a letter to William Roscoe dated December 27, 1820 regarding "our new University":

> ... [T]his institution will be based on the illimitable freedom of the human mind. [F]or here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it. ...

[116] Also located on the University website is this quote from Robert Charles Wallace, *The University of Alberta: 1908 – 1933* (Edmonton: University of Alberta Press, 1933), pg. 14:

> A university is an institution for all time. It can only build soundly if it has wide vision and a far-seeing penetration. It cannot permit itself to be too seriously affected by the difficulties of the moment, whether in its spirit or its material well being. For it has a carryover value, which is one of its greatest assets: and to maintain this value a continuity of purpose is essential.

[117] In light of all the foregoing, which is substantiated by the record before this Court, a holding that the university is subject to the *Charter* in relation to *freedom of expression of students while on campus* under s 2(b) of the *Charter* cannot be said to be inimical to the very nature of the University or destructive of its capacities.

[118] That factor alone, however, does not determine the question whether section 32 of the *Charter* applies such as to create a Constitutional obligation on the part of the University to allow for freedom of expression by students on its grounds, wherever they are and whatever the content or mode of delivery. The University has several different campuses in the City of Edmonton. But this history of the University does help situate the question. Pro-Life would contend that it is determinative.

[119] The fact that the University by its rules, and by the public statements of its then president, and by the assertions (some might call them promises) on its website, does not mean it is improper for the University to argue, as here, that it is *conforming* with s 2(b) of the *Charter* without being *obliged* to do so *vis a vis* Pro-Life and its members.

[120] Pro-Life offers the syllogism that the University cannot say it supports freedom of expression in all its colors for students without being Constitutionally committed to doing so. That has the superficial appearance of logic, but it overlooks the fact that while all organizations and individuals may consider themselves morally obliged to respect the freedom of expression of others in light of the values reflected in our *Charter,* this does not translate automatically into a remediable Constitutional obligation to do so. Indeed, that moral obligation pre-dates the *Charter.*

[121] As pointed out by McIntyre J in ***RWDSU v Dolphin Delivery Ltd,*** [1986] 2 SCR 573 at paras 12-14:

> 12 As has been noted above, the only basis on which the picketing in question was defended by the appellants was under the provisions of s. 2(b) of the *Charter* which guarantees the freedom of expression as a fundamental freedom. Freedom of expression is not, however, a creature of the *Charter.* It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.
>
> 13 The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1664), and as well John Stuart Mill, "*On Liberty*" in *On Liberty and considerations on Representative Government* (Oxford 1946), at p. 14:
>
> > If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

14 Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy. The courts have recognized this fact. For an American example, see the words of Holmes J. in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919), at p. 630:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

[122] McIntyre J added, at para 15, that freedom of expression had constitutional status long before the *Charter*, citing ***Boucher v The King***, [1951] SCR 265 at 288:

> There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are

> exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

[123] McIntyre J also added reference to ***Switzman v Elbling***, [1957] SCR 285 where, significantly, Abbott J mentioned Duff C.J. in ***Reference re Alberta Statutes***, [1938] SCR 100 at pp. 132-33 who linked free expression to the preamble of our *Constitution Act 1867* saying:

> Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

[124] McIntyre J went on in ***Dolphin Delivery*** to discuss the scope of the *Charter* right finding that the picketing under consideration did not lose its status as exercise of freedom of expression merely because it was designed to put "economic pressure" on the employer. As for whether an injunction to stop the picketing sought by the employer was a breach of the *Charter*, he wrote:

> 34 It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. *Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the Charter will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a Charter right or freedom. In this way the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.* [Emphasis added]

In other words, since the early days of the *Charter,* it has been accepted that a *Charter* right or freedom may be involved in a factual situation without the party seeking to limit it being either an aspect of government or carrying out government action under s 32 of the *Charter*.

[125] Accordingly, it is only one part of the analysis to find that the *Charter* applies to action taken under statutory authority: ***Eldridge v British Columbia (Attorney General)***, [1997] 3 SCR 624 at para 21. Acting under statutory authority may be necessary but it is not sufficient: see ***Harrison v University of British Columbia***, [1990] 3 SCR 451.

[126] ***Harrison*** acknowledged that "the province exercises a significant measure of control" but Wilson J, dissenting, opined that

> 35 I agree that the government does not have a direct hand in the formulation or implementation of the policy of mandatory retirement at issue here. I also agree that fiscal control is not commensurate with control over those university matters directly involving the principle of academic freedom. However, for the reasons I expressed in McKinney, I do not think it necessary for government to have control over every aspect of a subordinate body in order to establish that government "controls" that body in a constitutionally significant sense. There may well be instances where it is in the best interests of government to assert only general control over a body and leave to that entity the discretion to deal with certain matters in ways it considers most appropriate to its own objectives. With respect to the universities, it is my view that the lack of government control over the mandatory retirement policy specifically in issue here and over matters specifically directed to the principle of academic freedom does not justify the conclusion that the *Charter* has no application to the universities.

The majority in ***Harrison*** however wrote at para 18:

> [...] While I would acknowledge that these facts suggest a higher degree of governmental control than was present in *McKinney*, I do not think they suggest the quality of control that would justify the application of the *Charter*. [...]

[127] As we follow the law, therefore, Pro-Life must also show that the University was effectively engaged in a form of governmental action when it set conditions under which Pro Life would be permitted to set up its displays in early 2016.

[128] Governmental action as part of a "public function" may be sufficient to bring that activity within the purview of government and attract *Charter* scrutiny: ***Greater Vancouver Transportation Authority*** at paras 15-16:

> 15 In *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624, La Forest J. reviewed the position the Court had taken in *McKinney v. University of*

> *Guelph,* [1990] 3 S.C.R. 229 (university), *Harrison v. University of British Columbia,* [1990] 3 S.C.R. 451 (university), *Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483 (hospital), *Douglas/Kwantlen Faculty Assn. v. Douglas College,* [1990] 3 S.C.R. 570 (college), and *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 S.C.R. 211 (college), on the issue of the status of various entities as "government". Writing for a unanimous Court, he summarized the applicable principles as follows (at para. 44):
>
> ... the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a [page310] non-governmental actor, correctly be described as "private". *Second, an entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities.*
>
> 16 Thus, there are two ways to determine whether the Charter applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the Charter. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*. [Emphasis added]

For present purposes, it is sufficient to consider whether the specific activity of the University in relation to the specific *Charter* freedom of expression *exercised by students on University campus property* is "governmental in nature". It is not necessary to decide whether the University more broadly is subject to judicial *Charter* scrutiny via s 32 of the *Charter*.

[129] In sum, the position for Pro-Life is that the University is bound under s 32 of the *Charter* to allow students to engage in freedom of expression on the Quad, and therefore that the imposition

of Security Costs on Pro Life was an unconstitutional restriction of that freedom possessed by Pro-Life, Nicol and Wilson. They cite ***Pridgen, R v Whatcott***, 2012 ABQB 231 at paras 15, 20-37, 538 AR 220, and ***Wilson v University of Calgary (Board of Governors)***, 2014 ABQB 190. Those cases are illuminating but not dispositive.

[130] ***Pridgen*** as an authority in the present situation is complicated by the fact that McDonald JA concluded that administrative law principles could in his view resolve the point and it was not necessary to engage in a *Charter* invocation. O'Ferrall JA also found it possible to step past the *Charter*. Paperny JA, in ***Pridgen***, however, noted the *Post-Secondary Learning Act*, SA 2003, c P-19.5 and agreed, at para 63, with the chambers judge there that the University of Calgary was acting governmentally in its regulation of expression on the campus as against Pridgen. She went on to say at para 66 that "*McKinney* did not rule out *Charter* applicability on university campuses for all purposes."

[131] After tracking from ***Dolphin Delivery*** and ***Greater Vancouver Transportation Authority***, Paperny JA said in ***Pridgen*** as follows:

> 78 Despite these statements, the task of determining who is a government actor or what is a government act remains a challenge. A review of the authorities yields five broad categories of government or government activities to which the Charter applies.
>
> 1. Legislative enactments;
> 2. Government actors by nature;
> 3. Government actors by virtue of legislative control;
> 4. Bodies exercising statutory authority; and
> 5. Non-governmental bodies implementing government objectives.
>
> The categories can be described as follows: [...]

[132] This description of categories of government or government activities yielded the following later conclusions by Paperny JA:

> 104 That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed. The rather more fine distinction the University seeks to draw here is that it is not a "specific governmental objective", which it says *Eldridge* requires. I find this distinction to be without merit. *Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSL Act*, while couched in broad terms, are tangible and clear.

> 105 Applying the *Eldridge* analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion. The issue is whether in disciplining students pursuant to authority granted under the *PSL Act*, the University must be *Charter* compliant. The statutory authority includes the power to impose serious sanctions that go beyond the authority held by private individuals or organizations. Those sanctions include the power to fine, the power to suspend a student's right to attend the university, and the power to expel students from the university: *PSL Act*, section 31. *Accordingly, Charter protection for students' fundamental freedoms, including freedom of expression, applies in these circumstances. This goes to the fundamental purpose of the Charter as noted by Wilson J. at 222 of her dissent in McKinney, where she stated that those who enacted the Charter "were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role".* [Emphasis added]

[133] To be precise, then, Paperny JA's decision in ***Pridgen*** specifically found the University of Calgary's actions towards Pridgen fell within the 4th category described by Paperny JA as "exercising statutory authority" although she hinted, in *obiter*, support for the application of what she called the "***Eldridge*** category" of "implementing government objectives". Accordingly, and *strictissimi juris*, the *ratio decidendi* of Paperny JA centred on the position of ***Pridgen*** as a *target* of University action (thus also illuminating the choice of the other judges in ***Pridgen*** to see this in administrative law terms) and not on whether the University was implementing government objectives.

[134] That said, the University here disputes Paperny JA views stating:

> 105 ...The Preamble to the PSLA does not rise to the level of a specific government objective. Relying on a general, implied requirement in a preamble that applies to all public post-secondary institutions in Alberta would sweep nearly every aspect of the University and other post-secondary institutions under the *Charter*, contrary to the Supreme Court's decision in *McKinney*. (RF at para 105, underlining emphasis in original)

[135] On the other hand, Strekaf J (as she then was) being the chambers judge at the lower level in ***Pridgen*** 2010 ABQB 644 at paras 59-63, 497 AR 219 opined that the University of Calgary was carrying out governmental policy, saying, *inter alia*, as follows:

> 63 In this context, I find that the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta, thus bringing the facts of this case into line with *Eldridge*. The structure of the *PSL Act* reveals that in providing post-secondary education, universities in Alberta carry out a specific government objective. Universities may

> be autonomous in their day-to-day operations, as both universities and hospitals were found to be when dealing with employment issues involving mandatory retirement, *however, they act as the agent for the government in facilitating access to those post-secondary education services contemplated in the PSL Act, just as the hospitals in Eldridge were found to be acting as the agent for the government in providing medical services under the Hospital Insurance Act*, R.S.B.C. 1979, c 180 (now R.S.B.C. 1996, c. 204). [Emphasis added]

That is also the position which is pressed in particular by Pro Life, citing inter alia s 30.1 of the *Code of Student Behaviour*: see below.

[136] In entertaining the conclusions of Paperny JA and Strekaf J that the University is subject to s 32 of the *Charter* in relation to its regulation of freedom of expression by students on campus grounds, we hasten to clarify that we are not dealing with the topic of freedom of expression by *academic staff*. In her decision in ***Pridgen***, Paperny JA made broader observations in rejecting the contention that to subject the University to *Charter* scrutiny as to freedom of expression was a threat to academic freedom. She found those freedoms should work together.

[137] It is not necessary to delve deeply into Paperny JA's illuminating discussion about why academic freedom and freedom of expression should not be conceptually competing values. It suffices to note that the position of staff and students is quite different. It can be understood why the University being subject to a *Charter* enforceable obligation as to freedom of expression relating to the academic staff of the University might be problematic. That idea was resisted by the Universities in ***Pridgen*** as well as here. The academic staff *have* contractual rights and for that matter are eligible for rights under the relevant statutes, notably the *Alberta Human Rights Act*, RSA 2000, c A 25.5 (as the University later concedes as to students as well).

[138] To show the difference between a student and a professor, consider the situation of an academic who is on staff to teach courses A to D and then refuses to do so and insists on teaching course X. That scenario presents issues that are better left for another day: compare ***McKinney v University of Guelph***, [1990] 3 SCR 229 at p 275. That is also a different question from the one before this Court which has to do with the exercise of freedom of expression of students in a physically suitable marketplace of ideas controlled by the University. As the BCCLA points out, *state* University grounds are not immune to their 1st Amendment: ***Healy v James***, 408 U.S. 169 (1972) at 180 cited by Paperny JA in ***Pridgen*** at para 115.

[139] To some extent the position for Pro-Life appears to relate the imposition of s 32 *Charter* obligations on the University to its argument elsewhere about the existence of a contractual relationship with the University: AF at paras 43 and 55. If that is Pro-Life's position, I do not accept it. In my view, the test for s 32 resides in the analysis in ***Greater Vancouver Transportation Authority*** and rests on the ability to identify an area of government policy and objectives that the University can be said to be implementing for the state more broadly and not just for internal

University objectives. To that end, the proven existence of a contractual right might or might not be relevant to the analysis.

[140] The BCCLA refers to language in s 45.1 of the *School Act*, RSA 2000, c S-3 as well as to the *Post-Secondary Education Act*, as discussed in ***Pridgen***. The BCCLA contends that the statutory context in Alberta distinguishes this case from that of ***Lobo v Carleton University***, 2012 ONCA 498 at para 4, 265 CRR (2d) 1. ***Lobo*** is invoked by the University here for the proposition stated, at para 4 in ***Lobo***, that "when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*".

[141] The facts in ***Lobo*** were that the students appear to have ignored a University request to set up their demonstration in a less frequented location and, when the University had them charged with trespassing and then barred them from placing material at any campus location, they sued the University for "failing to allocate the desired space for the appellants to advance their extra-curricular objectives". It was the striking-out of that lawsuit that got to the Ontario Court of Appeal. The BCCLA contends that ***Lobo*** turned on the legislative history of Carleton University. There is substance to the suggestion that ***Lobo*** is not of penetrating effect here inasmuch as the issue there was a strikeout motion. In any event, it is not binding here.

[142] The BCCLA also refers to ***BC Civil Liberties Association v University of Victoria***, 2016 BCCA 162 at paras 21-25, 31-33, 404 DLR (4th) 750 which took a somewhat different path but concluded in key passages, drawing from ***Eldridge***, as follows:

> 31 The Court noted two important points with respect to the scope of the applicability of the *Charter* to private entities in such circumstances:
>
> > 43 ... [T]he mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*.
>
> And:
>
> > 44 ... [A]n entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity

> performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.
>
> 32 Applying the criteria *Eldridge* suggests we must use, I cannot find the specific impugned acts of the University of Victoria to be governmental in nature. The government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom, s. 43(1) of the Education (No. 2) Act 1986 (UK), c. 61, which imposes an obligation on universities and colleges to:
>
> > ... take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.
>
> 33 The *University Act,* by contrast, does not describe a specific governmental program or policy which might have been affected by the impugned decisions and there was no evidence before the judge of any legislation or policy that does so. There is no basis upon which it can be said on the evidence that when the University regulated the use of space on the campus it was implementing a government policy or program.

[143] The University relies on these observations to suggest that in order to justify a finding of governmental activity by it in relation to controlling freedom of expression by students on the grounds of the University, there must be a "direct" and "precisely defined connection" between what the University is doing and the governmental objective. The University cites ***Yashcheshen v The University of Saskatchewan***, 2018 SKQB 57 at paras 27 to 34, [2018] SJ No 75 (QL) as another example of the careful assessment of what the *Charter* may reach in dealing with student admission standards. In my view, that case is directed to academic management and to student qualification for college entry and not to freedom of expression.

[144] In response, the BCCLA contends, in a sense, that the University approach gives s 32 of the *Charter* a pinched and technical reading (and thereby a narrowing and technical reading of freedom of expression) citing Dwight Newman, "*Application of the Charter to Universities' Limitation of Expression*", (2015) 45 R.D.U.S. 133 at p 147 [IF p 6, para 19]. In addition, the BCCLA invites this Court to adopt the view taken of the 1st Amendment of the United States Constitution that freedom of expression extends to "the campuses of state universities": ***Widmar v Vincent***, 454 US 263 at p 274 (1981).

[145] In its reply factum to the BCCLA intervention factum, the University says that the concept of "delivery of education" is not sufficiently clear to help determine how s 32 of the *Charter* should apply to the situation. I tend to agree on that point. There is a need for judicial discipline and, for that matter, some degree of judicial humility, in assessing what should be within the reach of

judicial review via s 32 of the *Charter*. The University also says the concept of "delivery of education" was not something which was beyond the ken of the authors of decisions such as ***McKinney*** where the majority did not elect to take the wider view of Wilson J's dissenting opinion.

[146] The following appears to summarize the University's position:

> [104] Nothing in the University's governing legislation requires it to provide a forum for extracurricular expression by students. There is no specific government direction that such a policy be carried out by post-secondaries institutions in Alberta. While the University may choose to provide supports for extra-curricular activities by its students, it does not attract Charter scrutiny merely in doing so. This does not mean, however, that students are without protection for fundamental human rights. The University is subject to the *Alberta Human Rights Act* like any other private or statutory body in Alberta.
>
> ...
>
> [106] This case does not relate to the imposition of discipline against a student. It does not relate to the potential or actual exclusion of a student from an academic course or program, nor to a decision relating to research, teaching, or academics. As in *BCLA* and *Lobo,* the powers being exercised here go no further than those powers held by any owner of land: the ability to make rules about who can use the land and to place conditions on that use, including the requirement that the actual costs associated with ensuring safety and security are passed on to that user. Under a proper *Eldridge* analysis, the *Charter* should not apply to this Security Cost decision. [RF at paras 104 and 106]

[147] The reference to the *Alberta Human Rights Act* is interesting. It is not entirely obvious why that enactment's existence should speak against recognizing a s 32 *Charter* application to freedom of expression exercised by students on a University campus. The rights and protections of that Act are not the same as those in the *Charter*.

[148] Tracking through all of the materials leads ultimately back to the crucial question, which is whether the University's regulation of freedom of expression by students on University grounds should be considered to be a form of governmental action. In my view, this specific area of action should be found to be under s 32 of the *Charter* for five overlapping reasons:

(1) The education of students largely by means of free expression is the core purpose of the University dating from its beginnings and into the future. It is a responsibility given to the university by government for over a century under both statute and the *Constitution Act, 1867*. It is largely funded by government and by private sector donors who likewise support and adhere to the core purpose of the University. Education of

students is a goal for society as a whole and the University is a means to that end, not a goal in itself.

(2) The education of students is the acknowledged core purpose of the University even by the University's own view of its mandate and responsibility. The University recognizes that society of Alberta, Canada and the World benefits from higher education and its production of wisdom, innovation and associational harmony and peace. In a sense, education of a younger generation is the primary duty of the generations that came before. Again, the University is a method for the older generations to pass both knowledge and values down to the younger generations.

(3) The ability of students to learn and to debate and to share ideas is not only a central feature of the core purpose of the University, but also the grounds of the University are physically designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space. This involves infrastructure and land holdings granted to the University and / or sustained by money from many sources. These resources of infrastructure and land holdings are, above all, designed to permit interaction, assemblies, for a, and the ancient characteristics of educational exchange.

(4) Recognizing the *Charter* as applicable to the exercise of freedom of expression by students on the campuses of the University is a visible reinforcement of the great honour system which is the Rule of Law. The core values of human rights and freedoms, democracy, federalism, Constitutionalism, equality and respect for minority interests are continually reinforced and invigorated where it is apparent that there are no places where the government is present by proxy and yet the *Charter* writ does not run.

(5) The recognition of the University's being subject to s 32 of the *Charter* in relation to freedom of expression by students on University grounds does not threaten the ability of the University to maintain its independence or to uphold its academic standards or to manage its facilities and resources, notably in light of the degree of deference available to the University under the ***Dore / Loyola / TWU1 / TWU2*** analysis as discussed below.

[149] In the result, I conclude that the University's dealing with the request of Pro-Life to carry out an event to demonstrate and express as done in 2015 was governed by the freedom of Pro-Life and its members to express under s 2(b) of the *Charter*. So that ground of appeal for Pro-Life, albeit not as expressed by Pro-Life, is accepted.

[150] The second ground of appeal of Pro-Life as to the Security Costs Decision is expressed by Pro-Life as follows:

The common law right to freedom of speech and freedom of expression at the University of Alberta that [sic] protects the Appellants

[151] The brief submissions for Pro-life under this heading seem to draw largely from the concurring opinion of O'Ferrall JA in ***Pridgen.*** But, once again, Pro-Life would convert this contention into an effective basis for Pro-Life proceeding against the University on the premise that there is a contractual obligation of the University that backs up this common law right.

[152] For reasons outlined above, I am not persuaded that there is such a contractual obligation and as such the University's Code would be able to override any common law rights of Pro-Life to the extent those rules do so. This ground of appeal is rejected.

[153] The third ground of appeal of Pro-Life as to the Security Costs decision is expressed by Pro-Life as follows:

It was unreasonable for the Respondent to impose a $17,500 security fee on the Appellants as a prerequisite for permission to communicate with their fellow students through the holding of an event similar to that held in 2015.

[154] The chambers judge's approach to this aspect of the matter was elucidated as following the guidance of the Supreme Court in ***Doré*** v ***Barreau de Quebec***, 2012 SCC 12, [2012] 1 SCR 395 She said, *inter alia* as follows:

> 54 In *Doré*, the Supreme Court held that the reasonableness analysis in the *Charter* context centres on proportionality, ensuring that the decision interferes with the relevant *Charter* guarantee "no more than is necessary given the statutory objectives." A decision that disproportionately impairs the guarantee is unreasonable, but if it reflects a proper balance of the mandate with *Charter* protection, it is reasonable (at para 7).
>
> [...]
>
> 57 It was reasonable for the University to require the Applicants to participate in a security assessment. The University is responsible for the "appropriate management, government and control of the university buildings and lands" (PSLA s. 18). As owner of the lands, they also have a duty to take reasonable care to ensure that individuals on its lands will be reasonably safe. The University cites ss. 5-6 of the Occupiers' Liability Act, RSA 2000, c O-4. The University is therefore required to assess risks arising from its operations or activities on its lands in order to ensure all participants' safety.

> 58 It was also reasonable for the University to have UAPS prepare the security assessment given their specialized expertise and firsthand experience with the 2015 event.

[155] The chambers judge went on to examine the University's explanation for its anticipated costs. She accepted that there were "important reasons for the need to pass along costs of security to Student Groups", adding:

> 64 The decision must also be considered in the context of University funding and the resources available to the University. Universities are generally funded through base government grants, specific grants, and tuition fees. Tuition fees are regulated by government and have in recent years been subject to a 'freeze': *Public Post-secondary Institutions Tuition Fees Regulation,* Alta Reg 273/2006. As the Supreme Court of Canada has recognized, it is a closed system with limited resources: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 284. Expenditures in one area will mean fewer resources available in another area.

[156] The chambers judge found that she did not have evidence before her to accept Pro-Life's contention that it was, in effect, being singled out for restriction. Applying ***Agraira***, there is no error on the part of the chambers judge in relation to that specific finding. I am not persuaded that the University's approach was colourable although, as explained below, there is a factor in the 'section 1 analysis' related to these circumstances. In the end, the chambers judge wrote:

> 67 The decision to require the Applicants to pay the cost of security for their event was consistent with the Student Groups Procedure and was based on a security assessment that is well supported by the Record. The University recognized that the event was a form of expression and expressly stated that it values the expression of diverse points of view. The decision balanced this against the University's obligation to ensure safety and security and the financial impact on University operations, including other University programs, if student groups were not required to pay the cost. Passing along the actual costs of security does impact UAlberta Pro-Life's exercise of freedom of expression. That impact had to be balanced against other interests.
>
> 68 It also arguable that another reasonable approach would be to require UAlberta Pro-Life be responsible for only a portion of the costs, since the anticipated counter protesters contribute to the risk identified in the assessment. While that may have been another possible outcome, the decision that UAlberta Pro-Life pay the full cost falls within the range of possible acceptable outcomes defensible in respect of the facts of this case and the law.

[157] Pro-Life argues that this analysis does not fit the ***Dore*** principles, let alone what the BCCL argues to be the evolution of the ***Dore*** principles of reasonableness and proportionality in ***Loyola***

High School v Quebec (Attorney General), 2015 SCC 12, [2015] 1 SCR 613, ***TWU1*** and ***Trinity Western University v Law Society of Upper Canada,*** 2018 SCC 33, [2018] 2 SCR 453 (***"TWU2"***). Pro-Life say the effect of the Security Costs Decision was to suppress their exercise of freedom of expression absolutely. They argue that the chambers judge did not approach the review of that decision against a form of 'section 1' limit on a *Charter* freedom. They say the chambers judge simply found the University position was reasonable in practical terms from the University's perspective without considering further whether it was proportional or minimally infringing in a *Charter* context.

[158] In particular, Pro Life says that, in acknowledging the existence of alternatives, the chambers judge at para 68 of the Reasons was effectively recognizing that the University had not shown that it was acting in a proportional way or minimizing the injury to the expression freedom in question. The University was not called on, for example, to show 'undue hardship' as would apply to an equality argument and accommodation. Pro-Life reads the chambers judge's conclusion to rest simply that the University's decision to place a condition on Pro-Life's expression was within the scope of reasonableness such that the decision withstood judicial review.

[159] In my respectful view, the chambers judge did fall into error in this respect. She essentially applied a utilitarian approach that did not recognize the onus on the University, and did not apply the correct criteria. Even if ***Dore*** opened a form of *Charter* s 1 analysis to fit with administrative law principles about deference, ***Dore*** did not, in my view, substitute a test of mere arguable reasonableness for demonstrable justification in a free and democratic society as adapted under ***Dore.*** This error cut both ways. Both Pro-Life's position and that of the University did not get the complete evaluation which was necessary under the proper test with the burden properly allocated.

[160] It is useful to first identify the applicable test in law following from ***Dore***, ***Loyola*** and ***TWU1*** and ***TWU2***, and then turn to point out how the chambers judge's approach also limited the University's position as well as Pro-Life's on the flip sides of the same topic.

[161] A string of authority started with ***Slaight Communications Inc v Davidson,*** [1989] 1 SCR 1038 at pp 1077-78. But ***Slaight*** was departed from for the purposes of administrative law in ***Dore*** at paras 25 - 58, and ***Loyola High School*** at paras 39-40. To be consistent with the *Charter*, the limitation must, in my view, be demonstrably justified in a free and democratic society. Although that expression about demonstrable justification does not figure prominently in the cases from ***Dore*** onward, it is not erased from the *Charter* as linguistic frill. As pointed out in ***Loyola,*** at para 40, "*Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test"".

[162] Furthermore, and of key importance, the onus on proving the 'section 1 limit' on expression freedom even under administrative law should be on the state agent as it is the exercise of power by an emanate of the state. It may well be that as state agents go, the University would be one of the best regarded and best trusted. But the principle under ***Dore*** and later cases should not be variable on the seeming repute or seeming good intent or reliability of the state agent.

[163] ***Dore*** and other cases confirm that the exercise of discretion must conform with the *Charter*. What ***Dore*** did was offer the view that the required conformity is subject to an adaptation --, for administrative law purposes with its concern about deference -- of the s 1 analysis which is applied to *statutory* intrusions on a *Charter* protection. As mentioned, there is both 'proportionality' and 'reasonableness' test as described in ***Dore*** and later cases, notably ***TWU2*** at paras 30-31, and ***TWU1*** at para 79.

[164] This Court's decision in ***CCBR1*** - released in April, 2018 and thus prior to the ***TWU1*** and ***TWU2*** decisions in June, 2018 - involved in a situation where a transit manager's decision under review had not really grappled with the *Charter* issues. Slatter JA with creditable foresight noted ***Greater Vancouver Transportation Authority***, ***Dore*** and ***Loyola***, stating at paras 58-60:

> 58 The *Doré* test was applied in 2015 in *Loyola High School v. Quebec (Attorney General)*, a case that concerned freedom of religion:
>
> > 40 A *Doré* proportionality analysis finds analytical harmony with the final stages of the Oakes framework used to assess the reasonableness of a limit on a Charter right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and Doré require that Charter protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. *As such, Doré's proportionality analysis is a robust one and "works the same justificatory muscles" as the Oakes test: Doré, at para. 5.*
>
> *Loyola High School* confirmed that the *Doré* test is contextual and dependant on the facts underlying the decision.
>
> 59 A helpful example of the application of *Charter* values to advertising on municipal buses is the 2016 decision in *American Freedom Defence Initiative v. Edmonton (City)*. In this case, the City rejected advertisements opposing honour killings, which were linked to a website calling for anti-Muslim actions such as profiling, stopping immigration, and surveillance. The decision was made under a municipal policy requiring all advertising to be of a moral and reputable character and compliant with the standards of the Advertising Standards Council. The legal challenge was to the policy itself, not just the administrative decision denying this particular advertisement. The reviewing judge applied the Oakes test, and found that the policy was demonstrably justified in a free and democratic society.
>
> 60 The reviewing judge in American Freedom Defence Initiative relied on the Canadian Code of Advertising Standards as a well-publicized industry standard that provided context to the analysis. The municipal policy was sufficiently clear to

> constitute a limit "prescribed by law". Even though the advertisement only referred to honour killings, it was appropriate for the City to consider the contents of the related website. As in *Greater Vancouver Transportation*, the municipal objective of providing a safe and welcoming public transit system was sufficiently pressing and substantive. Further, the *policy met the tests of rational connection, minimal impairment, and the balancing of benefits with deleterious effects*. In a multicultural society advertisements that disparaged identifiable communities could properly be rejected. [Emphasis added]

[165] This expression of the test was, in my view, consistent with ***TWU1*** and ***TWU2*** which, as said, came soon thereafter. In ***TWU1*** at paras 80-82, the Court stated:

> 80 The framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality -- rather, it is a robust one. As this Court explained in *Loyola*, at para. 38:
>
> > The Charter enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the Charter in contexts where Charter rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality". [Emphasis added; text in brackets in original.]
>
> For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision proportionately balances these factors, that is, *that it "gives effect, as fully as possible to the Charter protections at stake given the particular statutory mandate" (Loyola, at para. 39)*. Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. *Simply put, a decision that has a disproportionate impact on Charter rights is not reasonable.*
>
> 81 The reviewing court must consider whether there were other reasonable possibilities that would give effect to Charter protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the Charter protection least. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (Doré, at para. 57; Loyola, at para. 41, citing RJR-MacDonald Inc. v. Canada

(Attorney General), [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

82 The reviewing court must also consider how substantial the limitation on the Charter protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the Oakes framework used to assess the reasonableness of a limit on a Charter right under s. 1: minimal impairment and balancing" (Loyola, at para. 40). In working "the same justificatory muscles" as the Oakes test (Doré, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right. [Emphasis added]

And in ***TWU2*** at paras 35-36, the Court states:

35 Under the *Doré/Loyola* framework, an administrative decision which engages *a Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola,* at para. 32). The reviewing court must be satisfied that the decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate (*Loyola*, at para. 39). In other words, *the Charter protection must be "affected as little as reasonably possible in light of the state's particular objectives*" (*Loyola*, at para. 40). When a decision engages the *Charter,* reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

36 The reviewing court must consider whether there were other reasonable possibilities that would give effect to Charter protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes (Doré, at para. 57; Loyola, at para. 41, citing RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 160). If there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes. The reviewing court must also consider how substantial the limitation on the Charter protection was compared to the benefits to the furtherance of the

> statutory objectives in this context (Doré, at para. 56; Loyola, at para. 68). In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not in issue, the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the Charter right. [Emphasis added]

[166] In the light of those authorities, it is clear, in my view, that the chambers judge engaged with the 'section 1 limit' analysis on the basis of the unelaborated language of ***Dore.*** It was that language which ***Loyola*** and the later cases was intended to explain. With respect, ***Dore*** was expressed in elastic terms after which incorrect readings of ***Dore*** exposed *Charter* rights and freedoms to an inadequate level of protection. In sum, the chambers judge here applied the wrong test for a 'section 1' limit, and she failed to allocate the 'demonstrably justified' onus of proof correctly in relation to its application. In addition, there are specific points covered below which are also, in my view, indications of error in how she applied the test.

[167] Before addressing those further subjects, it is appropriate to cover one other point which is an implication of the attempt to work 'section 1 analysis' into administrative law. That point is whether the process characteristics of judicial review might themselves enlarge the University's margin of appreciation in light of the heavy emphasis on discretion, and on the suggestion that as long as there is a right to seek judicial review then errors on the part of the state-serving actor / decision maker are not necessarily of concern as they must also be reasonable.

[168] In my view, it would be "cold comfort" for a student whose freedom of expression has been trimmed that he might later be able to try to persuade a judicial review judge that the restriction was unjustified. This question arose before ***Dore*** in ***Epilepsy Canada v Alberta (Attorney General)***, 1994 ABCA 246, 155 AR 212, dealing with the *Public Contributions Act*, RSA 1980 c. P-26. In seeking to allow overbroad language of restriction to stand, the government argued that the expresser could go to court if he was not happy. Côté JA wrote, at paras 36-37:

> 36 *The respondent says that administrative law rules cut down ostensible statutory discretions and bar their exercise on irrelevant grounds.* Even assuming that there are some things which would be demonstrably irrelevant here, that would be cold comfort. It would mean that one could not solicit without seeking government or municipal permission, and then moving for judicial review akin to *certiorari* and *mandamus* in Queen's Bench, and then succeeding in Court. Those remedies are discretionary, they put the onus of proof on the applicant, and there is no duty on the municipal or government official to give reasons for his refusal. I cannot call that the minimum interference with a Charter-protected right.
>
> 37 It is also argued that there is a right of appeal under this Act. But it is to a group who need not be legally trained, and are appointed ad hoc by the Minister to whom the government official being appealed reports, and there are few set criteria for the initial refusal, and none for the appeal. I cannot see why the appeal body

> would not accord the official appealed from as great a scope of discretion as what the Act seems to give him. [Emphasis added].

[169] The existence of a remedy of judicial review, in our opinion, does not of itself make slippage on the 'section 1 analysis' less worrisome. Better it would be, in my view, to hold fast to the burden of proof on the state agency even if the standard of review would be correctness on the *Charter* definition elements. It follows from this that the chambers judge's decision was in error. Also, since the chambers judge's decision was erroneous on a Constitutional legal test, it is reviewed for correctness and it is reviewable as incorrect.

[170] In this respect, the Supreme Court in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 57 recently referred briefly to ***Dore*** and appeared to distinguish review of the "effect" of a judicially reviewable administrative ruling from a specific finding of unconstitutionality of a statute on the basis of *Charter* inconsistency. The Supreme Court said "correctness" applied to the latter. The Court, however, did not state the standard of review for "effect" cases, and did not erase the above passages from ***TWU1*** and ***TWU2***. Significantly, the Court also reinforced, at para 53 and elsewhere in their reasons, that correctness review applies to any determination of law linked to respect for the rule of law namely "questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies". I read, therefore, ***Vavilov*** as being consistent with the approach taken here.

[171] Moving then to specific alleged errors in the application of the s. 1 justification for an infringement of Pro-Life's freedom of expression, there was raised in the debate before this Court a factor which might be called the factor of 'involuntary audience'. Consideration of 'involuntary audience' is properly considered during the section 1 analysis. Here the involuntary audience was identified in the evidence as people who would find the displays of Pro-Life to be unsettling and disturbing. On review of the materials, I am satisfied that the content of those displays would be regarded as unsettling and disturbing to the majority of persons potentially exposed to it. The University felt that to be so, and the chambers judge saw no error in that.

[172] An example of the situation of involuntary audience is arguably exemplified in cases such as ***Bonitto v Halifax Regional School Board,*** 2015 NSCA 80 at paras 53-55, 62, 69-89, 388 DLR (4th) 608, leave denied (2016) [2015] SCCA No 379 (QL) (SCC No 36644). In that case, the Court rejected the argument that children *en route* to school should be subjected to a "midway" of religious expression in order to permit freedom of religious expression by at least one parent in that location.

[173] In ***Ernst***, the Court did not find it necessary to address whether a decision not to 'listen' was a itself a violation of freedom of expression, a point mentioned in *obiter* in 2014 ABCA 285 at para 6, 580 AR 341. This case does not make it necessary for this Court to address whether refusal to listen is a potential breach although, in a sense, the facts give rise to that question. If a person who is a potential audience of expression sticks their fingers in their ears while going by,

it would not be a breach of freedom of expression by the University unless there is some variant on a 'positive' right: see below.

[174] The question whether there may be a countervailing freedom of the involuntary audience arose in the arguments in this case, notably on the basis that the displays of Pro-Life were said by some to be of a quality that people had the right not to be subjected to: compare ***CCBRI*** for discussion of the display of such photos as appeared here on public transit as a contextual factor. Pro-Life places stress on s 30.1 of the *Code* in the following terms:

> The University is defined by tradition as a community of people dedicated to the pursuit of truth and advancement of knowledge, and as a place where there is freedom to teach, freedom to engage in research, freedom to create, freedom to learn, freedom to study, freedom to speak, freedom to associate, freedom to write and to publish. There is a concomitant *obligation upon all members of the University community to respect these freedoms* when they are exercised by others. For these freedoms to exist, *it is essential to maintain an atmosphere in which the safety, the security, and the inherent dignity of each member of the community are recognized.* [Emphasis added]

[175] That statement of policy is not a one-way rachet. A full evaluation of the form of 'section 1' analysis applicable to any restriction of Pro-Life's freedom of expression could well permit the University to make a case for how its approach to the problem was sensitive not only to the expresser's freedom but also the freedom of any involuntary audience not to be disturbed. That said, there is a risk that crediting a factor of a right not to be exposed to the expression due to its potential to raise conflict would risk sliding towards a technique to suppress unpopular speech.

[176] BCCLA refers, for example, to ***Dr Martin Luther King Jr Movement Inc v City of Chicago***, 435 F.Supp 1295 (1977), ***Central Florida Nuclear Freeze Campaign v Walsh***, 774 F 2d 1515 (1985) and ***Gay and Lesbian Services Network Inc v Bishop***, 832 F Supp 270 (1993) as examples of cases where our neighbours to the south expressed concern about turning the unpopularity of certain forms of expression into a basis to call that expression provocative, and thereby to assert that the cost of permitting the expression should be cast on the expresser. BCCLA also mentions ***Forsyth Cnty v Nationalist Movement***, 112 S.Ct 2395 (1992), but there Blackmun J did concede that "Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit."

[177] It is not appropriate to burrow deeply into law of the United States 1st Amendment. It is clear that the Constitutional traditions there have a resonance in the social space of the United States that is of enormous power. As explained in ***Christian Legal Society Chapter of the University of California, Hastings College of the Law, AKA Hastings Christian Fellowship . Martinez (Leo P.) et al.***, (June 28, 2010) 561 U.S, the actions even by a University to conditionalize free speech must meet a strict scrutiny:

> First, in traditional public forums, such as public streets and parks, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U. S. ___ (2009) (slip op., at 6).

[178] American cases go on to consider such factors as topic neutrality and risk. ***Christian Legal Society*** goes on to point out that where a "limited public forum" is created by a university in an area not previously given over to free speech, the conditions the university sets for the use of that forum must not only be content neutral but must not focus on the risks that might be thought to be linked to the content. Citing ***Rosenberger v Rector and Visitors of Univ. of Va.***, 515 US 819, the Court in ***Christian Legal Society*** adds that "Once it has opened a limited [public] forum, the State must respect the lawful boundaries it has itself set." 515 US at 829. The University may "not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint."

[179] Similarly, and not for nothing, do our neighbours to the south insist on "strict scrutiny" of content based inroads on their analogous freedom: compare ***United States v Playboy Entertainment Group, Inc.***, 529 US 803 at 813 (2000); ***Citizens United v. Federal Election Commission***, 558 US 310, 130 S Ct 876 (2010); ***Brown, Governor of California v Entertainment Merchants Association***, 564 US (2011); ***Sorrell, Attorney General of Vermont v IMS Health Inc.*** 564 US (2011). As colourfully pointed out by Holmes J dissenting in ***Lochner v New York***, 198 US 45, 75 (1905), "The Constitution does not enact *Mr. Herbert Spencer's Social Statics*. It does enact the First Amendment." See also ***Derbyshire County Council v Times Newspapers Ltd*** [1992] UKHL 6; [1993] AC 534 at 547–549 per Lord Keith and ***Tajjour v New South Wales*** [2014] HCA 35 at footnote 67, invoking, *inter alia*, Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, c 11 at 151–152.

[180] All that said, it is not appropriate to immigrate American Constitutional notions into this case. The American case law is interesting, but Canadian law is robust enough to figure things out on its own. As said by L'Heureux-Dube J in ***Committee for the Commonwealth*** at para 87: "we should be particularly vigilant to formulate a "made in Canada" standard, that is sensitive to the legal, sociological, and political characteristics which inspired the Canadian Charter of Rights and Freedoms and its subsequent development."

[181] For example, where a state "action prevents individuals from lawfully expressing themselves because their expression might provoke or enrage others, freedom of expression as guaranteed by s. 2 (b) is also implicated": see ***Fleming v Ontario***, 2019 SCC 45 at para 66, [2019] SCJ No 45 (QL). On such occasions, the debate moves to s 1 of the *Charter* and whether reasonable limits meeting that provision have been made out.

[182] There is a flavor of topic regulation in what the University's decision makers said here and in what the chambers judge upheld. Pro-Life condemned this reasoning as 'victim blaming'. While I do not agree that victim blaming is what is involved, there appears to be error here by the

University in imposing on Pro-Life the exclusive burden of overcoming problems arising from the fact that their expression might attract an adverse response.

[183] One element of that here was that the cost calculation by the University appears to have been grounded upon the University's calculation of how much it had to pay to cover the costs of the 2015 event. Whether or not the figures are right, it cannot be said that Pro-Life should be held 100% responsible for costs that future events might generate. Although the University says the concept of the heckler's veto is misplaced here, the position for the University escalated the status of potential objectors to not merely being on par with the expresser, but above the expresser's position.

[184] It might, for example, involve costs for the University to set up fencing that would prevent direct interaction between the two competing forms of expression. But with the appropriate onus, the University should have to explain why with its standing UAPS staff and being likely possessed of or having access to mobile barriers for crowd control for peaceable occasions it would fall to Pro-Life to defray costs entirely at the figure provided. It should not have to fall to Pro-Life to lead evidence on facts within the knowledge of the University about its available assets. On this topic, I detect error in the chambers judge's decision as well.

[185] Another element of error arises from the position expressed by Dean Everall that the content of the expression of Pro-Life was "designed to be controversial" and to "evoke a vigorous and emotional response" and was seeking "public controversy". That may or may not be so, but it was not a compelling consideration to justify complete suppression of the event by a costs barrier as imposed here.

[186] This is not to say that the University might not be able to propose an alternative whereby the pamphlets or displays would be visible to passersby to a less provocative degree. The University might have to link such a condition to its providing, at primarily University expense, appropriate security for the revised event. Compromises on both sides are in order.

[187] In this regard, the suggestion of Pro-Life that it was and is targeted by University disapproval for its message does find some support even in the Factum of the University. Although the University suggests that its decision was not ultimately grounded in content, the Factum of the University does contend that Pro-Life is intentionally seeking controversy and should accordingly bear the costs [see RF p 31 paras 117-121]. This is not to suggest that it is offside for the University to contend that the design and manner of their expression is relevant to the effort to strike a proper balance. But it is not unreasonable for both sides to be realistic about what is involved.

[188] As this Court noted in ***CCBR1***, the tone and content of the message is relevant to conditions that might be imposed as a matter of reasonable and proportional limitation. If it were otherwise, the admissibility of a politely quietly expressed message could be substituted for by something of enormous difference in quality without any practical adjustment of the expresser's contribution to predictable expenses. That cannot be right either.

[189] This is not to suggest any specific answer for this situation if something like this comes up again. It is to suggest that if the University had the burden of establishing the limitation, it would have a full opportunity to do so. The alternative proposal that Pro-Life could move to a location which was out of the way and hence not really be expression to any audience would also, arguably, lean in favor of the heckler's veto. As noted above, there is nothing in the record about the Quad which suggests that its pattern of use establishes a local convention which would bar active demonstrations. This is not a narrow sidewalk or an airport passageway for which practical limitations can be imagined.

[190] In this regard, it is unnecessary to grapple with all of the nettles of the extent to which freedom of expression may be considered to be *definitionally* circumscribed by arguably countervailing social values. For example, early in the history of the *Charter* it was accepted that expression amounting to a form of violence was not included within freedom of expression under s 2(b) of the *Charter* at all, and accordingly it was not necessary to get into 'reasonable limits' of that sort of expression: see *eg* ***Bracken v Niagara Parks Police***, 2018 ONCA 261 at para 37, 421 DLR (4th) 157.

[191] On the other hand, generally speaking, the sort of expression which is likely to be subject to limitations will not be popular speech. As noted in ***Bracken*** at para 15:

> 15 A defining feature of a free society is the right to speak openly and publicly without fear of government censure. Freedom of expression is deeply ingrained in democratic, egalitarian cultures, and reinforces all of the other fundamental freedoms. In Canada, it receives legal protection through common law, statute and s. 2(b) of the *Charter*. Its counter-majoritarian nature was stressed by the Supreme Court in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, at pp. 968-69 S.C.R.:
>
> > Freedom of expression was entrenched in our Constitution and is guaranteed . . . so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, *however unpopular, distasteful or contrary to the mainstream.*
>
> The Supreme Court cautioned against restricting protection to only those ideas that are warmly received by the public, citing the European Court of Human Rights: [page175]
>
> > [freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, *but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"*.1

> 16 Freedom of expression is not boundless, however, and a properly functioning society must limit many types of expression for the common good. Discerning the line between reasonable and unreasonable limits on expression is, however, a perpetual challenge, taken up initially by legislators, and secondarily by courts on judicial review. [Emphasis added].

[192] The point respecting an involuntary audience relates to whether a condition on free expression is justified under ***Dore*** and the successor cases. It is not all alone as to factors that relate to balancing freedom of expression with proper University functioning.

[193] The proven existence of *other* compelling social values would be a feature of the circumstances of a given case which fall to be considered under the ***Dore / Loyola / TWU1 / TWU2*** analysis of a 'reasonable and proportional limit' established by a discretionary decision upon the freedom of expression possessed by Pro Life, Nicol and Wilson.

[194] Put another way, there are other pressing social values that also are definitive characteristics of society and which set the context of the exercise of the freedom: see eg ***Toronto (City)*** at paras 31 to 33. Those other social values include the effect of the content and manner of expression on recipients, which involves, *inter alia*, the freedom of others not to be subjected to unwanted expression, including the ordinary consideration of freedom from plain 'noise': see *eg* ***2952-1366 Québec Inc.***

[195] Those other social values also include the institutional need of the institution responsible for the place (here the University) to be a suitably regulated, peaceful and safe environment equally for all its students, faculty, staff and visitors. Those values also include the need of an institution of higher learning to focus its limited resources on its foundational educational objectives. The chambers judge referred to some of this, but only in the course of just adopting as within a group of alternatives of the University's reasoning, not by her independent assessment.

[196] Addressing this question, and thus striking the proper balance on these potentially countervailing elements of human social reality, involves recognizing that although freedom of expression under s 2(b) of the *Charter* is not, read by itself alone, semantically limited, it is part of a larger framework of Constitutional norms none of which trump any others and which should be read harmoniously to the extent possible. As pointed out in ***CCBR1*** at para 66:

> 66 There are a few statutory objectives that might be conclusive, in that those factors alone justify limits on expression. The "conclusive" factors might collectively be called "unlawful expression". Criminalized pornography, statements inciting violence or vandalism, discriminatory comments, and "hate speech" are the most obvious examples: *Greater Vancouver Transportation* at para. 76. These factors often would, in and of themselves, justify restrictions on free expression. However, "unlawful expression" is not the only basis on which limits on the content of expression could be justified. *Greater Vancouver Transportation,*

> which did not engage a s. 1 analysis, lists at para. 76 some types of unlawful speech as examples of expression that could be restricted, but does not limit the potential of justification to them only. In most cases the proportionality analysis will require consideration of a number of factors, all of which are relevant, but no one of which is conclusive in and of itself.

[197] Similarly, as also discussed in ***Bonitto***, where the state agent by statute is involved in regulating expression, it may well be doing so in service of its duty of *neutrality* as to opinion. The arguments to the chambers judge did not really identify how neutrality might enter into the decision being made. The complaint of Pro-Life was that it was singled out. The chambers judge reasonably concluded that there was no evidence of that. But in my view the onus of showing that the University was approaching the matter on a basis of neutrality was on the University.

[198] In saying this, we recognize the observations of this Court in ***CCBRI*** at paras 53-54 that a content neutral approach was not available respecting political advertising on the sides of buses, although content neutrality was a factor in American cases. But we read ***CCBRI*** as talking about the application of such as the Canadian Advertising Standards Authority in that bus advertising context, not that neutrality would be irrelevant as a factor in a s 1 analysis.

[199] The concept of neutrality has arisen in relation to freedom of religion in Canada: compare ***Mouvement laïque québécois v. Saguenay (City)***, 2015 SCC 16 paras 71-76, 120-127, [2015] 2 SCR 3 which described this duty of neutrality as the product of evolution in the understanding of freedom of religion and its role in society and applied it as a form of 'accommodation'.

[200] The analogy between neutrality as to freedom of religion and neutrality as to freedom of expression arguably arises here because the President of the University put that out as part of the rationale for restriction. The analogy may be that any generalized obligation of the University to respect freedom of expression would include within its ambit a duty of neutrality as to the content of the expression where there are competing views as to valid content of expression. One recalls the metaphor of the cauldron. In a given situation neutrality may work in favor of the limitation, or may lean against it, depending on the facts. But it is a relevant point to consider.

[201] Insofar as other factors relevant to the section 1 analysis and balancing is concerned, Canadian law appears to recognize that the large and liberal interpretation properly to be given to freedom of expression should not overshoot the crucial purposes and societal norms for which it exists: compare ***R v Poulin***, 2019 SCC 47 at para 53, [2019] SCJ No 47 (QL):

> 53 As outlined above, a *Charter* right must be interpreted purposively — that is, in a manner that is justified by its purposes. This bears repeating because, as this Court has observed, "purposive" can be mistakenly conflated with "generous" (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 17; see also P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.) vol. 2, at p. 36-30). This is despite this Court's instruction in *Big M* that, in applying a generous — rather than

> legalistic — lens, "it is important not to overshoot the actual purpose of the right or freedom in question" (p. 344). As was re-iterated in *Grant*, "[t]he purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose" (para. 17). This is because an overly generous reading of a right risks protecting "behaviour that is outside the purpose and unworthy of constitutional protection" (Hogg, at p. 36-30). Indeed, "[i]n the case of most rights . . . the widest possible reading of the right, which is the most generous interpretation, will 'overshoot' the purpose of the right . . ." (Hogg, at p. 36-30).

In addition, s 1 of the *Charter* recognizes that freedom of expression under s 2(b) of the *Charter*, once purposively interpreted, is subject to "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[202] In other words, the vital and foundational nature of freedom of expression under s 2(b) of the *Charter* in the context of this case is not absolute. Though mentioning this, I emphasize that I am not proposing to define the limits of freedom of expression. Rather, I am referring to factors to consider on a case by case assessment depending on what the University decision maker is asked to consider in situations like the present one.

[203] In practical terms in this specific case, the tension as to content and manner of expression is most clearly manifested in the different perspectives advanced between those who might see the exercise of expression as informational, edifying and persuasive and those who might see it as argumentative, aggressive and confrontational. It is not necessary for this Court to express an opinion on either perspective let alone to prioritize them.

[204] But it can be noted that the difference of perspective on the specific subject matter of the expression here has loomed large in legal debates in this country, in the United Kingdom and in the United States. Those debates arising in analogous situations have raised issues such as location and zone restrictions, non-contact prohibitions, barriers, protection personnel and so on. The University's effort to be neutral on the subject matter is a good thing. But such neutrality does not condemn the University to ignore issues of safety, security and cost of similar orders.

[205] This aspect of the appeal, accordingly, reflects a number of difficult social tensions. Fortunately, a University is specially experienced and equipped to accommodate hubbub: think, for example, of periods of partying and of sports events which also lead to costs. The University manages, if not condones, the occurrence of many types of events. Here the University tries to guide towards peaceable debate on "all existing things" on its campus. The duty of the University to uphold the Constitutional value of freedom of expression may be limited if there is such undue hardship to the University that it will be unable to assure that reason will be "left free to combat" error. The University is also, of course, entitled to bar conduct that is violent, obscene, freedom suppressing or intimidating in its nature.

[206] Indeed, the recognized 'violent conduct' limitation on freedom of expression serves that purpose of leaving reason "free" to combat error as well as serving its own intrinsic objectives: compare ***R v Khawaja***, 2012 SCC 69 at para 70, [2012] 3 SCR 555; Joseph Raz, *The Authority of Law*, 2nd ed. [Oxford: Oxford University Press, 2009], at p. 22. Likewise, the University would necessarily have to be ensure it has the capacity to handle in a real and practical sense any competing demands for the opportunity to exercise freedom of expression: compare ***Greater Vancouver Transportation Authority*** at para 42. To its credit, the University wants to promote freedom of expression in its precincts and as well to facilitate the reciprocity that is its sensible manifestation.

[207] To re-cap, I note also the sentiment about the right to vote expressed in ***Frank v Canada (Attorney General)***, 2019 SCC 1, [2019] SCJ No. 1 (QL). A decision that effectively amounts to a barrier to the exercise of a fundamental freedom should be subjected to a "stringent standard" of justification. Just as true democracy does not accept the concept of a "select group" being able to vote, it does not casually accept the concept of governmental restriction on the ability of individuals to speak about matters of public interest or debate where the locations are public (as the open parts of a university campus are) and the manner of exercise of freedom to express is realistically compatible with that location: ***Saumur v Quebec***, [1953] 2 SCR 299 at p 329; ***Committee for the Commonwealth; 2952-1366 Québec Inc***; see also ***Morasse v Nadeau-Dubois***, 2016 SCC 44 at para 123, [2016] 2 SCR 232 (per Wagner CJC dissenting, the majority not disputing his expression of agreement "about the need to protect freedom of expression in all its forms to the fullest extent possible").

[208] This brings me to the final point of what to make of Pro-Life's submission that the University is required to provide a 'positive' right as to freedom of expression and thus more than refrain from negatively impacting that freedom. As I am not persuaded that the actions of the University here are to be assessed on any larger basis than on their negative effects on the exercise of freedom of expression, it is not strictly necessary to deal with this aspect of the Pro-Life submissions.

[209] But some observations are in order because the first appeal, in particular, embodied elements suggesting that the University's positive obligation included the conduct of a prosecution to deter others from making the expression by Pro-Life and its members difficult.

[210] As noted earlier in these reasons, the topic of a recognizing a positive duty as to freedom of expression raises Constitutional controversies in its own right: ***Baier***; ***Dunmore***; ***Greater Vancouver Transportation Authority; Toronto (City).*** As put in ***Haig v Canada (Chief Electoral Officer),*** [1993] 2 SCR 995 at para 72 by L'Heureux-Dube J, "the freedom of expression contained in s. 2 (b) prohibits gags, but does not compel the distribution of megaphones".

[211] ***Haig*** was also referred to in ***Native Women's Association of Canada v Canada***, [1994] 3 SCR 627. In ***NWAC***, the case concerned the argument that the government of Canada was required

to provide equal funding of parties to participate in an inquiry process. The narrow sort of positive right contemplated in NWAC was put this way at para 52:

> 52 Therefore, *Haig* establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in *Haig* leaves open the possibility that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful.

[212] ***Greater Vancouver Transportation Authority*** does suggest that if a state institution does provide facilities for expression to one person or group it need not make available similar facilities for other groups. To an extent Pro-Life is suggesting that it is facing a problem of that order. I do not agree.

[213] The question of whether there is a positive side to freedom of expression was discussed by the majority in ***Toronto (City)***, at paras 41-42, which itself relied on the test for positive rights set out in ***Baier,*** stating:

> 41 The freedom to communicate with others is an important component of freedom of expression; it allows the dissemination of opinions and ideas. It is essential to any joint enterprise that requires individuals to coordinate their efforts with others. Section 2(b) of the Charter protects against government interference with most (but not all) such communication. But s. 2(b) protects against interference with the expressive activity itself, not its intended result. Put another way, freedom of expression does not guarantee that government action will not have the side-effect of reducing the likelihood of success of the projects or joint enterprises that any person is working to achieve. Accordingly, legislation that changes some state of affairs (such as the number of electoral wards), such that a person's past communications lose their relevance and no longer contribute to the desired project (election to public office), is not, on that basis, a limitation of anyone's rights under s. 2(b): *Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989, at paras. 39-41; *Baier v. Alberta,* 2007 SCC 31, [2007] 2 S.C.R. 673.
>
> 42 Freedom of expression has an essentially negative orientation, an orientation that is especially important in the context of political expression. Freedom of expression is respected, in the main, if governments simply refrain from actions that would be an unjustified interference with it.

[214] The case at bar does not provide an appropriate opportunity to reach any final conclusion about what a 'positive' aspect of freedom of expression might mean. It is one thing to provide equal access to opportunities to express. It is quite another to take steps to ensure that the party exercising the freedom has an optimal chance to persuade other people. The University cannot be expected to guarantee that Pro-Life's message will persuade anybody. More particularly, one thing

it does not mean, in my view, is that the University was required to set its face so much against counter protests that it must prosecute without exception any overshoot potentially governed by the Rules of Student Behaviour.

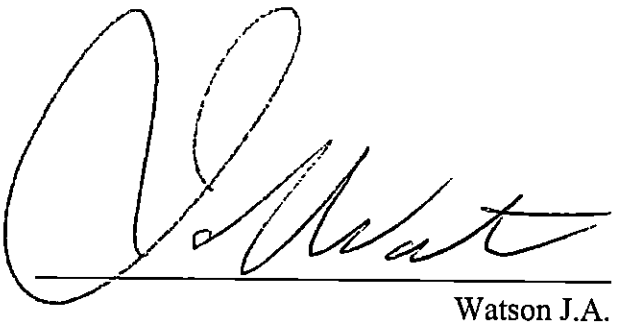
[215] In the end, the appeal of Pro-Life from the Security Costs Decision of the chambers judge is substantiated. Accordingly, the appeal must be allowed and that decision is set aside for the reasons set out above. She applied the wrong test, did not allocate the burden of proof correctly, and adopted misconceptions as to factors to be considered. Nonetheless there is no other remedy which is useful or appropriate to be granted in these circumstances.

VI. Conclusion

[216] There is a saw-off in relation to the two appeals. The University was successful on the Complaint Decision appeal and Pro-Life was successful, in part, on the Security Costs Decision. Neither appeal needs additional remedial orders. I conclude that the parties should bear their own costs. As the intervener British Columbia Civil Liberties Association was of assistance in some respects to both sides of the debate, it will neither get costs nor be subjected to costs by other parties.

Appeal heard on November 28, 2018

Memorandum filed at Edmonton, Alberta
this 6th day of January, 2020



Watson J.A.

Crighton J.A. (Concurring in the Result)

[217] We have had the opportunity to review our colleague's extensive reasons for decision disposing of the two appeals in the manner indicated. While we agree with most of what our colleague says, there are issues with which we disagree or that we would not have decided. We have explained below where our views diverge from those of our colleague and why that is the case.

[218] We agree with our colleague that the appeal from the Complaint Decision must fail. Prosecution under the University's Code is not compulsory. Rather, as our colleague points out at para 47, "the Code provides for exercises of discretion akin to those in other prosecutorial spheres."

[219] In order to have standing, Pro-Life must demonstrate fundamental unfairness in the appeal process and it has failed to do so on the record that is before us. The chambers judge correctly discharged her obligation to decide whether the discipline officer's decision fell within a range of possible, acceptable outcomes that are defensible having regard to the facts and the law. We agree with our colleague she made no error in doing so.

[220] We also agree with my colleague that Pro-Life should not be granted permission to argue the new grounds raised as part of this appeal for the reason that the concerns about doing so are particularly acute in cases of judicial review where it is both difficult, if not impossible, to enlarge the record and to permit argument on new grounds would unfairly impact the University's ability to fairly and fully respond. For those reasons, we would not have commented on the merits of any of those new grounds of appeal given that they were not properly before the Panel.

[221] Regarding the Security Costs decision, it must be noted that the chambers judge did not err in deciding that the *Charter of Rights and Freedoms* did not apply to the exercise of speech by students at the University of Alberta; she did not decide the issue one way or another. Instead, it is readily inferred from the standard of review she identified as applying in the circumstances before her that she assumed, for the purposes of her analysis, that the *Charter* applied and that the appellant's *Charter* rights had been infringed by the University through its decision to recover the costs for security as a condition to holding the 2016 event. Had there been no *Charter* considerations, the chambers judge would not have applied the ***Doré*** standard of review; she would have applied the standard of review in ***Dunsmuir***.

[222] However, we agree with my colleague that it is appropriate to decide whether the *Charter* applies to the University in the context raised in this appeal. Having reviewed his very thorough reasons on this issue, we agree both with the conclusion and with his analysis.

[223] We prefer not to decide whether there is a common law right to freedom of speech and freedom of expression at the University that protects Pro-Life, first because it is unnecessary in light of our decision regarding the applicability of the *Charter*, and second because as our

colleague points out, it is anchored to Pro-Life's contractual arguments that are new grounds of appeal that are not properly before the Court.

[224] With some limited exceptions, we agree with our colleague for the stated reasons that while the chambers judge identified the correct test, she did not apply it correctly having regard to the record and to the statutory framework. However, we do not find it necessary to delve into American jurisprudence on this issue as our colleague has done because we agree with him that Canadian law is robust enough to resolve the issues that are engaged here.

[225] We do not agree, however, that it was, as suggested at para 185, an error for Dean Everall to take into account that the content of the expression of Pro-Life was "designed to be controversial" and to "evoke a vigorous and emotional response" and was seeking "public controversary." In our view, the record supports Dean Everall's position, but in any event, it is relevant to the highly contextual analysis undertaken when applying the standard of review in ***Doré*** that must have regard to the factual matrix and to the statutory objectives.

[226] The context is relevant because the University approved the *Student Groups Procedure ("Procedure")* pursuant to its statutory and delegated powers from the Board of Governors. The Procedure provides for the administration and regulation of the activities of "recognized" student groups on campus. A group of students may, but is not required to, apply for official recognition on certain conditions. Recognized student groups under the Procedure are accorded a number of benefits not available to other student groups. One of those exclusive benefits is the ability to book University-owned space for events.

[227] The appellant UAlberta Pro-Life is a recognized student group at the University whose status, activities and events are regulated under the Procedure. As a recognized student group, it must, in accordance with the Procedure, seek approval from the Office of Dean of Students for any "student group events or activity". "Student Group Event or Activity" is broadly defined as any "student function organized by the Student Group ... including ...demonstrations."

[228] The Procedure specifically provides that:

> ... The responsibility for running the events in a safe manner belongs to the Student Group.
>
> All Student Group Events and Activities must be approved by the Office of the Dean of Students. This approval must occur at the planning stage of the event and prior to any advertising or announcement of the event.
>
> Student Groups are subject to all University policies and procedures and must adhere to these when organizing Events and Activities.
>
> ...

> Depending on the nature of the activity, the Dean of Students may require a Student Group to obtain additional insurance or require the presence of University of Alberta Protective Services or the Edmonton Police Service. The costs of these will be the responsibility of the Student Group.

This Procedure governing the events and activities of recognized student groups is of longstanding and the rule applies to any and all recognized student group holding an event on campus.

[229] Pro-Life did not challenge the constitutionality of the Procedure itself. It only argues that the University failed to apply the Procedure in a *Charter* compliant way. The intended purpose of the event is relevant to the security risk and the risk is relevant to the costs for which Pro-Life agreed to be responsible. While we agree the chambers judge did not consider whether the University's decision minimally impaired Pro-Life's *Charter* right to freedom of expression and, therefore, her analysis fell short of what was required, she did not fall into error when she considered the established purpose of the 2016 event as a relevant factor in the overall analysis. Unlike my colleague, we read the University's argument to accept Dean Everall's position that Pro-Life's 2016 event was seeking public controversy that enhanced the security risk for that event.

[230] In conclusion, we agree with our colleague that the Complaint Decision appeal should be dismissed and the Security Costs appeal should be allowed. However, we also agree with my colleague that because the appellant did not challenge the constitutionality of the Procedure under which the University sought to recover the security costs for the 2016 event, no other remedy is useful or appropriate beyond setting the security costs decision aside. We would venture no opinion regarding the University's ability to justify such a decision in the future assuming a complete record and the proper allocation of the burden of proof in the overall proportionality analysis.

Appeal heard on November 28, 2018

Memorandum filed at Edmonton, Alberta
this 6th day of January, 2020

Crighton J.A.

I concur:

Authorized to sign for: Martin J.A.

Appearances:

R. J. Cameron/J.S. Kitchen
for the Appellants

M.A. Woodley/ P.T. Buijs
for the Respondent

N.J. Whitling
for the Intervenor