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APPLICANTS	Jonah Pickle and Frances Widdowson
RESPONDENTS	The University of Lethbridge and the Governors of the University of Lethbridge
DOCUMENT	**BRIEF OF THE APPLICANTS, JONAH PICKLE and FRANCES WIDDOWSON**
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BRIEF OF THE APPLICANTS,

JONAH PICKLE and FRANCES WIDDOWSON

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I. INTRODUCTION and FACTS

A. Widdowson

1. The applicant, Frances Widdowson ("**Widdowson**"), is an accomplished political scientist who has spent much of her career studying:

> *… indigenous politics and economy and, in particular, understanding the causes of massive socioeconomic disparity between indigenous and other Canadians. My life's work is motivated by sincere concern for this problem and the urgent desire to help remedy it.*[1]

2. Widdowson's primary thesis is that indigenous prosperity is being suppressed by policies which tend to prolong and exacerbate indigenous isolation and dependency and by a superstructure of lawyers, advisors, and consultants.[2] Widdowson's work is rooted in reason and free inquiry - the principles of the Enlightenment:

> *Only if we understand the causes can we hope to find solutions. Therefore, my research is necessarily informed by rigorous empiricism and analysis. Sometimes this leads to uncomfortable, heterodox, or politically incorrect conclusions. I would rather pursue the truth, wherever that leads, than signal my ostensible virtue.*
>
> *…*
>
> *My research challenges, both, conventional wisdom on indigenous policy in Canada and a large, established industry that benefits from maintaining indigenous dependency and deprivation. At times my research leads to "politically incorrect" conclusions. Therefore, my research is viewed by some as controversial.* [3]

3. As a consequence of her heterodox political incorrectness, she has become a "case study" in "cancel culture" including having been terminated from her position as a tenured professor at Mount Royal University.[4] She has, therefore, developed an academic interest in academic cancel culture, about which she has given lectures at Stanford and Western and is writing two manuscripts.[5]

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[1] Affidavit of Frances Widdowson, sworn July 26, 2023 (the "**Widdowson Affidavit**"), para 2 – 4.
[2] Widdowson Affidavit, para 7.
[3] Widdowson Affidavit, paras 6 and 11.
[4] Widdowson Affidavit, paras 3 and 12 - 15.
[5] Widdowson Affidavit, para 15.

B. University of Lethbridge – Let There Be Light

4. The University of Lethbridge's (the "**UofL**") motto is *Fiat Lux* ("Let There be Light") with a government[6] mandate to operate a comprehensive academic and research university in accordance with the principles of liberal education.[7] The UofL, the government, Widdowson, and others agree that "freedom of inquiry and freedom of expression are prerequisite requirements in all aspects of [a university's] operation." [8] [edits added]

5. In 2019 Alberta's Premier, Jason Kenney, instructed his Minister of Advanced Education (the "**Minister**") to require all universities to develop, post, and comply with free speech policies that conform to the University of Chicago Statement on Principles of Free Expression (the "**Chicago Principles**").[9] All 26 Alberta post-secondary institutions complied, including the UofL.[10] The Chicago Principles confirm:

> *… free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] that without it they cease to be universities.":*

6. In Widdowson's words:

> *In academic universities, the focus is on cultivating an open-ended process involving the use of reason and logic and the careful weighing of evidence. The truth is never known as it must be constantly revised when new information refutes what was previously understood. In such an environment, rational disputation is encouraged because it enables errors to be identified and refuted … In an academic setting, no one can rely upon status, tradition, or authority to shield any idea from scrutiny … This rational disputation model of university education is reflected in the "Chicago Principles".[11] [emphasis added]*

7. Consistent with its function as a university, UofL's "Principles of Student Citizenship"[12] (the "**Citizenship Principles**") are designed to support and protect an educational environment of "free inquiry and expression, diversity, equality, and equal opportunity for participation." They require that students respect "a wide range of thoughts, opinions and ideas," and uphold "the rights and freedoms of all members of The University of Lethbridge community,

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[6] The Government of Alberta is referred to herein, as the "**Government.**"
[7] See below at Part IV.C.i.b. "Investment Management Agreements", IV.C.i.c. "Mandate", and IV.D.i. "University Education", IV.D.ii. "Campus Free Speech"
[8] Affidavit of Paul Viminitz, sworn July 27, 2023, (the "**Viminitz Affidavit**"), Exhibit "I".
[9] The Chicago Principles are at Exhibit "QQ" to the Affidavit of Ashley Sexton, sworn July 26, 2023 (the "**Sexton First Affidavit**").
[10] See below at paras 233 and 234.
[11] Widdowson Affidavit, para 19.d. to e.
[12] See, for example, Viminitz Affidavit, Exhibit "G".

in accord [*sic*] with the principles articulated in the *Canadian Charter of Rights and Freedoms*."

C. University of Lethbridge – Indigenous Initiatives

8. As part of its government mandate, outside of which the UofL may not operate[13] UofL is to work to improve indigenous access to, participation in, success in, and completion of university education.

9. Seemingly independent of its Minister-approved mandate, the UofL has seemingly decided to implement the "Calls to Action" of the Truth and Reconciliation Commission (the "**TRC**") and to facilitate "meaningful reconciliation."[14] This initiative has been described by UofL as a "strongly held[15]… valu[e] we endorse and continuously work towards."[16] The applicants are not aware of whether UofL's board of governors ("**BOG**") has approved this initiative.

D. The Event

10. The former applicant, Paul Viminitz ("**Viminitz**"), was a professor of philosophy at the UofL[17] (who, like Widdowson, was also recently terminated by his university) whose interests also include woke-ism and academic freedom.[18] He was struck from the application by order of Justice Honourable Justice O.P. Malik who declined to grant Viminitz access to this Honourable Court by the operation of the principles of labour law.[19]

11. In connection with campus cancel culture, Widdowson's thesis (with which Viminitz agrees[20]) is that campus free speech, open inquiry and dissent, "the *sine qua non* of a university" are being attacked and undermined by a political ideology: "woke-ness" which replaces the objective search for truth with subjectivity and dogma and is, therefore, hostile to free speech, open inquiry and dissent.[21]

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[13] See below at Parts IV.b. "Investment Management Agreements" and IV.c. "Mandate"
[14] See, for example, Viminitz Affidavit, Exhibit "L" [PDF page 133] and Certified Record of Proceeding filed October 31, 2023 (the "**CRP**") documents CRP000002, CRP000025, CRP000055, CRP000108. None of the calls to action can be found in the CRP, nor have the relevant calls to action been provided upon request: Affidavit of Ashley Sexton, sworn July 15, 2023 (the "**Sexton Third Affidavit**"), Exhibits "P" and "Q"
[15] CRP000108.
[16] CRP000055.
[17] Viminitz Affidavit, paras 2 – 3.
[18] Viminitz Affidavit, paras 5 – 8.
[19] *Pickle v. University of Lethbridge*, 2024 ABKB 378.
[20] Viminitz Affidavit, para 6.
[21] Widdowson Affidavit, para 19.

12. In Widdowson's opinion, woke-ness is likely to continue to do great damage to the main function of universities in Canada: the exchange of ideas, the promotion of learning, and the pursuit of knowledge:

> *As this truth-seeking function of universities is narrowed or eliminated, technological, social, political, and economic progress will accordingly decline or reverse. This holds true in the area of research into indigenous issues. Censorship of dissenting opinions eliminates inquiry into, and therefore discovery and communication of, the causes of and solutions for indigenous socioeconomic disparities. Censorship, therefore, will tend to prolong and aggravate an already dire situation. For indigenous peoples, censorship, however well-meaning or virtuous, will be disastrous.*

13. Given their joint interests, Viminitz (in partial fulfillment of his service obligations as a member of faculty to promote academic freedom)[22] invited Widdowson to speak at the UofL on the topic of "How Woke-ism Threatens Academic Freedom" which was to be hosted on February 1, 2023, at 4:30 p.m. (the "**Event**"). The Event, open to students, faculty, and the public, was to include a 40-minute talk by Widdowson, followed by a 40-minute question-and-answer session for any interested attendees.[23]

14. Viminitz's administrative assistant contacted a UofL scheduling specialist to request an appropriate space and Anderson Hall. Room 175 was offered and selected.[24]

15. Viminitz booked the Event pursuant to, *inter alia*, the Use of University Premises for Non-Academic Purposes Policies and Procedures (the "**Booking Policy**")[25] which states:

> *As an institution of higher learning the University recognizes academic freedom and permits lawful assemblies and free speech, subject to the limits set out herein.*

The Booking Policy references an Impartiality and University Facility Utilization Policy[26] (the "**Impartiality Policy**") which states:

> *… the University should be a place where ideas are generated and circulated with the greatest possible freedom. It follows from this premise that the University must maintain the strictest impartiality with regard to any and all religious, political, social, or commercial groups, parties, organizations, bodies of opinion, or interests.*

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[22] Agreed Statement of Facts, filed November 28, 2023, Appendix "B"
[23] Viminitz Affidavit, para 10, Widdowson Affidavit, para 16 to 17.
[24] Viminitz Affidavit, Exhibit "Q".
[25] Viminitz Affidavit, Exhibit "O", sections 1.01.2 and 11.01 – 11.03
[26] Viminitz Affidavit, Exhibit "C".

> *If the University favours or is believed to favour any such groups, then it cannot adequately perform its function of encouraging the free exchange of ideas or opinions.*

16. The intended content of the Event is outlined in the Widdowson Affidavit at paragraph 19.

17. The applicant, Jonah Pickle ("**Pickle**"), is an undergraduate student at UofL in the Department of Neuroscience and is an Arts & Science representative on UofL's Student's Union. He made the decision to study at UofL, in-part, because it advertised that it would provide a "liberal education" including free inquiry and viewpoint diversity.

18. Pickle's experience at UofL has not been one of liberal education – quite the opposite. In fact, apart from the Event, no other controversial public talks were hosted on campus about which he was aware and interested in attending. Pickle states:

> *To my observation, campus life is one more of woke political indoctrination and conformism than intellectual diversity. Opposing or even questioning prevailing woke dogmas on campus is highly alienating. Students even learn, in mandatory political training, that doubting or opposing woke dogma is ignorance which training can fix.*
>
> *This has been a great disappointment to me. Based on UofL's representations, I had hoped to enjoy the full "university experience" while at the UofL including contentious, civil and reasoned dialogue.*
>
> *For this reason, the Event was very exciting to me.*[27]

19. The Event would have provided each of the applicants and other guests an opportunity to listen, speak and engage in a question-and-answer session, all of which was for the purposes of:

    a. engaging in democratic discourse;

    b. seeking and promulgating the truth; and

    c. engaging in a discourse the applicants each finds personally self-fulfilling.[28]

20. In Widdowson's view, within days of announcing the Event, its subject matter (woke-ism's threat to academic freedom at UofL) was plainly manifest and, ironically, lead to the Event's cancellation on January 30, 2023.[29] Students, faculty, UofL's Department of Indigenous

[27] Affidavit of Jonah Pickle, sworn July 27, 2023 ("**Pickle Affidavit**"), paras 3 to 8.
[28] Widdowson Affidavit, para 20, Viminitz Affidavit, para 18, Pickle Affidavit, para 9.
[29] Widdowson Affidavit, paras 22 to 31 and CRP000002.

Studies, UofL's Indigenous Relations, UofL's Students Union and others demanded the Event – or, more precisely, Widdowson's presence on campus – be cancelled. The calls to cancel the Event were numerous but highly consistent in their messaging which will be summarized in the next Part with reference to some key communications.

E. Cancellation - Context

21. When the Event was eventually cancelled, UofL's President, Mike Mahon ("**Mahon**") indicated the UofL had sought guidance from, *inter alia*, "scholars" and UofL's department of Indigenous Relations.[30]

22. Indigenous Relations provided to Mahon and others seemingly[31] involved in the decision to cancel the Event (the "**Decision**") the following:

    a. An email[32] from Leroy Wolf Collar a UofL Education Navigator: Siksika in the Office of the Provost & Vice-President (Academic) in which the author objects to the Event on the basis of "her racist views and denial of the TRUTH about Indian residential schools and Blackfoot Ways." He continued:

> *All of a sudden the reconciliation relationship with Indigenous peoples at the University is pushed aside so they could accommodate one white racist Individual who gets to spread her hate (racist views) about Indigenous peoples because the University is placing more weight on her rights (freedom of speech) rather than being concerned about bringing harm to the Indigenous students, employees, elders at the University … I guess the one white woman's freedom of speech is more important to protect than the lives of 500 plus Indigenous students attending the UofL who may be exposed to harm mentally, emotionally, spiritually, culturally, and even physically.*

    b. A change.org petition[33] from "Concerned Students" objecting to "her presence on campus" and accusing Widdowson of "residential school denialism" and promoting "historical falsities and racial bigotry but [*sic*] endangers student's well being and safety." The petition emphasized Widdowson's presence on campus as "violence upon its BIPOC, LGBTQIA2S+ and especially Indigenous students by allowing space for these ideologies to traumatize students" and as a "retraumatization of Indigenous

[30] CRP000002.
[31] See below at para 30 re: deficiencies in the CRP.
[32] CRP000065 and CRP000105.
[33] CRP000098 and Widdowson Affidavit, Exhibit "E".

students." The petition also suggests the UofL is not "focused on Truth and Reconciliation," and accuses Widdowson of being anti-Black Lives Matter, anti-transgenderism, and anti-woke.

c. A change.org petition[34] from Nathan Crow, the Indigenous Student Representative on UofL's Student Union, opposing the Event and Widdowson's "attendance on our campus" and claiming the Event would be "focused on the 'positives' of the Indian Residential School System." He references Widdowson's "false narratives" and "misinformation." Crow states:

> *The atrocities that occurred within the Indian Residential School system are 100% accurate and true … This issue not only affects the many survivors … but it also affects the children and grandchildren … who are dealing with the impacts of intergenerational trauma like myself and many other students."*

d. A statement[35] from UofL's Department of Indigenous Studies which "vehemently condemns the anti-Indigenous rhetoric routinely disseminated by former MRU professor Frances Widdowson and deplores the fact that she is being given a platform …" It continues:

> *She specifically denounces the TRC's classification of the Residential School system as genocide and disputes the veracity of the unmarked graves of Indigenous children found at the sites of multiple former Residential School sites.*
>
> *The facts of the Residential School system and the experiences of Indigenous children within that system were rigorously established through the Truth and Reconciliation Commission …*
>
> *The University of [Lethbridge] … honour[s] the Blackfoot people … as well as all Indigenous Peoples …*
>
> *This honoring [*sic*] must include a commitment from all faculty to ensure that Indigenous histories, cultures, memories, and lives, past and present, are represented faithfully, truthfully, and safely … It must be a commitment from all faculty to vigorously reject ideologies which continue to propagate violence against Indigenous Peoples through the rhetoric of historical erasure, dismissal, diminishment, and dehumanization, such as that espoused by Dr. Widdowson. [edits added]*

[34] CRP000105 and Widdowson Affidavit, Exhibit "F"
[35] CRP000077 and CRP000105.

e. A statement[36] from UofL's Vice Provost (Students), Kathleen Massey, circulated to a number of UofL email lists[37] stating that the "speaker's views are in conflict with a number of the values and commitments strongly held by the University" and noting the "… University emphatically re-stated its dedication to addressing the Truth and Reconciliation Calls to Action." She references "safety" and tells students:

> *You have agency in these situations.*
>
> *…*
>
> *You can … be an ally and focus on the support of Indigenous people who may find the topic re-traumatizing.*
>
> *You can listen to a talk that debunks the perspective you disagree with and empowers you with scholarly counter-arguments that reinforce your experience- and values-informed beliefs.*
>
> *If a controversial speaker is invited to your class and listening to them would be traumatic for you, you can excuse yourself to protect your mental health.*

23. UofL also received guidance from the scholars including:

a. Jason Laurendeau,[38] a professor in the UofL Department of Sociology, calling Widdowson a "residential school denialist" who "decr[ies] 'wokeism'" [edits added]. He continues:

> *I refuse to debate the merits of so-called open-inquiry. My focus, instead, is in on the very real harms that such "inquiry" inflicts. Imagine, if you will, the impacts of such campus events on Indigenous faculty, staff, graduate students, and undergrads. … This is what it means to suggest that the university is a place of white supremacist violence … This talk has and will cause(d) harm. I will not enumerate the specific harms …*

b. Caroline Hodes,[39] an Associate Professor of Women & Gender Studies at the UofL seeking to "cancel residential school denier Frances Widdowson." She states:

> *… She is known to distort the facts, deny genocide and engage in campaigns of anti-Indigenous and anti- Black racism …*

[36] CRP000056 and CRP000108.
[37] Sexton Third Affidavit, Exhibit "Q"
[38] CRP000012.
[39] CRP000087, CRP000153, CRP000154.

> *Residential school denial is genocide denial and this is a violation of Indigenous rights. This is not a form of speech protected by either the Alberta Human Rights Act or academic freedom … Both Drs. Widdowson and Viminitz are engaging in forms of hate speech. … the university is responsible under the Occupational Health and Safety Act amendments of 2018 to provide an environment free of psychological hazards for faculty, staff and students. Dr. Viminitz has created a psychologically unsafe environment on campus not only through his own conduct but by inviting this speaker. I need not remind you that many students, staff and faculty at the University of Lethbridge are residential school survivors whether through direct experience or inter generational trauma. This is a betrayal of the University of Lethbridge's commitment to Indigenization and reconciliation …*

24. The following themes are evident and consistent across communications opposing the Event in the CRP:[40]

    a. That the Event should be cancelled - not moderated or modified, but cancelled;

    b. That Widdowson herself should be cancelled. Many expressly called for cancellation of her "presence on campus" and "platform." Others called for cancellation on the basis of what she had allegedly said in the past or her alleged political opinions.

    c. There were many vague allegations as to what "racist" things Widdowson had ever said, usually having to do with "genocide denialism"[41] or "residential school denialism,"[42] without so much as a single quote in the entire Record of Proceeding or, at least, an attempt at an accurate summary of what she had said. The closest the record comes to any such detail is the submission of the Department of Indigenous Studies. [See para 22.d, above.]

    d. There were many vague and erroneous allegations as to the subject matter of the Event. For example, that she planned to "share her racist views and denial of the TRUTH…"[43] or that she would "talk about how 'residential schools were good and brought proper education'".[44]

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[40] We would also draw the Court's attention, particularly, to the complaints at CRP000010, CRP000024, CRP000026, CRP000068, CRP000048, CRP000158, and CRP000152.
[41] CRP000006.
[42] CRP000098 and Widdowson Affidavit, Exhibit "E".
[43] CRP000066.
[44] CRP000048.

e. That the Event and Widdowson's presence on campus was an impediment to truth and reconciliation because there was a "truth" which had been "rigorously established"[45] by the authority of the TRC, was "100% accurate"[46] and was, therefore, undeniable. Opposing viewpoints were "debunked"[47] and indicative of "hate."[48]

f. That the event and Widdowson's presence on campus was "unsafe", "violence"[49] and a "psychological hazard"[50] which put the "lives"[51] and mental and physical wellbeing of faculty and students, especially indigenous students, at risk. The risks to indigenous students from "intergenerational trauma" and "retraumatization" are frequently cited.[52] There are many suggestions, including by Mahon,[53] that indigenous (and other) students avail themselves of counselling services including the University of Lethbridge Faculty Association's ("**ULFA**") statement[54] which provides the number for two indigenous crisis support lines.

25. The CRP contains no evidence the UofL made any inquiries into or (subject to paragraph 26) obtained any evidence about:

a. whether Widdowson was actually a "racist" or bigot;

b. what Widdowson had actually said, if it was said in good faith, if she provided reasons and evidence, and if she was correct; or

c. what Widdowson actually intended to say at the Event - one apparent member of the "President's Executive" which decided to cancel the event spoke, days earlier, only of the "opinions likely to be expressed by Frances Widdowson."[55]

26. The only person who seems to have commented[56] on these glaring evidentiary deficiencies was Victor Rodych ("**Rodych**"), a professor in the Department of Philosophy. He said:

[45] CRP000078.
[46] CRP000110.
[47] CRP000109.
[48] CRP000066.
[49] For example, CRP000012, CRP000098, CRP000105.
[50] CRP000087 and CRP000153.
[51] CRP000066.
[52] For example, CRP000087, CRP000098, CRP000110, CRP000108, and CRP000158.
[53] CRP000055, see also CRP000068.
[54] Absent from the CRP, see Widdowson Affidavit, Exhibit "L".
[55] CRP000025.
[56] CRP000100.

Although people are claiming that Dr. Widdowson is a racist, I have not seen a single piece of hard evidence that Dr. Widdowson is a racist. …

Dr. Hodes doesn't say what constitutes "residential school denial." … From what I can tell from only 2 videos, Dr. Widdowson does not deny that residential schools harmed indigenous people, and I have NOT heard her deny that thousands of Indigenous children died at residential schools … I believe Dr. Widdowson said that academics and others aren't even allowed to say things like some Indigenous children would have received no education if they had not received a residential school education.

… Dr. Hodes … writes: "This speaker has been fired from academic institutions due to her racism, transphobia and bigotry. She is known to distort the facts, deny genocide and engage in campaigns of anti-Indigenous and anti-Black racism." I don't understand this. If it is so well known that Dr. Widdowson "de[nies] genocide" and "engage[s] in campaigns of anti-Indigenous and anti-Black racism," why doesn't Dr. Hodes help us all to see the facts by providing us with the facts/evidence? … In all seriousness I ask: These are very serious allegations. If someone, e.g., Dr. Hodes, has solid evidence of some of this, help our community by providing the evidence. Please.

F. Cancellation of the Event

27. Mahon appears to have contemplated the cancellation of the Event almost immediately upon receiving complaints. On January 26, 2023, at 9:00 a.m. he circulated an email of "examples" of event cancellations. On the same day, however, he released a statement about the "controversial guest speaker"[57] refusing to cancel the event. The statement is noteworthy in many respects:

a. He references Widdowson's "abhorrent" views which "are in conflict with a number of the values held by the University." He does not reference the alleged or actual subject matter of the Event.

b. His reference to the "values held by the University" contradicts the premises of the liberal education the UofL is mandated to deliver. As articulated in UofL's Impartiality Policy:[58]

[57] CRP000055.
[58] Viminitz Affidavit, Exhibit "C".

> *… the University must maintain the strictest impartiality … If the University favours or is believed to favour … then it cannot adequately perform its function of encouraging the free exchange of ideas or opinions.*

or, as articulated in the UofL's Statement on Free Expression:

> *Debate or deliberation on campus may not be suppressed because the ideas put forward are thought by some, or even most, to be offensive, unwise, immoral, or mis-guided. <u>It is for individual members of the university community, not the University as an institution, to make those judgments</u> …*

c. He claims as a university "value" the "stated commitment to the Calls to Action of the Truth and Reconciliation Commission of Canada." This is nowhere in UofL's mandate. Neither does Mahon here, nor anywhere in the CRP, identify what calls to action are allegedly engaged.

d. He finds "encouraging" an "evidence based counter lecture" implying Widdowson's Event was not "evidence based" and confirming, based on the title of the "counter" lecture ("Truth before Reconciliation: How to Identify Denialism")[59] that the UofL had determined the Event was to include "denialism." Again, the CRP reveals no efforts to determine the actual subject of the Event. The UofL seems to have been relying on the vague allegations summarized above.

e. He says, "[b]elow, please find the University's position regarding free expression," and then provides something which is not, in fact, entirely consistent with UofL's Statement on Free Expression. Most notably, Mahon inserts:

> *Our university is true to the tenets of equity, diversity and inclusion and is committed to meeting the Truth and Reconciliation Commission's Calls to Action. These are the values we endorse and continuously work toward.*

f. He references the "safety of our diverse community" and then provides links to, *inter alia*, counselling services. Counselling services (most being specific to indigenous

[59] CRP000010.

students) were also offered by Indigenous Services,[60] Kathleen Massey, Vice Provost Students[61] the Students' Union,[62] UofL's Human Resources,[63] and ULFA.[64]

28. Within a day, however, the "President's Executive" had decided[65] "… regarding the potential presence of a controversial speaker on campus … " [emphasis added] to:

> *… NOT allow the event to take place on our U of L campus … This decision reflects our belief that the potential harm to students, faculty and staff is significant … Free Speech is not an absolute right on our campus and must be considered in the context of protecting the campus community from harm … the potential for harm is too great for the event to take place.*
>
> *… We will be doing government relations over the weekend to hopefully mitigate the back lash from government.*
>
> *… the potential for government blow back is real and we will spend the weekend on this. Leakage of this decision would severely harm our GR.*
>
> *… The TRC makes it clear that education is one of the critical avenues for truth and reconciliation. It is so important that our university embrace this path forward and make difficult decisions with the TRC in mind.*

29. This email is noteworthy in that it:

a. confirms again that the cancellation related, in fact, of Widdowson's "presence on campus" as opposed to the alleged or actual subject matter of the Event;

b. confirms that the cancellation is a complete and permanent cancellation of Widdowson's presence on campus – whatever the content of the Event may have been;

c. raises again the "significant" risk to students, faculty and staff; and

d. confirms the potential for "government blow-back" and harm to government relations.

30. The potential for harm to its relationship with government, as well as the significant pressure and attention on the Event makes it quite striking that UofL kept "no minutes from any of the

[60] CRP000058, CRP000068
[61] Who went so far as to advise students, "If attending Widdowson's potential in-class talk(s) will cause harm to you, you may excuse yourself from attending the talk(s)," [emphasis added] – see CRP000109 and CRP000168.
[62] CRP000130.
[63] CRP000167.
[64] Widdowson Affidavit, Exhibit "L".
[65] CRP000003.

meetings," and that it is "not possible to confirm with certainty which of the named individuals attended those meetings."[66]

31. The "President's Executive" then spent the weekend crafting a statement released on January 30, 2023[67]. UofL's Vice-Provost also emailed Viminitz on January 30 cancelling the booking:

> *No alternative University of Lethbridge facilities will be provided for this event.*[68]

(the statement and email referred to collectively herein as the "**Reasons**").

32. The Reasons are noteworthy on the same basis as the email (as discussed at paragraph , above). In addition, the Reasons state:

> *… assertions that seek to minimize the significant and detrimental impact of Canada's residential school are harmful.*

33. The Decision rested, therefore, on the vague allegation of "residential school denialism" which, as only Rodych correctly observed, was undefined and unsubstantiated. The Reasons continue:

> *We are committed to the calls to action of the Truth and Reconciliation Commission (TRC) of Canada. It is clear that the harm associated with this talk is an impediment to meaningful reconciliation.*
>
> *Indigenous peoples have and continue to play an undeniably impactful role in shaping the University of Lethbridge that we know today. A continued commitment to providing a safe place for our diverse community … is critical …*

34. The factual context and the Reasons demonstrate, therefore, that the UofL cancelled Widdowson's presence on campus (including the Event) because, it vaguely perceived, Widdowson had somehow dissented from the "truth" as revealed by the TRC and her presence on campus, therefore, put people, and especially indigenous people, at physical and psychological risk.

35. The Decision squarely contradicts with UofL's mandate to deliver a liberal education which, as expressed:

    a. in UofL's Statement on Free Expression[69] requires that:

[66] Sexton Third Affidavit, Exhibits "P" and "Q"
[67] CRP000002.
[68] CRP000001.
[69] CRP000004.

Debate or deliberation on campus may not be suppressed because the ideas put forward are thought by some, or even most, to be offensive, unwise, immoral, or mis-guided …

b. In UofL's Impartiality Policy:[70]

The purpose of the university is to formulate ideas, to test them, to criticize them, to accept them, to reject them. The university by definition cannot become the curator of any particular viewpoint, or the defender of a faith, the guardian of an ideology. [emphasis added.]

c. the Chicago Principles:[71]

… free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] that without it they cease to be universities. [emphasis added]

d. and by Widdowson:[72]

The antithesis of this disputation process is the process of enforced dogma where ideas are "ring-fenced": certain ideas are posited as true on the basis of status (including membership in one or more minority identity group), tradition (including oral history), or authority (including "lived experience" and purported "expertise"); while all other ideas and all rational disputation of dogmatic assertions is prohibited.

36. The Reasons also state:

Our statement acknowledges the University must be able to reasonably regulate the use of facilities, time, place and manner of expression.

37. In fact, the Statement on Free Expression[73] permits such regulation only "[t]o achieve its purpose and mandate [because] the University must operate free from unreasonable interference." [emphasis and edits added.] Here the discretion was being exercised for the opposite purpose: to interfere with free inquiry. In addition, UofL did not "regulate" the "time, place and manner." It effectively decided:

Not ever. Not here. Not her.

[70] Viminitz Affidavit, Exhibit "C".
[71] Sexton First Affidavit, Exhibit "QQ".
[72] Widdowson Affidavit, para 19.f.
[73] CRP000004.

G. The Cancellation Continues

38. Notwithstanding the Decision, Widdowson elected to come to campus, as was her right as a member of the public, to speak in UofL's Atrium on the same topic. She attended on February 1, 2023, and was confronted by an enormous mob of protesters who successfully drowned-out any possibility of speech by shouting, obscenities, drumming, chants, and an electric guitar assisted and guarded by UofL's Student Union President, Kairvee Bhatt, and VP Academic, Gage Desteur. One indigenous man's attempt to speak with Widdowson was likewise cancelled. His plea, "when you silence her you silence me," fell on deaf ears.[74] As later expressed by Jay Gamble, UofL professor of English:

> *Drummed the fuck out on her ear.*[75]

39. While UofL throughout its mandate and policies affirms that liberal education depends on not interfering with expression, this cancellation was praised by several UofL faculty and administrators including Mahon himself.[76] Mahon thought to praise the mob for not descending into violence. He cited the "values" of the UofL including "truth before reconciliation."

40. No one, including Mahon, appears to have been disciplined for blatant violations of UofL policies[77] including the Citizenship Principles[78] which states:

> *Mutual respect, tolerance, and civility are valued within the University but do not constitute sufficient justification for closing off the discussion of ideas or shielding students from ideas or opinions, no matter how offensive or disagreeable.*

H. The Charter of Rights and Freedoms

41. Almost 35 years ago, La Forest J., writing for the Supreme Court of Canada (the "**SCC**"), found that certain universities were not "government" entities within the meaning of s. 32(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"). The Honourable Justice continued:

> *My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the Charter, but rather that the appellant*

[74] Widdowson Affidavit, paras 36 and 41, Pickle Affidavit, paras 15 – 19.
[75] Widdowson Affidavit, para 44.b. and Exhibit "T".
[76] Widdowson Affidavit, Exhibit "S".
[77] Pickle Affidavit, para 21, Viminitz Affidavit, para 27.
[78] See, for example, Viminitz Affidavit, Exhibit "G".

universities are not part of government given the manner in which they are presently organized and governed.[79]

42. Applying the legal principles set-out in *McKinney* and its companion cases[80] (the "***University Cases***") to Alberta universities as "presently organized and governed" leads inescapably to the conclusion they are "government" subject to *Charter* scrutiny. Should they not be found to be government based on the overwhelming facts, they would instead remain simple "expedients" by which the *Charter* is (largely) circumvented.[81]

43. It is equally clear that the Alberta Government's $6.3 billion annual operating expenditures for post-secondary education (representing about 10% of Alberta's annual budget)[82] is an activity that can be squarely "ascribed to government"[83] - along with a host of other programs implemented by Alberta universities including campus free speech, campus safety and (more generally) the management of university campuses.[84]

44. In fact, apart from government programs and objectives, Alberta universities have no core operations or objectives of their "own choosing."[85]

45. If the conception of certain universities as a "traditional … community of scholars and students enjoying substantial internal autonomy"[86] ever described universities in Alberta, that conception has become an anachronism.[87]

46. The UofL is government, subject to *Charter* scrutiny. Its activities are ascribed to government: university education, campus free speech, and the management of university campuses.

47. The cancellation clearly and significantly infringed the applicants' *Charter* rights under:

    a. 2(b) to the freedom of thought, belief, opinion and expression including the right to listen to others and the right to have their thoughts, beliefs and opinions informed by the expression of others (of their choosing); and

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[79] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 ("***McKinney***"), para 46.
[80] *McKinney*, *Harrison v. University of British Columbia* [1990] 3 S.C.R. 451 ("***Harrison***"), *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 ("***Stoffman***"), and *Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 S.C.R. 570 ("***Douglas***").
[81] *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 ("***Godbout***"), at para 48.
[82] Sexton Third Affidavit, Exhibit "B" [PDF page 597] and Sexton First Affidavit, Exhibit "BB" [PDF page 936].
[83] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 ("***Eldridge***"), para 44
[84] See below at Part IV. "Section 32(1) – UofL is Delivering Government Programs".
[85] *McKinney*, para 31.
[86] *McKinney*, para 34.
[87] *Pridgen v. University of Calgary*, 2012 ABCA 139 ("***Pridgen***"), para 108.

b. under 2(c) to freedom of peaceful assembly including the right to interactive expression and the right to mutually enjoy the power, community, support and show of values that physical assembly permits.

48. On January 30, 2023, the UofL cancelled the Event, without every recognizing that in so doing it was violating the *Charter* rights of its students, faculty and other members of the public who intended to participate in the Event. The UofL failed to correctly identify the scope of the *Charter* freedoms of expression and peacefully assembly most directly limited by its Decision, nor did it attempt to apply the relevant, constitutional frameworks necessary to respect these *Charter* rights. The failure of UofL to correctly determine these issues (UofL in fact never even attempted to determine these issues) is "fatal"[88] to the Decision.

49. Even if the above issued could hypothetically be overcome, the Decision and its Reasons do not disclose a reasonable and proportionate balancing of *Charter* protections and the UofL's statutory objectives.

II. ISSUES

50. The issues in this application are:

a. Is the UofL government under s. 32(1) of the *Charter*?

b. Are the UofL's programs of university education, campus free speech, and the management of campus, subject to *Charter* scrutiny under s. 32(1) of the *Charter*?

c. Did the UofL infringe the applicants' fundamental freedoms of thought, belief, opinion and expression under s. 2(b) of the *Charter*?

d. Did the UofL infringe the applicants' fundamental freedom of peaceful assembly under s. 2(c) of the *Charter*?

e. If so, were such infringements justified in a free and democratic society under s. 1 of the *Charter*?

f. What meaningful remedy under s. 24(1) of the *Charter* is appropriate in the circumstances?

[88] *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 ("***York***"), para 69 and 94.

III. LAW

A. Section 32(1) – What is Government?

51. The Alberta Court of Appeal has affirmed that Alberta universities are, at least, subject to the *Charter* insofar as they regulate the freedom of expression of students on campus.[89] The Alberta Court of King's Bench has twice affirmed the *Charter's* applicability to the government program of "post-secondary education."[90] While this still-relatively narrow framing of the *Charter's* applicability to Alberta universities ought to be sufficient to vindicate the applicants' *Charter* rights at issue in this action, it may be necessary for this Honourable Court to recognize that, in fact, the *Charter's* application is broader.

52. Section 32(1) caselaw recognizes a tension – between characterizing the *Charter's* application clause:

a. too widely, which "… could strangle the operation of society and … 'diminish the area of freedom within which individuals can act';"[91] and

b. too narrowly, which would "permit the provisions of the Charter to be circumvented by the simple expedient of creating a separate entity and having it perform the role."[92]

53. Section 32(1) is to be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic.[93]

54. Courts have grouped the *indicia* of what constitutes "government" for the purpose of section 32(1) into loose and often overlapping categories. For example, in *McKinney* Madam Justice Wilson (in dissent), laid out the categories (*circa* 1990) as:

a. the control test: does the legislative, executive or administrative branch of government exercise general control over the entity in question?;

b. the government function test: does the entity perform a government function?; and

c. the government entity test: is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?[94]

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[89] *UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1 ("***UAlberta***"), para 148.
[90] See below at paras 101-105.
[91] *McKinney*, para 23.
[92] *McKinney*, para 220, see also *Godbout*, para 48.
[93] *McKinney*, para 221, *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 ("***Dickson***"), para 45.
[94] *McKinney*, para 248.

55. Following the SCC's decisions in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 ("***Eldridge***") and *Godbout*, Madame Justice Paperny of the Alberta Court of Appeal laid out the categories (*circa* 2012) as:

a. government actors by nature: is the entity government by its very nature?

b. government actors by virtue of legislative control: is the entity subject to a sufficient degree of governmental control by government?

c. bodies exercising statutory authority: does a statutory delegate exercise some form of coercive power that belongs to government alone? and

d. non-governmental bodies implementing government objectives / Eldridge: is a non-governmental entity carrying out a specific governmental objective?[95]

56. For the purpose of this written argument, the applicants focus on the following four categories:

a. governmental control (paragraphs and);

b. governmental objective (paragraphs);

c. government by nature (paragraphs); and

d. government program (paragraphs).

i. Governmental Control

57. The University Cases focused heavily on the degree to which the entities were controlled by government.

58. While the universities were found to be substantially funded by and regulated by government and, therefore, had their "fate … largely in the hands of government …," they were nonetheless found to be "essentially autonomous." Various *indicia* of control were noted but, perhaps, the most significant dividing line between Douglas College (which was found to be government) and the universities and the hospital (which were found not to be government) was the line between "ultimate or extraordinary control and routine or regular control."[96]

59. In *McKinney*, the majority found:

[95] *Pridgen*, paras 78 – 99
[96] *McKinney*, para 40, *Harrison*, para 56, and *Stoffman*, para 102.

a. the mere fact that an entity was a creature of statute given natural person powers was "in no way sufficient" to make its actions subject to the *Charter*;

b. the fact that the university served a "public service" and, as such were subject to judicial review in respect of certain decisions, did not make a university subject to the *Charter* because the *prerogative writs* are to enforce law and procedure, not "substantive rights;"

c. the implementation of mandatory retirement was not "taken under statutory compulsion";

d. the mere fact that the university performed a function within the legislative jurisdiction of an order of government was insufficient to attract *Charter* scrutiny; and

e. the university's financial and regulatory dependence on government did not make them subject to the *Charter* because other non-governmental organizations are in the same position and, in any case, the "government has no legal power to control the universities" and any such attempt "would be strenuously resisted."[97]

60. Wilson J., in dissent, rested her opinion on many of the same *indicia* and, in addition:

a. that government financial contributions gave government a "substantial measure of control" over universities; and

b. that government exercised control over new programs in consideration of "academic considerations, societal need, student demand, economic constraints, and duplication of existing programs."[98]

61. The most significant point of divergence between the majority and Wilson J. was, according to Wilson J, differing conceptions of government as either:

a. the "oppressor of the people" who's function is to enact coercive laws, which Wilson J. found to be "no longer valid in Canada, if indeed it ever was;" or

b. a guarantor of socioeconomic benefits including adequate health care, access to education and a minimum level of financial security, provided through "many different instrumentalities."[99]

[97] *McKinney*, paras 30, 33, 34, 35, 36, 40 – 42.
[98] *McKinney*, paras 254 and 257.
[99] *McKinney*, paras 189, 218, 220.

62. The following year, in *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 ("***Lavigne***") (to quote Paperny J.A. in *Pridgen*):

> *[75] … LaForest J., who had earlier authored the majority judgment in McKinney, embraced a similarly broad view and wrote:*
>
> > *In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to simply be a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare.... To say that the Charter is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the Charter was enacted.*[100]

63. In *Harrison*, the majority provided very little section 32(1) analysis, citing "relatively minor factual differences" with *McKinney*. While the majority acknowledged a "higher degree of governmental control" at UBC in *Harrison* than at the University of Guelph in *McKinney* based on facts including that "the Lieutenant Governor appoints a majority of the members of the university's board of governors [and] that the Minister of Education may require the university to submit reports or other forms of information," the court found such control was merely "ultimate and extraordinary" rather than routine or regular. Commenting on legislation imposing "fiscal accountability" on UBC the court found "fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university."[101]

64. Only in Wilson J.'s dissent is there a thorough itemization of the "higher degree of governmental control" present in *Harrison* including:

a. the Lieutenant Governor in Council was a "Visitor" with concomitant powers;

b. the majority of the board was appointed by the Provincial Government, and the entire board served at the government's pleasure;

c. the Board was given special government like powers including expropriation and exemption from expropriation and taxation;

d. asset dispositions were subject to government approval;

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[100] See also *Lavigne*, para 226.
[101] *Harrison*, paras 14 and 56.

e. statutory duties to, *inter alia*, carry on the work of a university;

f. 80% of UBC's operating costs were borne by the government;

g. the government had control over UBC's foundation; and

h. the government had control of financial dealings through legislation.[102]

65. In *Stoffman*, reflecting on sections of the *Hospital Act*, R.S.B.C. 1979, c. 176 which, *inter alia*, required the hospital to:

a. make room for government representation on its board;

b. have a board and by-laws thought necessary by the minister;

c. obtain approval of a constitution and its by-laws and rules; and

d. comply with the conditions prescribed by the government, "a provision which leaves it open for the [government] to set virtually any requirement deemed appropriate",

La Forest J. stated:

> *[102] …While it is indisputable that the fate of the Vancouver General is ultimately in the hands of the Government of British Columbia, I do not think it can be said that the Hospital Act makes the daily or routine aspects of the hospital's operation, such as the adoption of policy with respect to the renewal of the admitting privileges of medical staff, subject to government control. On the contrary, it implies that the responsibility for such matters will, barring some extraordinary development, rest with the Vancouver General's board of trustees.*
>
> *…*
>
> *[104] The same can be said with respect to the minister's power to order a revision of a hospital's by-laws, at least until such revision has actually been ordered. [emphasis added]*

66. In *Douglas*, the SCC found "direct and substantial" governmental control, notwithstanding the college's board retaining a "measure of discretion," by virtue of:

a. the college being created for the purpose of conducting post-secondary education and training in British Columbia;

b. the college being, for all purposes, an agent of the government;

[102] *McKinney*, paras 5 – 17.

c. the College's board being, appointed by and removable at the pleasure of the government; and

d. the government being able "by law [to] direct its operation" including:

e. in consultation with the college, setting policies and directives for post-secondary education and training in the province;

f. approval of board bylaws; and

g. providing 83% of its operating funds.[103]

67. Wilson J., in her concurring opinion in *Douglas*, noted that, not only was the minister empowered to "mold college policy", the minister had done so on at least two occasions prior to 1990: in 1980 the minister divided the college into two separate institutions (with no evidence the board participated in that decision); and in 1985 the minister informed the college by letter of his intention to transfer a nursing program to the college from another post-secondary institution in the province.[104]

68. In *Lavigne*, a sufficient degree of governmental control was found to render the Council of Regents "government" under section 32(1). While in *Douglas* the college's constituent act expressly described it as an "agent" of government, in *Lavigne* the act simply gave the minister power to conduct and govern the colleges "assisted" by the Council:

> *… But the reality is the same. The government, through the Minister, has the same power of 'routine or regular control' …*[105]

69. The more recent case of *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 ("***Greater Vancouver***") focused on two transit authorities: TransLink, which operated in the Greater Vancouver Regional District (the "***GVRD***"); and BC Transit, which operated outside the GVRD. The trial court found BC Transit a government entity under section 32 of the *Charter*, which finding was not appealed to the SCC:

> *It is clearly a government entity. It is a statutory body designated by legislation as an "agent of the government", with a board of directors whose members are all appointed by the Lieutenant Governor in Council [who] has the power to manage BC Transit's affairs and operations by means of regulations … Thus, BC Transit*

[103] *Douglas*, paras 36, 37 and 49.
[104] *Douglas*, para 11.
[105] *Lavigne*, para 20.

> *cannot be said to be operating autonomously from the provincial government, since the latter has the power to exercise substantial control over its day-to-day activities.*[106]

70. The SCC agreed with the lower courts that TransLink was, likewise, government because, inter alia:

a. the GVRD (found to be a government) could exercise "substantial control over the day-to-day operations of TransLink;"

b. the GVRD had power to appoint the vast majority (12 of 15) of the members of TransLink's board;

c. to the extent the GVRD did not have complete control over TransLink, control was shared by another order of government: the Province;

d. it could not be viewed to be operating "independently or autonomously";

e. TransLink's strategic transportation plan had to be ratified by the GVRD and TransLink was required to "prepare all its capital and service plans and policies and carry out all its activities and services in a manner that is consistent with its strategic transportation plan;" and

f. the GVRD ratified bylaws relating to a variety of taxes and levies.[107]

71. It should be noted from the above cases that:

a. No one *indicium* of control was conclusive and any particular *indicium* may be found to have either no, or low or high probative value depending on the remaining factual matrix - for example:

b. While in *Douglas*, the proportion of government funding (83%) was highly probative, in *McKinney*, the same proportion (78.9%) was not; [108]

c. While in *Douglas* the fact of the college being designated an "agent" under the legislation was key, in *Lavigne* there was no such designation but the court nonetheless concluded "the reality is the same;" [109]

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[106] *Greater Vancouver*, para 17.
[107] *Greater Vancouver*, paras 17 - 21.
[108] *McKinney*, para 39, *Douglas*, para 37.
[109] *Douglas*, paras 34 and 36, *Lavigne*, para 20.

d. While in *Stoffman*, the court found a statutory assignment of management and control to the board "meaningless" unless control was understood to be ultimate and extraordinary rather than routine or regular, in *Douglas*, the court found "direct and substantial" governmental control notwithstanding that "the affairs of the college [were] managed and directed by a board of seven members;"[110]

e. While in *Douglas*, the board being removable by the government was central, in *Harrison* that same power was not even expressly referenced by the majority;[111] and

f. While in the University Cases, the mere existence of a means of control was characterized as "extraordinary and ultimate control" ("… at least until such revision has actually been ordered.") and therefore insufficient to establish government control, in *Greater Vancouver* the court characterized the mere existence of such control mechanism as a decisive "…power to exercise substantial control over [BC Transit's] day-to-day activities," and as "… substantial control over the day-to-day operations of TransLink."[112]

g. In *Harrison* (and to some extent *McKinney*) the court was particularly interested in whether the government had "control or influence upon the core functions of the university" [emphasis added];[113]

h. The government merely having a power is often differentiated from the government actually exercising that power (however, see para , above). In fact, in performing the section 32(1) analyses the above cases made very little reference to how the entities and government actually interacted. Rather, the cases were largely decided on the basis of the powers granted under the applicable regulatory frameworks, not whether and to what extent those powers were actually deployed. To the extent power is in fact exercised by the government, the application of the *Charter* is more likely.[114]

72. The control test is, therefore, a highly contextual analysis to determine, ultimately, whether the government exercises a sufficient degree of control so as to alter the "essentially autonomous" nature of the entity.[115]

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[110] *Stoffman*, para 102, *Douglas*, para 37.
[111] *Douglas*, para 49
[112] *Stoffman*, paras 102 – 104, *Harrison*, para 56 and *Greater Vancouver*, paras 17 – 21.
[113] *Harrison*, para 56 and *McKinney*, para 436.
[114] See especially *Stoffman*, para 104.
[115] *Douglas*, para 49.

ii. Governmental Objective

73. A central feature in the various section 32(1) tests (and especially Wilson J.'s government entity test) and a through-line in the above cases is a characterization of the objectives of the entity and, in particular, whether the entity pursues merely its own objectives or the objectives of government.

74. In *McKinney*, the majority's analysis depended heavily on a finding that universities pursue their own objectives and not governmental objectives. For example:

a. the majority's rejection of the university being considered government because it was a creature of statute with natural person powers was premised on the observation that such an entity "may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government;"[116]

b. the majority dismissed the applicability of Professor Hogg's concern, echoed in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 ("***Slaight***") that government might "authorize action by others that would be in breach of the *Charter*" on the grounds that such concern applies only where an entity is performing a governmental objective not, "private individuals [doing] things of their own choosing without engaging governmental responsibility;"[117]

c. the majority indicated that, had the university's actions been "taken under statutory compulsion" or "following the dictates of government" rather than "acting purely on their own initiative," the *Charter* may have applied; and[118]

d. while the university's "fate [was] largely in the hands of government" they were not organs of government because their governing board's "duty is not to act at the direction of the government but in the interests of the university."[119]

75. Similarly, in *Stoffman*:

a. the fact the board could be required by the minister to adopt specific by-laws did not "undermine its responsibility for by-laws or rules … which it adopts on its own initiative

[116] *McKinney*, para 30.
[117] *McKinney*, para 31.
[118] *McKinney*, para 35.
[119] *McKinney*, para 40.

and pursuant to its own sense of what is in the best interests of the Vancouver General;" and

b. the ministerial power of approval of board bylaws was dismissed as:

> *… nothing more than a mechanism to ensure that the hospital's actions do not run counter to the powers conferred on the government … to prescribe standards in respect of hospital administration . It is a mere supervisory power to that end. It does not displace the ongoing responsibility of its board to manage the affairs of the hospital for the benefit of the community.*[120]

76. In *Douglas*, the college was found to be government, in large measure, due to its pursuit of governmental objectives: "… the college is a Crown agency established by the government to implement government policy."[121]

77. Likewise, in *Greater Vancouver*, TransLink was government because, *inter alia*, "it has no independent agenda." Commenting on this aspect, the Alberta Court of Appeal's Justice M. Crighton later stated:

> *… [Greater Vancouver] 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.*[122]

78. As to the scope of what might be described as a "governmental objective," Wilson J. in *McKinney*, informed by a broader view of government than simply "the maker and enforcer of laws," found, *inter alia*, the university to be subject to the *Charter* because it performed a government function (education) which, "… has been a traditional function of governments in Canada." Wilson J. rejected the argument that the *Charter* ought only apply in this respect to "inherently" governmental functions:

> *A function becomes governmental because a government has decided that it should perform that function, not because the function is inherently a government function. [emphasis added]*[123]

79. While the McKinney majority ultimately disagreed on the disposition, it agreed with this particular principle:

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[120] *Stoffman*, paras 96 and 104.
[121] *Douglas*, paras 9, 18, 37 and 49.
[122] *UAlberta*, para 139, see also *Greater Vancouver*, para 20 and 21
[123] *McKinney*, para 238.

> *… the Charter is not limited to entities which discharge functions that are inherently governmental in nature. As to what other entities may be subject to the Charter by virtue of the functions they perform, I would think that more would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments. [emphasis added]*[124]

80. See also the discussion below at para 88 regarding *York* which determined the school board was government, in part, on the basis of its governmental objectives.

iii. Government by Nature

81. In *Eldridge*, La Forest J. noted two bases upon which an entity may be found to be government for the purpose of the *Charter*: "either by its very nature or in virtue of the degree of governmental control exercised over it."[125]

82. A finding that an entity is government "by its very nature" is best typified by *Godbout* in which the SCC determined that a municipality was subject to the *Charter*. According to La Forest J. (and the two concurring justices) the:

> *… ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments.*[126]

83. La Forest J. based his opinion on the following *indicia*:

a. Municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to legislatures: "[t]o my mind, this itself is a highly significant (although perhaps not a decisive) *indicium* of 'government' …"[127]

b. Municipalities possess a general taxing power.[128]

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[124] *McKinney*, para 36.
[125] *Eldridge*, para 44.
[126] *Godbout*, para 47.
[127] It should be clarified that municipal councils are, in fact, elected by the members of the public who reside within the municipality's jurisdiction.
[128] It should be clarified that while Parliament has an unrestricted right of taxation under the *Constitution Act*, 1867, section 91(3), the Provinces enjoy more restricted authority under sections 92(2) and 92(9), and municipalities enjoy only such powers of taxation as are granted to them by a provincial legislature.

c. Municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction – to enact coercive laws binding on the public generally, for which offenders may be punished.

d. Municipalities derive their existence and law-making authority from the provinces.[129]

84. With respect to this last point, the court found this *indicium* most significant, although it noted that municipalities "have distinct political mandates" and are not, therefore, "agents" of the province. Compare this to the argument in *McKinney* that universities were also creatures of statute with such powers as granted by the legislature. As shown above, La Forest J. rejected this argument on the basis that universities were doing "things of their own choosing without engaging governmental responsibility." This apparent contradiction between *McKinney* and *Godbout* (i.e. the pursuit of its "own objectives" being an *indicia* against or for a finding of *Charter* applicability) can be reconciled on the basis that what a municipality chooses to do is its "political mandate" – i.e. it pursues the objectives of the democratic electors within its jurisdiction. In other words, contrary to the general rule (that an entity pursuing its "own objectives" is less likely to be a government entity under section 32(1) of the *Charter*), an entity pursuing its "own objectives" is evidence the entity is government if such objectives are the objectives of a democratically elected body.[130]

85. The "government nature" test was further fleshed-out in *Greater Vancouver*. There the GVRD was determined to be government because:

a. the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "***LGA***") defined "local government" to include "the council of a municipality" and "the board of a regional district" including electoral area directors;

b. the *LGA* described regional districts as "independent, responsible and accountable order[s] of government within their jurisdiction" intended to provide "good government for its community"; and

c. the *LGA*'s designation of regional districts as "government" was consistent with the powers granted to the GVRD by statute:

d. to operate any service the board considered necessary or desirable for its geographic area;

[129] *Godbout*, paras 51 – 55.
[130] *McKinney*, para 31 and *Godbout*, para 52.

e. to recover the costs of its services; and

f. to make bylaws which are enforceable by fine or by imprisonment.[131]

86. To these *indicia* of "government nature" should be added the "special government-like powers" noted by Wilson J.: the power of expropriation; exemption from expropriation; and exemption from taxation.[132]

87. The majority in *Douglas* found that the college's designation as a government agent (or "agency") made "immediately evident" that "the college is simply a delegate through which the government operates a system of post-secondary education in the province."[133]

88. Most recently the SCC found the York Region District School Board a government entity in *York*. It is frankly difficult to distinguish *York* from the present case. For example, the following observation applies equally to UofL:

> *A review of the … Act confirms that … school boards are government by nature. The section of the Act entitled "Purpose" highlights the role that school boards play in the education system; s. 8 of the Act provides for extensive powers of the Minister of Education with respect to boards. Ontario public school boards are, in effect, an arm of government, in that they "exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves" [emphasis added.]*[134]

89. As will be seen below, this describes UofL. The Court continues:

> *… 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 [entity] can be said to be implementing for the state more broadly and not just for internal ... objectives" …* [135]

90. As described below, UofL implements many governmental policies and objectives including its core function: university education. The SCC also noted:

> *Public education is inherently a governmental function. It has a unique constitutional quality, as exemplified by s. 93 of the Constitution Act, 1867 and by s. 23 of the Charter. Ontario public school boards are manifestations of*

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131 *Greater Vancouver*, paras 18 and 19.
132 *Harrison*, para 6 and *Douglas*, para 6
133 *Douglas*, para 37.
134 *York*, para 79.
135 *York*, para 80.

> *government and, thus, they are subject to the Charter under Eldridge 's first branch.*[136]

91. Again, this observation applies equally to UofL. Provinces have constitutional jurisdiction over "education" and the *PSLA* is promulgated within that jurisdiction.

iv. Government Program

92. At least as early as the University Cases, the SCC has recognized the possibility of *Charter* application to non-government entities in respect of "some functions." The impetus for such recognition is, again, the risk that government might circumvent the *Charter* by the simple expedient of "creating a separate entity and having it perform the role."[137]

93. The principle was established and applied in *Eldridge*, where La Forest J. found that a non-governmental entity's delivery of "health services" (as generally defined by the *Canada Health Act*, R.S.C. 1985, c. C-6, the "***CHA***") attracted *Charter* scrutiny. La Forest J. stated:

> *… 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 … but rather into the nature of the activity itself … 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. [emphasis added]*[138]

94. The court also observed that,

> *… The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any* a priori *elucidation.* McKinney *makes it clear, however, that the Charter applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it … [emphasis added]*[139]

95. As stated in *McKinney*, the mere performance of a "public service" is insufficient to attract *Charter* scrutiny (see para 59.b above). Rather, as stated in *Eldridge,* "it must be found to

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[136] York, para 81.
[137] *Harrison*, para 67 and *McKinney*, paras 42, 45 and 220.
[138] *Eldridge*, para 44.
[139] *Eldridge*, para 42.

be implementing a specific governmental policy or program." This condition ought not be too formalistically applied. In *Eldridge* at para 44 (cited at para 93 above) La Forest J. described a "specific statutory scheme or a government program" as just an "example" of an activity that might "be ascribed to government."[140]

96. While the applicable legislation in *Eldridge* generally defined the "health services" at issue (including those "normally available" and "historically provided" at hospitals) full discretion was left to hospitals to determine the hospital services they would and would not provide, the manner of providing such services, and how they would allocate annual grants received for hospital services provided the previous year.[141]

97. Having established a government activity, the Court in *Eldridge* then sought a connection between the program and the impugned conduct. In *Eldridge* the impugned conduct was the failure to provide sign-language interpreters to patients with hearing impairment seeking health services. None of the applicable legislation was found to either require or prohibit the provision of interpreters (i.e. sign language interpretation was not the relevant government program). The SCC found the failure to provide interpretation a breach of section 15(1) of the *Charter*. The court accepted the appellants' assertion that:

> *… sign language interpretation, where it is necessary for effective communication, is integrally related to the provision of general medical services. [emphasis added]*[142]

98. Distinguishing *Stoffman*, which determined that a mandatory retirement policy at the hospital was not conduct attracting *Charter* scrutiny, La Forest J. stated:

> *Unlike* Stoffman*, then, in the present case there is a "direct and ... precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination - the failure to provide sign language interpretation - is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy [emphasis added].*[143]

99. *Eldridge* demonstrates that:

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[140] *Eldridge*, paras 43 and 44.
[141] *Eldridge*, paras 24 - 34, 49 and 50.
[142] *Eldridge*, paras 29, 34 and 69.
[143] *Eldridge*, para 51

a. a government funded program to deliver a service through or with the involvement of a private entity;

b. notwithstanding broad discretion on the part of the entity to define the service, to provide some services and not others, and as to the manner of delivery; and

c. notwithstanding that the service was historically provided by that entity without government involvement,

constitutes an activity "ascribed to government" attracting *Charter* scrutiny provided there is also a "direct and precisely-defined connection" between the government activity (eg. health services) and the impugned conduct (eg. refusing to provide sign language interpretation).

100. The *Charter* has been found to apply to Alberta universities under the *Eldridge* rubric in three cases.

101. In *R. v. Whatcott*, 2012 ABQB 231 ("***Whatcott***") an accused had been issued a trespass notice under the *Trespass to Premises Act*, R.S.A. 2000, c. T-7 for circulating pro-life flyers on campus. He was later found delivering more flyers on campus and was arrested and charged with an offence under the act. At trial, the Provincial Court judge determined his *Charter* rights had been violated and stayed the proceedings. The trial judgment, affirmed on appeal, followed *Pridgen* v. *University of Calgary*, 2010 ABQB 644 ("***Pridgen QB***", Justice Strekaf's decision under appeal in *Pridgen*) and held the university was delivering a government program of post-secondary education.

102. The judgment in *Whatcott* found the use of provincial trespass legislation to respond to an individual's complaint concerning the content of Mr. Whatcott's flyer was "integrally connected" to that program – a direct connection between the governmental mandate and the impugned activity – which attracted *Charter* scrutiny. Jeffrey J. added, *inter alia*:

a. The university was utilizing provincial trespass legislation to curtail Mr. Whatcott triggered *Charter* rights;

b. the university had itself expounded on its mandate, confirming it included providing a platform for the exchange of ideas; and

c. the university was publicly funded, "a factor that could not be easily discounted in assessing the applicability of the *Charter*."[144]

[144] *Whatcott*, para 29 to 35.

103. In *Pridgen*, University of Calgary students were sanctioned for online criticism of a professor. The lower court quashed the decision of a review committee for violation of the *Charter*. On appeal, only one of the three-judge panel, Justice M. Paperny, rested her decision on *Charter* grounds.

104. As in *Whatcott*, Justice Strekaf of the lower court, applied the *Charter* on the basis of *Eldridge* with respect to "the provision of post-secondary education," stating:

> *The structure of the* [Post Secondary Learning] 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 …*[145]

105. Paperny J.A., commenting on the lower court decision in her concurring opinion, stated:

> *[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.*
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> *[105] Applying the Eldridge analysis to the facts of this case is one possible approach. However, I find that the nature of the activity … fits more comfortably within the analytical framework of statutory compulsion … [emphasis added]*[146]

106. In *UAlberta*, the applicant students had sought judicial review of a university decision to impose a significant security costs order as a condition for a pro-life campus event. The court unanimously held that the *Charter* applied, per *Eldridge*, to the university's "regulation of freedom of expression by students on University grounds." This was considered a form of governmental action because, *inter alia*:

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[145] Quoted at *Pridgen*, para 102.
[146] *Pridgen*, paras 104 and 105

> *… 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.*[147]

107. The *Charter* has also been applied to a government program implemented by the university of Manitoba in *Zaki v. University of Manitoba*, 2021 MBQB 178 ("***Zaki***"). A university expelled a student for posting pro-life and pro-gun positions online, pursuant to a bylaw and procedure which referenced a sexual violence policy. The sexual violence policy was one adopted pursuant to a statutory obligation. The court found that in developing its sexual violence policy and in applying the bylaw and procedure which referenced it, the university "… was engaged in developing and implementing government policy …" On this basis, the university was subject to the *Charter* in connection with such government policy.[148]

108. In some recent Canadian caselaw certain universities have also been found not to be subject to the *Charter*.

109. In *Lobo v. Carleton University* 2012 ONCA 498 ("***Lobo CA***") (an appeal of *Lobo v. Carleton University*, 2012 ONSC 254 ("***Lobo 2***") which followed an earlier decision in *Lobo v. Carleton University* 2011 ONSC 4680 ("***Lobo 1***")) the court considered *Eldridge* and concluded that:

> *As explained by the motion judge, 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.*[149]

110. *Lobo* should be understood in its context. First, it was conceded by the applicant that the university was not government. Second, the decision appealed from (Lobo 2) was a decision striking a claim for failing to disclose a reasonable cause of action. Contrary to the above statement from the Ontario Court of Appeal, the lower court had not determined that

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[147] *UAlberta*, para 148. Earlier in Watson J.A.'s reasons, he stated: "… 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)." (para 109) but, as demonstrated below, "surveillance" by the government is, in fact, increasing not decreasing.
[148] *Zaki*, paras 155 – 169.
[149] *Lobo CA*, para 4.

the university was not implementing a government program. Rather the court had merely determined that:

> *The amended pleading … fails to plead the material facts to establish that [the university] is implementing a specific government program or policy …*[150]

111. The lower court had earlier struck the pleading saying:

> *At a minimum, the Plaintiffs are required to plead the necessary facts establishing a clear* nexus *between the university and government, if it is alleged that the university acted as agent of government.*[151]

112. In *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 ("***UVic***") the British Columbia Court of Appeal declined to apply *Eldridge* to the University of Victora in connection with the university's statutory power to regulate the use of its property. The petitioner conceded (improperly, the applicants submit) that the university was not a government entity. The Court dismissed the petition, relying heavily on *McKinney* because, notwithstanding a specific invitation to do so from the court, the applicants advanced no argument or evidence to distinguish the University Cases. In fact, there appears to have been no effort whatsoever to evidence the contemporary relationship (in law or in fact) between government and universities.[152]

113. *UVic* is obviously mistaken in one key respect. The Court rejected the argument that the university was delivering a government program of university education because it "would result in all of the core activities of the University being considered to be measures taken to effect government policy … The Court's ruling in *Harrison* is, in my view, full answer to this argument." In fact, Justice La Forest in *McKinney* had specifically warned against such a mistaken application of *stare decisis.*[153] Prior caselaw does not bind as to facts or outcome

[150] *Lobo 2*, para 9.
[151] *Lobo 1*, para 31.
[152] *UVic*, paras 6, 21, 33 and 36.
[153] *McKinney*, para 46.

– it only binds as to legal principles.[154] Where new arguments are raised[155] or where the facts are distinguishable[156], a different outcome may well result.

114. Also, s*tare decisis* is "not a straitjacket that condemns the law to stasis." Applying a "high threshold," a court may reconsider binding precedent where a new legal issue is raised – including arguments not raised in the precedent – or where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" – as opposed to merely an "alternative analysis of existing evidence."[157]

115. As will be seen below, the relationship between the Alberta government and universities including UofL is significantly different that the relationship described in the University Cases.

B. Freedom of Expression

i. Purpose and Relevance

116. The freedoms of thought, belief, opinion and expression protected under section 2(b) of the *Charter* are "fundamental" because they facilitate the search for truth, participation in social and political decision-making, and individual self-fulfillment and human flourishing – activities which are integral to a free, pluralistic and democratic society.[158] If citizens are not free to think for themselves, to express their thoughts, or to hear the free thoughts of other citizens – democratic consent and pluralism are illusory.

117. The freedoms of thought, belief, opinion and expression are essential to scientific progress and liberal education.[159] The discovery, dissemination, and application of scientific knowledge depend entirely on freedom of inquiry and expression. For this reason, "freedom

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[154] See for example Halsbury's Laws of England, vol. 18, § 535, *R. v. Ingram*, (1981) 12 Sask. R. 242, 1981 CarswellSask 25, para 7 - 9, *R. v. Sullivan*, 2022 SCC 19, paras 6 and 64, *Cameron v. Canadian Pacific Railway* (1918), [1918] 2 W.W.R. 1025, 1918 CarswellSask 106, paras 4 and 5, *R v.Couture*, 2007 SCC 28, para 21, *Carom v.Bre-X Minerals Ltd.*, 2010 ONSC 6311, para 32, *Sriskandarajah v. United States of America*, 2012 SCC 70, para 18 and *Canada (Attorney General) v. Confédération des syndicats nationaux,* 2014 SCC 49, para 26.
[155] *Eldridge* was decided after the University Cases.
[156] For example, evidence before the court demonstrating distinguishable government control or government programs.
[157] *Bedford v. Canada (Attorney General),* 2013 SCC 72, para 44, *Carter v. Canada (Attorney General)*, 2015 SCC 5, paras 42 and 44 and *R v. Comeau*, 2018 SCC 15, paras 31 and 34.
[158] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, para 54, *R. v. Keegstra*, [1990] 3 S.C.R. 697, para 94.
[159] See below at Part IV.ii "Campus Free Speech".

of inquiry and freedom of expression are prerequisite requirements in all aspects of [UofL's] operation."[160]

ii. Test

118. The SCC in *Montréal (Ville) v 2952-1366 Québec Inc.*, 2005 SCC 62 ("***Montréal***") summarized the 3-part test:[161]

a. Does the activity in question have expressive content that brings it within the *prima facie* protection of s. 2(b)?

b. The test is content neutral. Protection is afforded no matter how offensive, unpopular, disturbing[162] or false[163] it may be.

c. It protects both speakers and listeners.[164]

d. If so, does the method or location of this expression remove that protection?

e. Methods, like violence, which conflict with the values underlying the provision may not enjoy protection.[165]

f. Location: is it a public place[166] where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve[167] considering:

g. the historical or actual function of the place; and

h. whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

i. Does the law or government action at issue, in purpose or effect, restrict freedom of expression?

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[160] CRP000004.
[161] See paras 56 to 81.
[162] *R v. Keegstra*, [1990] 3 S.C.R. 697, para 244.
[163] *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, para 60; *R. v. Zundel*, [1992] 2 S.C.R. 731, para 36; *R. v. Lucas*, [1998] 1 S.C.R. 439, para 25.
[164] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326), para 85.
[165] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, para 37; *Montréal*, para 72.
[166] Although UofL is a "public place" this aspect of the test is not applicable. The "public place" requirement is really a s. 32(1) issue: state action is necessary to implicate the *Charter* [See *Montréal*, paras 62 and 71]. Here the *Charter* applies because UofL is government and delivers government programs.
[167] Democratic discourse, truth seeking, self-fulfillment.

j. Where the purpose is to restrict the content of expression, to control access to a certain message, or to limit the ability of a person who attempts to convey a message to express him or herself, that purpose will infringe section 2(b). A purpose to restrict the harms associated with people coming to have false beliefs is also an infringing purpose, because the purpose remains to regulate thoughts, opinions, beliefs or particular meanings.

k. Where the purpose is not to restrict the content of expression, the applicant must demonstrate the action infringes the right including the applicant's intention to convey a meaning reflective of the principles underlying freedom of expression. [168]

119. Where government interference in freedom of expression is accompanied by the systemic targeting of a particular group in society, the issue "takes on a further and even more serious dimension."[169]

C. Freedom of Assembly

120. The section 2(c) freedom of assembly relates to physical gatherings.[170] Its purpose is to safeguard Canada's liberal democratic society.[171] It is largely derivative of freedom of expression under section 2(b) - "Freedom of assembly is 'speech in action'"[172] - although the intrinsic value of peaceful assembly is more than a derivative freedom.[173] Where the purpose of assembly is expression, freedom of assembly is subject to the same analysis as freedom of expression.[174]

D. Justification

121. In reviewing decisions that limit *Charter* protections, courts are exercising their crucial role as "guardians of the Constitution."[175] Courts' approach "must reflect the particular importance of justification in decisions that engage *Charter* protections."[176] The Supreme Court of Canada recently summarized the approach as follows:

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[168] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, paras 48 – 50.
[169] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para 36.
[170] *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FCR 406, para 51, *Ontario (A.G.) v. Dieleman,* (1994) 20 O.R. (3d); *R. v. Collins*, [1982] O.J. No. 2506; *Fraser v. Nova Scotia (A.G.),* (1986), 30 D.L.R. (4th) 340.
[171] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, para 48.
[172] *R. v. Behrens*, [2001] O.J. No. 245 (Ont. C.J.), para 36.
[173] *Bérubé c. Ville de Québec*, 2019 QCCA 1764, paras 43 - 46.
[174] *Ontario (Attorney General) v. Dieleman* (1994), 20 O.R. (3d) 229 (Ont. Gen. Div.) at pages 329-330.
[175] See *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 ("***CSFTNO***"), para 70.
[176] *CSFTNO,* para 70.

> *a reviewing court must first determine whether the discretionary decision limits Charter protections. If this is the case, the reviewing court must then examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of Charter rights or the values underlying them.*[177]

122. The burden of proving that a decision reflects a proportionate balancing of the *Charter* rights it engages is on the decision maker.[178] Administrative decision makers must consider the *Charter* values relevant to their decisions, which constrain the exercise of their powers.[179]

123. It is not sufficient for a decision maker to claim that, in effect, its decision and reasons performed the necessary *Charter* analysis. When a *Charter* right applies, it is fatal to the decision for there not be "a clear acknowledgement and analysis of that right."[180]

124. Likewise, it is not sufficient for a decision maker to merely give lip service to the *Charter*; rather, the decision maker must be able to convince a reviewing court that it actually engaged in the required *Charter* analysis and proportionately balanced and minimally impaired *Charter* protections.[181] The decision must show that the decision maker meaningfully addressed the *Charter* protections to reflecting the impact the decision would have on the affected people.[182]

125. If a decision maker did engage in the required *Charter* analysis, courts are then required to review the "the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted by the decision maker" and consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives.[183]

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[177] *CSFTNO,* para 73.
[178] See *Doré v. Barreau du Québec*, 2012 SCC 12, para 66 ("Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion."); *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12 ("***Loyola***"), para 38 ("The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate."); *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, paras 80, 162; *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654, para 89; *Baars v. Children's Aid Society of Hamilton*, 2018 ONSC 1487, para 122; *Canadian Centre for Bio-Ethical Reform v City of Peterborough*, 2016 ONSC 1972, para 15
[179] *CSFTNO*, para 66.
[180] *York*, para 94.
[181] *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654*,* paras 108-109, 112; *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43, paras 61, 87.
[182] *CSFTNO*, para 68.
[183] *CSFTNO*, para 72.

126. A reviewing court must be satisfied that the decision gives effect, as fully as possible to the *Charter* protections at stake in light of the decision maker's statutory objectives.[184] This properly involves an inquiry in the decision maker's statutory framework.[185]

127. Both a decision's outcome and its reasoning process must be justified and defensible in relation to the law and facts.[186] The SCC posits that "some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning.[187] Also, some reasoning is so improper that an otherwise reasonable decision cannot stand.[188]

128. Decisions that fail to meet the above constitutional requirements will be struck down, as explained by Professor Paul Daly, University Research Chair in Administrative Law & Governance at the University of Ottawa, in an illuminating article on this subject:

> *First, where an administrative decision-maker has failed to discharge the Doré duty, either because the failure is manifest in its reasons or evident from the record, the decision will be struck down and (subject to any exercise of remedial discretion) the matter remitted to the decision-maker.*[189]

IV. FACTS AND ARGUMENT

A. Jurisdiction and Standing

129. This Court has constitutionally-protected supervisory jurisdiction to engage in judicial review of administrative decision makers.[190] This jurisdiction is further buttressed in this case where the impugned Decision violates *Charter* rights, and section 24(1) of the *Charter* confirms that this Court, as a court of competent jurisdiction, can receive applications for remedy of those violations.

130. As explained in the Reasons, the authority for the Decision was the UofL's *Statement on Free Expression* which "acknowledges the University must be able to reasonably regulate

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[184] *CSFTNO*, para 92; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, para 80; *Loyola*, para 39
[185] See *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654, paras 70, 111; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, paras 29-47.
[186] *CSFTNO*, para 66.
[187] *Vavilov,* para 86.
[188] *Vavilov,* paras 86 and 105.
[189] Paul Daly, The Doré Duty: Fundamental Rights in Public Administration, 2023 CanLIIDocs 1256, p 14.
[190] See *Real Estate Council of Alberta v. Henderson,* 2007 ABCA 303 para 19 ("as a matter of constitutional law, judicial review cannot be ousted entirely"); see also *Constitution Act, 1867,* section 96; *Crevier v. A.G. (Québec) et al.,* [1981] 2 SCR 220, 234.

the use of facilities, time, place and manner of expression."[191] UofL's *Statement on Free Expression* was adopted by the BOG at the direction of the Minister of Advanced Education.[192] It expressly "applies to individuals or organizations making use of University of Lethbridge property",[193] and is an exercise of the UofL's statutory authority, including over university buildings and land.[194] University decisions exercising this authority are appropriately subject to judicial review including whether they unreasonably violate *Charter* protections.[195]

131. Both Widdowson and Mr. Pickle have direct standing to challenge the Decision.

132. The Decision and its Reasons were responding to backlash against Widdowson, and were directed at Widdowson, personally, and her views,[196] which the Reasons brand as harmful, a danger to community safety, and an impediment to reconciliation with indigenous peoples. As stated in the cancellation email, the booked room would not be made available for "the Frances Widdowson public lecture" and no alternative UofL facilities would be provided.[197]

133. The Decision specifically targeted and directly infringed Widdowson's *Charter* freedoms of thought, opinion, belief and expression protected by section 2(b) as described below. Despite the UofL's commitment to make the use of UofL property available to individuals

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[191] *Reasons*, CRP p 2.
[192] Sexton First Affidavit, Exhibit "FF" [PDF page 1027] and Exhibit "GG" [PDF page 1031].
[193] *Statement on Free Expression*, CRP000004.
[194] *Post Secondary Learning Act*, SA 2003, c P-19.5 [*PSLA*], section 18(1) ("A board may make any bylaws the board considers appropriate for the management, government and control of the university buildings and land."); see also *PSLA*, s 60(1) ("The board of a public post-secondary institution shall (a) **manage and operate the public post-secondary institution in accordance with its mandate**, (b) develop, **manage and operate**, alone or in co-operation with any person or organization, programs, services and **facilities** for the economic prosperity of Alberta and **for the educational** or cultural **advancement of the people of Alberta**") [emphasis added]; *PSLA*, s 78(2) ("A board shall enter into an investment management agreement with the Minister that includes (a) **the mandate of the institution**, (b) performance metrics for the institution, and (c) anything else determined by the Minister.") [emphasis added]; Affidavit of Ashley Sexton, sworn November 23, 2023 (the "**Sexton Second Affidavit**"), Exhibit "A" [PDF page 369 and 372], *2022-2025 Investment Management Agreement* ("Founded on the principles of liberal education, the University of Lethbridge is broad in scope…. 9. System Mandate… **Public speaker** series and **events engage, enrich, and challenge the surrounding communities through individual guest speakers**….") [emphasis added].
[195] *UAlberta*.
[196] The Reasons refer to Widdowson as "a controversial speaker". CRP 002. The Reason linked to the President's January 26, 2023, Statement, which took issue with Widdowson's alleged "assertions that seek to minimize the significant and detrimental impact of Canada's residential school systems." This was not however, the topic of the Event, which was titled "How 'Woke-ism' Threatens Academic Freedom." Widdowson Affidavit, Exhibit "B."
[197] CRP0000001.

external to the University,[198] the Decision effectively bars Widdowson from the opportunity to physically and peacefully gather as a speaker at an event at UofL, in violation of *Charter* section 2(c) as also described below.

134. Widdowson is obviously the person most "aggrieved"[199] by the Decision and whose constitutional rights are most significantly violated by it.

135. As described by Pickle in his affidavit, Pickle's interest in the cancellation of the Event was "greater than the interest of the public at large."[200] Pickle as a student of UofL planned to attend the Event and engage in the discourse, including the question-and-answer session.[201] Pickle had come to the UofL, in part, because it offered a liberal education featuring free inquiry. The Decision cancelling the Event and preventing it from being held at UofL violated Pickles' constitutional freedoms protected by *Charter* sections 2(b) (including his right to hear) and 2(c). While there are likely other persons who had planned to attend the Event and engage in the discourse who would have a similar interest in Decision as Pickle, Pickle's interest "must be compared with the general public, not other similarly situated persons."[202]

B. Standard of Review

136. The SCC recently addressed the proper standard of review for decisions engaging *Charter* protections. In *York*, the Court was reviewing the decision of labour arbitrator that engaged teachers' privacy rights under section 8 of the *Charter*.[203] The labour arbitrator failed to recognize that *Charter* rights were engaged by her decision, an error the Court considered "fatal".[204] And despite citing *Charter* jurisprudence regarding the right to privacy,[205] she did not apply the section 8 legal framework, which she was required as a matter of law to respect.[206]

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[198] *Statement on Free Expression*, page 2, ROP 005: "The Board of Governors of **the University of Lethbridge affirms this commitment with the understanding that it applies to individuals** or organizations **making use of University of Lethbridge property** or resources, **including individuals** and organizations **external to the University**." [Emphasis added].
[199] See *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, at paras 7-10.
[200] *Ibid* at para 10.
[201] Pickle Affidavit, at para 9.
[202] *Alberta Liquor Store Association,* at para 10.
[203] *York,* para 4.
[204] *York*, para 69.
[205] *York*, para 21.
[206] See *York,* para 5.

137. Since the Court's reasoning is a significant clarification on the appropriate standard of review and apposite to the present case, paragraphs 62-64 are reproduced below in full:

> *[62] The correctness standard applies to the determination of whether the Charter applies to school boards pursuant to s. 32(1) of the Charter as this is a constitutional question that requires a final and determinate answer by the courts (Vavilov, at para. 55), one that will apply generally and is not dependent on the particular circumstances of the case.*
>
> *[63] The correctness standard also applies to review the arbitrator's decision. I would quash the award because the arbitrator erred in failing to appreciate that a Charter right arose from the facts before her. The issue of constitutionality on judicial review — of whether a Charter right arises, the scope of its protection, and the appropriate framework of analysis — is a "constitutional questio[n]" that requires "a final and determinate answer from the courts" (Vavilov, at paras. 53 and 55).*
>
> *[64] The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary "depending on how the state has chosen to delegate and wield its power" (Law Society of British Columbia v. Trinity Western University, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 116, per McLachlin C.J.). The presumptive standard of reasonableness is, thus, rebutted and correctness applies.*

138. Based on these illuminating paragraphs the correctness standard governs the following questions:

a. Whether the *Charter* applies to public universities in Alberta and the UofL in particular[207]; and

b. Whether the Decision engaged a *Charter* right, the scope of that *Charter* right and the appropriate framework for analyzing that *Charter* right.[208]

139. If the UofL had recognized that the *Charter* applied to its Decision and correctly identified the *Charter* rights engaged by its Decision, the scope of those rights and the appropriate framework for analyzing those rights, then the Decision and its Reasons for limiting *Charter*

[207] *York*, para 62; see also *York Region*, para 77.
[208] *York*, para 63.

rights would be reviewed on a reasonableness standard per *Doré, Loyola, Trinity Western University, and Vavilov*.[209] As explained below however, the Decision failed to recognize that it engaged *Charter* rights, and failed to apply the appropriate *Charter* framework which requires that a decision affect *Charter* protections as little as possible in light of the UofL's mandate.[210]

C. Section 32(1) – UofL is Government

140. The UofL is a government owned and funded entity with no substantial independent objectives. Far from theoretical, or "ultimate and extraordinary" control, UofL is subject to routine and continuous control in every aspect of its operations and assets. To the extent it retains discretionary power, that is exercised through bodies democratically elected by local constituents. In this and other ways the UofL is essentially a special purpose municipality. UofL is constituted and funded to deliver government programs including its core program: the delivery of university education.

141. By application of the legal principles in the University Cases, and other section 32(1) caselaw, the UofL is clearly "government" subject to the *Charter* in all respects. The failure to ascribe to government this massive – $6.2 billion annually – area of activity is to permit the maintenance of an impermissible (largely) *Charter* free zone.

142. The flexible, purposive, and generous (not technical, narrow, or legalistic) application of section 32(1) demands that this Honourable Court's application of Canada's Constitution "keep-up" with the evolution and expansion of the modern administrative state.

143. Because UofL is government, it is subject to the *Charter* in "all its activities."[211]

i. Control

144. Government control over Alberta universities, including UofL, is broad and complex and is exercised in a routine and regular manner over all aspects of university assets and operations, including their core mandate to deliver university education. The nature and extent of such control is summarized in this Part.

145. Requests made to the Minister under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 ("***FOIPP***") for communications between UofL and Advanced

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[209] See *CSFTNO*, para 60.
[210] *See Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, paras 35-36; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, paras 79-82.
[211] *Eldridge*, para 40.

Education's Executive Directors, Assistant Deputy Minister, Deputy Minister, or Minister reveal hundreds of pages of communication over a 3-year span and reference regular meetings and phone calls.[212]

a. The Post-Secondary Learning Act

146. The government primarily exercises control over universities through:

a. legislation which constitutes, empowers and governs universities: the *Post-Secondary Learning Act*, SA 2003, c P-19.5 (the "***PLSA***");

b. other legislation which controls universities like other government agencies; and

c. the power of the purse.

147. The primary governing body of an Alberta university is the BOG consisting of 21 members:

a. at least[213] half of whom[214], including the BOG chair, are appointed by the government from nominees of its own choosing[215];

b. a Chancellor, appointed by the Senate (which, like the BOG, will be referred to herein as a "**Hybrid Entity**" because it is partly composed of government appointees and partly composed of appointees of democratically elected bodies, referred to herein as "**Democratic Entities**");

c. the remaining half, or less, are appointed by the government from persons nominated by Democratic Entities or Hybrid Entities[216] being:

d. the Chancellor, who is appointed by the senate, a Hybrid Entity;

e. the President, who is appointed by the BOG, a Hybrid Entity;[217]

f. 2 members appointed by the government from nominees of alumni association, which is apparently a Democratic Entity;[218]

g. 1 member appointed by the government from nominees of the senate, a Hybrid Entity;

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[212] See for example, Viminitz Affidavit, Exhibit "L" [PDF page 137], Sexton Second Affidavit, Exhibit "B" [PDF pages 570, 574, and 581] and Sexton Third Affidavit, Exhibit "B" [PDF pages 14, 82,114, 125, 213, 497, and 610].
[213] Under *PSLA* s. 16(3)(f) the government may appoint an unlimited number of additional BOG members.
[214] *PSLA* s. 16(3)(a), (c), and (e).
[215] For the purpose of this argument, no distinction is drawn between the Alberta government as represented by the Minister of Advanced Education (the "**Minister**") or Lieutenant Governor in Council.
[216] *PSLA*, s. 16(3)(d).
[217] *PSLA*, s. 81(1).
[218] *PSLA*, s. 28(2).

h. 2 members appointed by the government from nominees of the general faculties council which is a Hybrid Entity (albeit largely elected[219]) and the academic staff association, which is a Democratic Entity;[220]

i. 2 members appointed by the government from nominees of the council of the students association which is a Democratic Entity;[221]

j. 1 member appointed by the government from nominees of the council of the graduate students association which is a Democratic Entity;[222]

k. 1 member appointed by the government from nominees of the non-academic staff association which is the union – the Alberta Union of Public Employees - a Democratic Entity;[223]

148. Therefore the BOG's members are either selected by the government (or by the government's appointees) or are selected by Democratic Entities.

149. The senate is composed of:

a. the Chancellor, who is appointed by the senate which is a Hybrid Entity;

b. the President, who is appointed by the BOG, a Hybrid Entity;[224]

c. a vice-president, who is appointed by the BOG, a Hybrid Entity;[225]

d. the chief academic officer for student affairs;[226]

e. the director of extension;[227]

f. the president and vice-president of the alumni association, which is apparently a Democratic Entity;[228]

g. 2 deans appointed by the deans' council, which is appointed by the BOG, a Hybrid Entity;[229]

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[219] *PSLA*, s. 24(2)(a).
[220] *PSLA*, s. 86(1).
[221] *PSLA*, s. 95(2).
[222] *PSLA*, s. 95(2).
[223] *PSLA*, s. 1(k).
[224] *PSLA*, s. 81(1).
[225] *PSLA*, s. 82(1)
[226] We assume, but don't know, that these are appointees of the senate.
[227] We assume, but don't know, that these are appointees of the senate.
[228] *PSLA*, s. 28(2).
[229] *PSLA*, ss. 21(1), 81(1), 82(1),

h. 2 members appointed by the BOG, a Hybrid Entity;

i. 3 members appointed by the general faculties council which is a Hybrid Entity, albeit largely elected;[230]

j. 2 members appointed by the alumni association, which is apparently a Democratic Entity;[231]

k. 2 members appointed by the non-academic staff association which is the union – the Alberta Union of Public Employees - a Democratic Entity;[232]

l. 4 members appointed by the council of the students association, which is a Democratic Entity;[233]

m. 1 member appointed by the council of the graduate students association, which is a Democratic Entity;[234]

n. 9 members appointed by the Minister; and

o. 30 representative members, elected by the members of the senate (a Hybrid Entity) to represent different constituencies within the university.

150. The BOG has such powers as granted to it under the *PSLA* subject to all conditions, prohibitions and restrictions set by Government.[235] The Government directs Alberta BOG's as to their roles and meeting processes.[236]

151. The BOG may only offer programs of study that are within its mandate and which have been approved by the Minister.[237]

152. The Minister may demand any information from the BOG[238] including information from students.[239] Student information includes system enrollment data reported to the government through the Learner and Enrolment Reporting System.[240]

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[230] *PSLA*, s. 24(2)(a).
[231] *PSLA*, s. 28(2).
[232] *PSLA*, s. 1(k).
[233] *PSLA*, s. 95(2).
[234] *PSLA*, s. 95(2).
[235] *PSLA*, s. 59(2).
[236] Sexton Third Affidavit, Exhibit "B" [PDF page 568]
[237] *PSLA*, s. 105 – regarding program approval see also below at Part IV...e. "Program Approval"
[238] *PSLA*, s. 118
[239] *PSLA*, s. 65.
[240] See the reference to "LERS" in the IMA referred to at paragraph below and in the UofL's 2019-2020 annual report at Viminitz Affidavit, Exhibit "L" [PDF page 121].

153. The Minister may investigate, appoint an administrator of, and may dissolve a university and thereafter transfer the assets and liabilities of the university to government or to a post-secondary BOG of its choosing.[241] Likewise, the Minister establishes student associations and may investigate student groups and terminate members, appoint an administrator or take any other action to resolve financial irregularities.[242]

154. The BOG (and universities, more generally) are also subject to a vast array of controls, including through other provisions of the *PSLA* referred to below.

b. Investment Management Agreements

155. Universities are "public agencies" under the *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5 ("***APAGA***"), pursuant to which they must develop, with the Government, a "Mandate and Roles Document" which sets out their mandate and the "accountability relationships of the public agency, including its duty to account to the responsible Minister."[243] The Government approves the mandate[244] then universities must fulfill it. UofL's most recent Mandate and Roles Document[245] requires UofL to operate a "comprehensive academic and research university" and confirms that "the Board is accountable to the Minister through the Chair [and the] Chair is accountable to the Minister for the mandate and conduct of the public agency."[246] Under *APAGA* the Minister may "set policies that must be followed by the public agency."[247]

156. This mandate is reproduced in the regularly reviewed and updated investment management agreement ("**IMA**") which the BOG must enter-into with government[248] and which must be "satisfactory to the Minister."[249]

157. While Government control over universities amply justified the application of the *Charter* prior to 2020, government controls over universities certainly increased in 2020. Reflecting on the 2020 introduction of the IMA requirement[250] the Minister told BOG Chairs:

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[241] *PSLA*, ss. 99 to 102.
[242] *PSLA*, ss. 93 to 97.
[243] *APAGA*, s. 1(i), 3(1) and 3(1)(c).
[244] Sexton First Affidavit, Exhibit "E" [PDF page 342].
[245] Sexton Third Affidavit, Exhibit "B" [PDF page 637] – explored in more detail below.
[246] For the previous Mandate and Roles document see Sexton First Affidavit, Exhibit "J'.
[247] *APAGA*, s. 10(1).
[248] *PSLA*, s. 59(3), 60(a) and 78 – see Part IV.C.i.b. "Investment Management Agreements", below regarding IMA's.
[249] See terms of grant agreement, for example see Sexton Third Affidavit, Exhibit "B" [PDF page 346].
[250] By the *Fiscal Measures and Taxation Act*, 2020, SA 2020, c 3.

> *The importance and impact of this agreement, as well as the shift it signifies in how we conduct our business, cannot be overstated.*[251]

158. This shift in the relationship seems[252] largely to have been the product of an August 2019 Blue Ribbon Panel on Alberta's Finances known as the "MacKinnon Report."[253] The MacKinnon report was a response to Alberta's "critical financial situation" in which new approaches were required "for delivering public services" including the "key areas" of health, education and post-secondary education. The MacKinnon Report found:

> *Most significantly … there does not appear to be an overall direction for Alberta's postsecondary system. The current funding structure doesn't link funding to the achievement of specific goals or priorities for the province such as ensuring the required skills for the current and future labour market, expanding research and technology commercialization, or achieving broader societal and economic goals.*
>
> *There also continues to be extensive overlap and duplication among post-secondary institutions …*
>
> *… The Panel recommends that the government consult with post-secondary stakeholders to set an overall future direction and goals for the post-secondary system along with appropriate governance models.*
>
> *… The Panel suggests that the future funding model ensure a link between provincial macro goals and outcovavmes to be achieved by post-secondary institutions.*[254]

159. IMA's are, therefore, the "primary accountability instrument"[255] by which the Government ensuring the billions "invested" in the post-secondary system each year are spent as effectively as possible to achieve the objectives of the provincial Government in a coordinated fashion.[256] IMA's, along with annual budgets [See paragraph , below], are referred to by the Government in annual grant agreements[257] as the "accountability

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[251] Sexton Third Affidavit, Exhibit "B" [PDF page 182].
[252] See, for example, Sexton Third Affidavit, Exhibit "B" [PDF page 146].
[253] Sexton First Affidavit, Exhibit "Y" [PDF page 581].
[254] Sexton First Affidavit, Exhibit "Y" [PDF page 621].
[255] Sexton First Affidavit, Exhibit "Z" [PDF page 701] – also see *PSLA* s. 8 titled "Accountability of Board".
[256] Sexton Third Affidavit, Exhibit "B" [PDF page 112], see also, for example, Sexton Third Affidavit, Exhibit "F" [PDF page 946]: "to facilitate the allocation of outcomes-based funding, to ensure government and institutions are focused on meeting the needs of the province" and Sexton Third Affidavit, Exhibit "B" [PDF page 129]: "To support system coordination and optimize the allocation of public investments in adult education … "
[257] See, for example, Sexton Third Affidavit, Exhibit "B" [PDF page 346].

documents." Government policy is informed by the work of the Minister's appointed Advisory Council on Higher Education and Skills.[258]

160. Universities' IMA's must: be consistent with the PSLA; be in the form mandated by the Minister; and must include the approved mandate of the institution, the Minister's performance metrics and anything else determined by the Minister.[259] The IMA also serves as partial satisfaction of the university requirement to provide the Minister a "business plan and annual report" under the *Sustainable Fiscal Planning and Reporting Act*, SA 2015, c S-29, s. 10(2).

161. UofL's inaugural IMA for 2021 to 2022[260] and current IMA for 2022 to 2025[261] include UofL's Minister-approved mandate[262] and various performance and "transparency" metrics tied to key government priorities from Alberta 2030: Building Skills for Jobs strategy. If designated performance metrics are not met, a percentage of government funding is at risk (by fall of 2024 a full 40% of the university's funding will be at risk if performance metrics are not satisfied).[263] Past and current performance metrics include the "proportion of approved programs at University of Lethbridge that have a Work Integrated Learning component," total domestic student enrolment, and the proportion of graduates who successfully find work in their chosen field.[264]

162. By the terms of the 2022 to 2025 IMA UofL agreed to provide approved programs to 6,232 domestic full-time students.[265]

163. Current "transparency metrics" include total international student enrolment, total indigenous student enrolment and the proportion of government revenue to total revenue.[266]

c. Mandate

164. UofL's Minister-approved-mandate, reflected in the Mandate and Roles Document and IMA's, which UofL must solely implement, include (relevant to this action):

[258] *PSLA*, s. 107.01 and 107.2 – see also Sexton Third Affidavit, Exhibit "B" [PDF page 425].
[259] *PSLA*, s. 78.
[260] Sexton Third Affidavit, Exhibit "B" [PDF page 182].
[261] Sexton First Affidavit, Exhibit "K".
[262] Discussed in detail below.
[263] Sexton First Affidavit, Exhibit "K" [PDF page 400].
[264] Sexton First Affidavit, Exhibit "K" [PDF page 401].
[265] Sexton Second Affidavit, Exhibit "A" [PDF page 367].
[266] Sexton First Affidavit, Exhibit "K" [PDF page 402].

a. operating a comprehensive academic and research university founded on the principles of liberal education;

b. fostering a learning community that meets the educational and personal growth needs of its students by emphasizing, *inter alia*, information literacy and a spectrum of extracurricular opportunities;

c. contributing to society by discovering, preserving, synthesizing, and disseminating knowledge for the benefit of all;

d. protecting free inquiry and scholarship and supporting the free and open scholarly discussion of issues; and

e. facilitating public speaker series and events that "engage, enrich, and challenge" the surrounding communities and invite discussion on important issues.[267]

d. Financial Controls and Monitoring

1. Internal Finance

165. Under the *Financial Administration Act*, RSA 2000, c F-12 (the "***FAA***"), UofL is a "provincial agency"[268] whose money is "public money"[269] which is part of the Government's "general revenue fund."[270]UofL must prepare its financial records in accordance with Government requirements[271], must provide any information requested by Treasury Board,[272] and must comply with other Treasury Board policies.[273]

166. The UofL's fiscal year-end is determined by the Minister and its accountant is the provincial Auditor General.[274] UofL must annually submit to the Minister its audited financial statements,[275] budget "satisfactory to the Minister",[276] and any other information and report requested.[277]

[267] Sexton First Affidavit, Exhibit "K".
[268] *FAA*, ss. 1(1)(p) and (r).
[269] *FAA*, s. 1(t).
[270] *FAA*, s. 14.
[271] *FAA*, s. 10(2).
[272] *FAA*, s. 6.
[273] *FAA*, s. 5, 78, 79 and 83.
[274] *PSLA*, ss. 70 - 71.
[275] *PSLA*, s. 79(1)(a).
[276] *PSLA*, s. 78(5) and the terms of grant agreement, for example see Sexton Second Affidavit, Exhibit "A" [PDF page 393].
[277] *PSLA*, ss. 79(1)(b) and 80.

167. The Government does, in fact, treat UofL's revenue and expenses, including tuition income[278] and staff and faculty salaries[279], as part of the Government's consolidated revenues and expenses.

168. Without Ministerial approval UofL may not budget a deficit[280] or borrow past the date upon when "revenues for the current year are available," or guarantee a debt. It may only borrow for prescribed purposes.[281]

169. UofL's BOG and executive remuneration is governed by *APAGA*[282] and (until recently) by the *Reform of Agencies, Boards and Commissions (Post-secondary Institutions) Compensation Regulation*, Alta Reg 47/2018 (the "**Compensation Regulation**"), by which the Minister becomes involved in such *minutiae* as approving executive health benefits.[283] Under the Compensation Regulation, and *Salary Restraint Regulation*, Alta Reg 6/2018 and *Salary Restraint Regulation*, Alta Reg 80/2021, the government imposed an extended freeze on the UofL's non-unionized wages to March 31, 2022.[284]

170. During and following the Covid-19 pandemic, the government permitted UofL to submit a request to draw down its reserves to address short-term budgetary challenges.[285]

2. External Finance

171. The Minister also exercises significant control over a university's ability to increase tuition fees and non-instructional fees including prohibiting increases and imposing caps and consultation requirements.[286] The government published an April 2020 Guidelines for The Alberta Tuition Framework[287] explaining its tuition regulations. As part of its 2023 budget, the government improved affordability for students by capping domestic tuition.[288]

3. Assets and Capital

[278] Sexton First Affidavit, Exhibit "BB" [PDF page 858].
[279] Sexton First Affidavit, Exhibit "BB" [PDF page 885].
[280] *PSLA*, s. 78(6).
[281] *PSLA*, s. 72 to 74.
[282] *PSLA*, s. 55.
[283] Sexton Third Affidavit, Exhibit "B" [PDF pages 28, 37, 68 and 149].
[284] Sexton Third Affidavit, Exhibit "B" [PDF pages 159, 176 and 281].
[285] Sexton Third Affidavit, Exhibit "B" [PDF pages 98 and 667].
[286] *PSLA*, s. 61 and the *Tuition and Fees Regulation*, Alta Reg 228/2018.
[287] Sexton Third Affidavit, Exhibit "B" [PDF page 228].
[288] Sexton Third Affidavit, Exhibit "B" [PDF page 625].

172. Apart from tuition fees which are "public money"[289] UofL is publicly funded including through, *inter alia*, the public donation of land, buildings, capital maintenance, operating costs and exemption from taxation[290]

173. UofL acknowledges its "… fiduciary responsibility as a publicly funded institution to ensure that Assets purchased are managed responsibly …"[291]

174. UofL's land and capital planning, use, maintenance and disposition is all subject to government control. UofL may neither dispose of or lease for more than 5 years any land, without government approval.[292] When UofL wanted to renew lease space to a radiology clinic, it requested government approval by means of an investment evaluation and business case.[293]

175. The *PSLA* requires that UofL prepare and submit an annual capital plan "in the form and containing the information acceptable to the Minister."[294] According to the UofL:

> *The Capital Plan forms the University's request to government for funding of priority capital projects over the next five years … The University of Lethbridge's Capital Plan also strives to align itself with government goals, business plans and other key government strategic documents. University Senior Administration communicates regularly with ministers and other government officials to discuss the capital needs and priorities of the institution …*[295]

176. The *PSLA* requires that UofL prepare and submit a long-range land use and development plan "in accordance with the regulations."[296] The regulations are the *Land Use Regulation*, Alta Reg 54/2004 by which the UofL is required to consult with landowners and the City of Lethbridge and consider their comments, a process the Minister oversees.[297] Capital plans and long-range plans must, of course, be consistent with UofL's approved mandate.

177. Capital planning and submissions are coordinated through Alberta Infrastructure including by use of its Building and Land Infrastructure Management System (BLIMS) and "VFA"

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[289] See para 165 above.
[290] See paras 184 below.
[291] Viminitz Affidavit, Exhibit "F" [PDF page 23].
[292] *PSLA*, s. 67.
[293] Sexton Third Affidavit, Exhibit "B" [PDF page 162], Exhibit "J" [PDF pages 994, 1000 and 1004], Sexton Second Affidavit, Exhibit "A" [PDF pages 251, 404, 422, 496, and 566].
[294] *PSLA*, s. 78(7) and (8)
[295] Viminitz Affidavit, Exhibit "L" [PDF page 137] – the 2022-2027 Capital Plan and its submission to the Minister is at Sexton Third Affidavit, Exhibit "B" [PDF page 421].
[296] *PSLA*, s. 121(2).
[297] *Land Use Regulation*, ss. 5, 9, and 10.

which provides access to basic building information, pictures, condition information, functional information, deferred maintenance, and recommendations to remedy deficiencies.[298] Alberta Infrastructure provides supports for government "owned and supported buildings" including on-site reviews, energy audits, environmental audits, safety audits, condition and functionality ratings, compliance with the building standards, coordinating maintenance with ongoing or planned capital development, and life cycle maintenance planning.[299]

178. Money provided by the Minister to the UofL for capital planning[300], operations[301], improvements[302] and maintenance[303], is provided under grant agreements which impose detailed governmental controls including: permitted uses of funds and capital assets;[304] quality and specification requirements;[305] compliance with UofL's approved mandate;[306] cost-recovery obligations;[307] compliance with various Ministerial guidelines;[308] extensive reporting obligations including use of BLIMS and VFA;[309] audit and inspection rights.[310]

179. UofL is prohibited from having a subsidiary without government approval under the *PSLA*[311] and *FAA.*[312] Given these restrictions, and the restrictions set-out above, UofL recently sought Ministerial approval to create an arm's length business trust to "monetize" its south campus lands. The request was accompanied by a 60-page business case. The first "key opportunity" mentioned was to "diversify its revenues and become less dependent on provincial operating grants"[313] – consistent with the MacKinnon Report's recommendation that post-secondary institutions diversify revenue sources and implement more

[298] Sexton Third Affidavit, Exhibit "J" [PDF page 977].
[299] Sexton First Affidavit, Exhibit "O" [PDF pages 434 and 442] and Exhibit "R".
[300] Sexton Second Affidavit, Exhibit "A" [PDF page 544].
[301] Sexton Second Affidavit, Exhibit "A" [PDF pages 6, 16, 59, 112, 236, 390, and 482].
[302] Sexton Second Affidavit, Exhibit "A" [PDF page 201].
[303] Sexton Second Affidavit, Exhibit "A" [PDF pages 6, 16, 59, 112, 236, 390, and 482].
[304] Sexton Second Affidavit, Exhibit "A" [PDF pages 8, 18, 15, 60, 66, 68, 114, 122, 217, and 239].
[305] Sexton Second Affidavit, Exhibit "A" [PDF page 547].
[306] Sexton Second Affidavit, Exhibit "A" [PDF pages 23, 66, and 122].
[307] Sexton Second Affidavit, Exhibit "A" [PDF pages 23 and 66].
[308] Sexton Second Affidavit, Exhibit "A" [PDF pages 7, 17, 61, 114, and 126].
[309] Sexton Second Affidavit, Exhibit "A" [PDF pages 15, 18, 24, 61, 66, 68, 122, 123, 126, 127, 221, 546, and 548].
[310] Sexton Second Affidavit, Exhibit "A" [PDF pages 9, 18, and 62].
[311] *PSLA*, s. 77.
[312] FAA, s. 80(4).
[313] Sexton Third Affidavit, Exhibit "B" [PDF page 437].

entrepreneurial approaches to program finance[314] and the Minister's 2022 – 2025 IMA transparency metric "revenue dependency ratio."[315]

180. UofL is a registered charity and, as such, enjoys tax benefits under section 149.1 of the *Income Tax Act,* R.S.C., 1985, c. 1, as do its donors under section 118.1.

e. Program Approval

181. Much government control over UofL is related directly to its core function; for example, the Minister's control over program approvals.[316]

182. UofL may only provide programs of study that are within its mandate and may only provide, rename, or terminate such programs with the approval of the Minister in accordance with the *Programs of Study Regulation*, Alta Reg 91/2009. Under the regulations the Minister and (where a request relates to a degree program) the Campus Alberta Quality Council[317] review new program requests to ensure they meet the Minister's criteria for post-secondary system co-ordination[318] and meet the Council's quality standards and conditions.[319] The Council's standards are consistent with[320] the Council of Ministers of Education, Canada's *Ministerial Statement on Quality Assurance of Degree Education in Canada*, 2007.[321] Such standards relate to admission requirements, program design and outcome, and graduation requirements including depth and breadth of knowledge, communication skills, professional capacity and humility.

183. Recently the Minister has approved a program name change,[322] the termination of a program[323] and several new programs for UofL.[324]

[314] Sexton First Affidavit, Exhibit "Y" [PDF page 586].
[315] Sexton Second Affidavit, Exhibit "A" [PDF page 369].
[316] See also Part IV.C.i.e. "Program Approval", below
[317] *PSLA*, ss. 108 and 109.
[318] *Programs of Study Regulation*, s. 4.
[319] *Programs of Study Regulation*, s. 5.
[320] Sexton First Affidavit, Exhibit "KK".
[321] Sexton First Affidavit, Exhibit "PP".
[322] Sexton Third Affidavit, Exhibit "B" [PDF page 63].
[323] Sexton Third Affidavit, Exhibit "B" [PDF page 67].
[324] Sexton Third Affidavit, Exhibit "B" [PDF pages 70, 73, 187, 265, 427, and 613].

f. Power of the Purse

184. Along with health (about 40% of the provincial operating budget)[325]and K-12 education (about 17% of the budget), about 10% of the provincial operating budget[326] goes to "delivering public services"[327] in the form of post-secondary education. Universities are highly dependent on government funding – UofL described a 20% reduction in government funding as "catastrophic".[328]

185. The MacKinnon Report found that operating grants were "no longer linked to enrolment or program offerings"[329] and that funding was not linked to the "achievement of specific goals or priorities for the province."[330]

186. Funding is now very clearly conditional on universities achieving specific provincial objectives including the delivery of approved programs to at least 6,232 students [see paragraph , above].

187. In addition to the controls mentioned above and, in particular, the Ministerial approval of university mandates, IMA's and program offerings, grant funding is made under grant agreements which, in exchange for funding, commit universities to the achievement of provincial requirements and objectives.

188. Under the *Innovation and Advanced Education Grants Regulation*, Alta Reg 121/2008 (now the *Ministerial Grants Regulation*, Alta Reg 215/2022) the Minister may establish eligibility criteria for grants, impose conditions on grants, and may require repayment of grants where the recipient failed to comply with a condition, provided any misleading information, or received a grant for which the recipient was ineligible. Grants may only be used for stated purposes and are subject to reporting and audit rights.[331]

189. By the grant agreement in place in January 2023[332] the Minister provided UofL $88 million as a base operating grant and $4.2 million for capital maintenance renewal. The money could only be used[333] to support UofL's approved mandate including the delivery of

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[325] Sexton First Affidavit, Exhibit "Y" [PDF page 589].
[326] Sexton Third Affidavit, Exhibit "B" [PDF page 667] and Sexton First Affidavit, Exhibit "BB" [PDF page 936].
[327] Sexton First Affidavit, Exhibit "Y" [PDF page 583].
[328] Sexton First Affidavit, Exhibit "E" [PDF page 346].
[329] Sexton First Affidavit, Exhibit "Y" [PDF page 620].
[330] Sexton First Affidavit, Exhibit "Y" [PDF page 621].
[331] *Innovation and Advanced Education Grants Regulation*, ss. 3,4,8,10
[332] Sexton Second Affidavit, Exhibit "A" [PDF page 390].
[333] Sexton Second Affidavit, Exhibit "A" [PDF page 392].

approved programs by payment of instruction, academic support, student services, computing, network and communications services, institutional support, facilities management, operations, maintenance, research and certain ancillary services (which are "generally expected to operate on a cost recovery basis").[334] UofL was required to comply with applicable program guidelines,[335] to submit a budget and IMA (called the "Accountability Documents") "which are satisfactory to the Minister,"[336] and to comply with audit, inspection and voluminous reporting requirements including: 6 enrollment reports; 18 financial reports; survey contact information; 4 tuition reports; and one or more program reports.

190. The government also provides UofL with substantial capital funding which, as described at paragraphs to , is earmarked and obligates UofL's to various government conditions.

191. UofL's south campus land was donated to it by the City of Lethbridge[337] and the provincial government provided $17.5 million in the late 1960's to build UofL's campus including architect Arthur Erickson's iconic University Hall.[338] About 10 years later the government funded the construction of UofL's Centre for Arts.[339] More recently the provincial government has granted to UofL:

a. $260 million in its "Destination Project – Phase I";[340]

b. $20 million to upgrade a heating and cooling plant;[341]

c. $7 million to maintain infrastructure under the Infrastructure Maintenance Program[342] - "more than other Provincial Governments provide to post-secondary institutions" but which is normally about $4.2 million annually;[343]

d. $3 million to plan Destination Project – Phase II,[344] including the renewal of Anderson Hall,[345] the space in which the Event was booked and cancelled;

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[334] Sexton Second Affidavit, Exhibit "A" [PDF page 399].
[335] Sexton Second Affidavit, Exhibit "A" [PDF page 392].
[336] Sexton Second Affidavit Exhibit "A" [PDF page 393].
[337] Sexton Third Affidavit, Exhibit "B" [PDF page 440]
[338] Sexton First Affidavit, Exhibit "V".
[339] Sexton First Affidavit, Exhibit "W".
[340] Viminitz Affidavit, Exhibit "L" [PDF page 137].
[341] Viminitz Affidavit, Exhibit "L" [PDF page 137].
[342] Sexton First Affidavit, Exhibit "A" [PDF page 27] and Sexton Second Affidavit, Exhibit "A" [PDF page 236].
[343] Sexton First Affidavit, Exhibit "A" [PDF page 18], Viminitz Affidavit, Exhibit "L" [PDF page 80], and Sexton Second Affidavit, Exhibit "A" [PDF page 390].
[344] Sexton Second Affidavit, Exhibit "A" [PDF page 545].
[345] Viminitz Affidavit, Exhibit "L" [PDF page 137].

e. $3 million for operation costs of The Destination Project- Science Academic Building;[346] and

f. $184K for the likaisskini Gathering Space (including federal money);[347]

192. UofL has also:

a. requested, by its capital plan, that government provide an additional $95 million for Destination Project – Phase II[348] (including the renewal of Anderson Hall);

b. requested $1.8 million to upgrade its Community Centre for Wellbeing;[349]

c. borrowed about $7 million[350] from government under the *Local Authorities Capital Financing Act*, SA 2019, c L-20.8, which makes low interest loans available to cities, health authorities, hospitals, school boards, and post-secondary institutions;

d. requested $3 million to operate its new Science Commons facility;[351]

e. requested $35 per user per year to upgrade employee software;[352]

f. requested "any investment" towards its $102 million deferred maintenance projects.[353]

g. Miscellaneous

193. In addition to the controls exercised above, the provincial government has used its power over UofL to, for example: require UofL to report on and pause partnerships with People's Republic of China or Chinese Community Party related entitles;[354] support displaced Ukrainian learners and report;[355] require the involvement of students associations in UofL's budget process;[356] cause UofL to circulate surveys to staff and students, and cause UofL to deliver the programs referenced in Part .[357]

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[346] Sexton Second Affidavit, Exhibit "A" [PDF page 6].
[347] Sexton Second Affidavit, Exhibit "A" [PDF page 201].
[348] Viminitz Affidavit, Exhibit "L" [PDF page 137 to 138].
[349] Sexton Third Affidavit, Exhibit "B" [PDF page 215].
[350] Viminitz Affidavit, Exhibit "L" [PDF page 162] and Sexton First Affidavit, Exhibit "L", Exhibit "M", and Exhibit "N".
[351] Sexton Third Affidavit, Exhibit "B" [PDF page 285].
[352] Sexton Third Affidavit, Exhibit "B" [PDF page 415].
[353] Sexton Third Affidavit, Exhibit "B" [PDF page 586].
[354] Sexton Third Affidavit, Exhibit "B" [PDF pages 179, 196, and 752].
[355] Sexton Third Affidavit Exhibit "B" [PDF page 386, 671 and 683].
[356] Sexton Third Affidavit, Exhibit "B" [PDF page 19].
[357] Sexton Third Affidavit, Exhibit "B" [PDF page 86].

h. Conclusion

194. In the University Cases, government was found to merely possess powers, including spending powers, which put the subject universities' "fate … largely in the hands of government …" However, such power was more a theoretical than practically reality. Government power might be "ultimately and extraordinarily" exercised, it was reasoned, but the power was not actually exercised, and certainly not exercised either over the universities' core functions or on a routine or regular basis. Therefore, the universities were found to remain "essentially autonomous" – a "traditional … community of scholars and students enjoying substantial internal autonomy." Any government attempt to exercise control over universities would, it was assumed, be "strenuously resisted."

195. The facts of the University Cases do not, therefore, remotely resemble the contemporary relationship between the Government and Alberta universities, including the UofL.

196. The Government has established a highly sophisticated system of control over universities through its legislative, regulatory and spending power including the power to reclaim the university's assets, its board appointments including its selection of the board Chair, its approval of university mandate and roles documents, IMA's, capital and development plans, grant agreements, program approvals, and through a suite of other legislation which treats universities as government agencies.[358]

197. The government exercises these powers (without any apparent resistance, much less "strenuous resistance") on a routine and regular basis over all aspects of the UofL's assets and operations including over its core function: the operation of a public facility delivering university education. The UofL is prohibited from pursuing any truly "independent objective."[359] Rather, it is permitted only to deliver its Minister-approved programs, in accordance with its *PSLA* and Minister-approved mandate, IMA's, and grant agreements. In addition to the government's power being used to control UofL's mandate, operations and assets – it is routinely and regularly used to cause the UofL to implement countless government policies[360]; chief among them the delivery of the "public service" of post-secondary education for which the UofL is accountable to the Minister. In fact, the UofL does nothing but deliver government programs. The fact that the UofL retains discretion as to the manner in which performs its governmental functions is irrelevant – administrative

[358] See below at Part IV.C.iii. "Nature"
[359] See below at Part IV.C.ii. "Objectives"
[360] See below at Part IV.D. "Section 32(1) – UofL is Delivering Government Programs"

discretion is the essence of the modern administrative state, as acknowledged in *Charter* caselaw.[361]

198. Even within its narrow discretion UofL is not immune to governmental power. When the decision had been made to cancel the Event, UofL's president frankly admitted, "the potential for government blow back is real and we will spend the weekend on this. Leakage of this decision would severely harm our [government relations]."[362]

199. The conception of universities as a traditional community of scholars enjoying substantial internal autonomy is now an obvious anachronism.

200. UofL is, therefore, government under section 32(1) of the *Charter* by virtue of government control alone. As explored below in,[363] UofL is also government by virtue of its solely governmental objectives and its quintessential nature. To the extent it might be argued UofL retains any independence from Government, its independent objectives are substantially no different than those of a democratically-elected municipal council.

ii. Objectives

201. An entity is more likely to be found to be government under section 32(1) of the *Charter* if and to the extent it implements government policy and objectives, as opposed to acting "purely on [its] own initiative." [See part ii "Government Objective", above.]

202. Given the regulation of universities described above it is difficult to discern any function served by universities except the implementation of government objectives and policy. For example:

a. The *PSLA*'s preamble identifies the statute as a means by which the government commits to ensuring a high-quality post-secondary education system which is accessible, affordable, accountable and coordinated. The purpose of the act is, therefore, to obtain the objectives of government[364] - objectives for which the government retains express accountability.[365]

b. The *PSLA* assigns UofL's BOG the duty (not just the right) to manage the public institution in accordance with its mandate and to operate Minister-approved programs

[361] See, especially, *Doré c Québec (Tribunal des professions),* [2012] 1 S.C.R. 395, see also paragraphs 66, 96 and 99.b, above.
[362] CRP000003.
[363] Parts IV.C.ii. "Objectives" to IV.C.iii. "Nature"
[364] *PSLA* preamble.
[365] See paras 74 and 75, above.

and services and facilities for the economic prosperity of Alberta and for the educational or cultural advancement of the people of Alberta.[366] The BOG's objectives are those of government, assigned to the BOG by government.

c. The BOG may have no other objective. It is prohibited from engaging in or carrying on "any activity that is not within the mandate … contained in the investment management agreement …"[367]

d. All other statutory rights and duties are, therefore, derivative including *PSLA*, s. 16(5) which requires the BOG "act in the best interests of the university" – the best interest of a university necessarily lies in pursuing objects within its exclusive, government assigned mandate.

e. As demonstrated at Part below, UofL's core function is the delivery of government programs and, most especially, the operation of a public university education.

203. Perhaps it could be argued that, within the scope of its permitted objectives, the BOG retains some measure of discretion or counterbalancing influence on government policy and, in that respect, might retain "initiatives" or "objectives" of its "own choosing." However:

a. The argument falls squarely within the Court's warning in *McKinney* to not "permit the provisions of the *Charter* to be circumvented by the simple expedient of creating a separate entity and having it perform the role."[368] The power of the administrative state – being the product of statutory discretion – is the impetus for broader *Charter* application.

b. Assuming that is correct, the question then becomes: "Whose initiatives and objectives?" As described in the following Part, to the extent the BOG pursues its "own objectives" it actually pursues its democratic mandate like a municipality which is, of course, subject to the *Charter*.[369]

204. Given that UofL pursues, exclusively, government objectives, it must be held to be government under s. 32(1) of the *Charter*.

205. As described at paragraph above, the reasoning in *York* seems to apply with equal force to UofL because it, too, implements an identifiable area of government policy and objective.

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[366] *PSLA*, s. 60.
[367] *PSLA*, s. 59(3).
[368] *McKinney*, para 220, see also *Godbout*, para 48.
[369] See para 84, above.

iii. Nature

206. Quite apart from the control exercised over it by government, and its sole pursuit of government objectives, the UofL is "quintessentially" government.

207. The scheme of the *PSLA* is to maintain a "coordinated" public post-secondary education "system"[370] for which the government provides coordination,[371] strategic goals, funding, and performance metrics.[372] Alberta's post secondary education system is, therefore, a system for delivering a "key"[373] "public service"[374] which constitute 10% of the Province's annual operating budget.[375]

208. UofL is, therefore, a part of a coordinated government system.

209. The UofL derives its existence and special government-like powers from the Province.[376] Its government-like powers include: the power to own and operate gas and public utilities;[377] the power to make traffic bylaws and enforce them by fine through a university-constituted quasi-judicial tribunal;[378] to fine, suspend or expel students;[379] exemption from and (the indirect) power of expropriation;[380] exemption from municipal building and development schemes;[381] and exemption from civil liability.[382]

210. UofL therefore shares many of the characteristics which quintessentially define government. UofL is, in substance, a special purpose municipality.

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[370] *PSLA,* preamble – a concept repeated frequently by government and by the UofL itself. See, for example, Sexton First Affidavit, Exhibit "MM" and Exhibit "Z" [PDF page 670] and Sexton Third Affidavit, Exhibit "B" [PDF page 410].
[371] See for example, Sexton First Affidavit, Exhibit "Y" [PDF page 621] and *Programs of Study Regulation*, s. 4.
[372] *PSLA*, ss. 78(2) and 107.01,
[373] Sexton First Affidavit, Exhibit "Y" [PDF page 589].
[374] Sexton First Affidavit, Exhibit "Y" [PDF page 583].
[375] Sexton Third Affidavit, Exhibit "B" [PDF page 667] and Sexton First Affidavit, Exhibit "BB" [PDF page 936].
[376] See paras 83.d and 84 above
[377] *PSLA*, s. 17.
[378] *PSLA*, s. 18 and see paras 83.c and 85.f, above.
[379] A determinative power in the concurring opinion of Paperny J.A. in *Pridgen*, see para 105.
[380] *PSLA*, ss. 66(2) and 120 and see Wilson J.'s opinion in *Harrison, para 6 and Douglas, para 6.*
[381] *PSLA*, s, 121.
[382] *PSLA*, s. 119.

211. To the extent not controlled by Government,[383] UofL's board is democratically elected by local constituents, to LaForest J.'s mind, "a highly significant (although perhaps not a decisive) *indicium* of 'government' …"[384]

212. Given the foregoing, the BOG's role includes providing "good government for its community."[385]

213. UofL is not only structured as an order of government, Alberta statutes consistently treat UofL as a government agency. For example:

a. UofL is subject to the extensive controls referred to above under the *PSLA* and associated regulations.

b. UofL's auditor is the Auditor General and the Minister sets UofL's fiscal year-end.[386] The Auditor General applies Canadian public-sector accounting standards.[387]

c. UofL has access to various public pension plans including under the "Local Authorities Pension Plan, the Management Employees Pension Plan, the Universities Academic Pension Plan, the Public Service Pension Plan and the Teachers' Pension Plan.[388]

d. Under *FOIPP* UofL is a "local public body" (as are municipalities, public school boards and regional health authorities) and "public body" (as are departments of the Government of Alberta) with public disclosure requirements.[389]

e. Under *APAGA*[390] the UofL is a "public agency"[391] required to jointly create and renew a "Mandate and Roles Document" which it must fulfill, is subject to Governmental investigation and surveillance in the performance of that mandate including goals, must follow any policy set by Government in carrying out its powers, duties and functions, and is subject to recruitment and employment obligations.[392] The Minister refers to UofL as part of Alberta's "agencies, boards and commissions."[393]

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[383] See para 70.c, above.
[384] See para 83.a, above.
[385] See para 85.b, above.
[386] *PSLA*, ss. 70 – 71.
[387] See Viminitz Affidavit Exhibit "L" [PDF page 76].
[388] *PSLA*, s. 69.
[389] Much of the evidence before the Court is the product of FOIPP requests.
[390] Referenced at para 155, above
[391] *APAGA*, s. 1(1)(i)(i).
[392] See the UofL's pre-IMA "Mandate and Roles" document at Sexton First Affidavit, Exhibit "J".
[393] See, for example, Sexton Third Affidavit Exhibit "B" [PDF page 26].

f. Under the *Sustainable Fiscal Planning and Reporting Act*, SA 2015, c S-29, formerly the *Fiscal Planning and Transparency Act*[394] UofL is a "Provincial agency" and "Provincial corporation" and "accountable organization" which must provide annual business plans, reports and other requested information to the Minister for the purpose of preparing consolidated public financial statements.[395]

g. Under the *FAA,* UofL is a "provincial agency" subject to the reporting and financial obligations.[396]

h. The Government controls UofL's compensation through the *Compensation Regulation, Salary Restraint Regulation*, Alta Reg 6/2018 and *Salary Restraint Regulation*, Alta Reg 80/2021.[397]

i. Under the *Local Authorities Capital Financing Act*, SA 2019, c L-20.8 UofL is a "local authority" along with cities, school boards, and health authorities. As such it has access to low interest government loans.[398]

j. Under the *Government Organization Act*, RSA 2000, c G-10 UofL is a "Provincial agency" restricted in their ability to enter into intergovernmental agreements and eligible for Minister acquired supplies for carrying out services or programs on behalf of the Government.

k. Under the *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c P-39.5 and Public Interest Disclosure (Whistleblower Protection) Regulation, Alta Reg 71/2013, UofL is a "public entity" subject to disclosure, investigation and employee protection requirements.

l. UofL is an "employer" subject to the *Public Service Employee Relations Act*, RSA 2000, c P-43 under which it entered into a collective agreement with the Alberta Union of Provincial Employees.[399]

m. The Ministerial organizational structure places universities accountable to the Minister along with his department, the Campus Alberta Quality Council (which the Minister

[394] Mentioned at *PSLA*, s. 78(8).
[395] See also the discussion of consolidated financials at para 167, above.
[396] Referred to at para 165, above.
[397] See para 169, above.
[398] See para 192.c., above
[399] Sexton First Affidavit, Exhibit "D".

wholly appoints[400] and the Minister's Advisory Council on High Education and Skills (which the Minister wholly appoints[401]).

214. As described at paragraphs to above, the reasoning in *York* applies equally to UofL: UofL "plays a role in the [post secondary] education system;" UofL is subject to significant Ministerial power over its BOG; university boards exercise "powers conferred .. by provincial legislatures, powers and functions they would otherwise have to perform themselves;" and, finally, public education is inherently a governmental function with constitutional roots in s. 93 of the *Constitution Act*, *1867*.

215. Given the foregoing, the UofL is quintessentially "government" under s. 32(1) of the *Charter*.

D. Section 32(1) – UofL is Delivering Government Programs

216. Where an entity is not "government" *per se,* by virtue of government nature, objectives or control, it is a private entity. However, as recognized in *Eldridge*, "… governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements."[402] Therefore, the *Charter* also applies to private entities implementing a program or policy "which can be "ascribed to government" for which the government has "retain[ed] responsibility."[403]

217. Given that the only thing UofL does is pursue government objectives, it is an unnecessary complication to attempt to apply the *Charter* to universities in slices. Nevertheless, it is clear that universities, including the UofL, deliver many "programs" on behalf of government. For the purpose of this argument the applicants focus on 3 major ones: university education; campus free speech; and the management of university campuses.

218. UofL activities that can be "ascribed to government" are subject to the *Charter* insofar as there is a "direct and precisely-defined connection" between such activities and the impugned conduct (like the connection between health care and communication).[404]

i. University Education

219. The Alberta Court of Appeal has found that Alberta universities are subject to the *Charter* at least insofar as they "regulat[e] … freedom of expression by students on University

[400] *PSLA*, s. 108(2).
[401] *PSLA*, s. 107.01
[402] *Eldridge,* para 40.
[403] *Eldridge,* para 42 to 44.
[404] *Eldridge*, para 51.

grounds." The conclusion rested primarily on the fact that university education "largely by means of free expression", which is the constitutional prerogative of provincial government, is the core purpose of universities and they are sustained, in part, by government funds.[405]

220. In *Whatcott*, as in *Pridgen QB*, this Court arrived at the more straightforward conclusion that universities were delivering post-secondary education. That universities deliver a program of university education is tautologically true. The only question, for the purpose of s. 32(1) of the *Charter*, is whether or not that program can properly be "ascribed" to government in the sense that the government retains responsibility for it.

221. The Court in *UAlberta* exercised "judicial restraint" and characterized the relevant program no more broadly than necessary to dispose of the appeal. However, the principles in that case do not negate "university education" being a government program; quite the opposite. The Court explained:

> *(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 [i.e. education] is a responsibility given to the university by government for over a century under both statute and the Constitution Act, 1867. It [i.e. the university] 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 … [emphasis and commentary added]*[406]

222. The Court's reasoning centres on university education, of which free expression is an integral part – much like communication was found to be an integral part of the government program of health care services in *Eldridge*.[407] There is no principle discernible in *UAlberta* which justifies *Charter* scrutiny over the part (free speech), but not the whole (university education).

223. University education is most certainly a government program:

a. The whole structure of the *PSLA* is one in which universities are assigned, by government, an exclusive mandate: to provide such university education as is

[405] *UAlberta*, para 148.
[406] *UAlberta*, para 148.
[407] *Eldridge*, para 69.

approved by government as part of a coordinated, efficient, and accessible university education system;[408] Universities may do nothing outside their mandate and may offer no programs but government approved programs. UofL is not "established to facilitate the performance of tasks that those seeking incorporation wish to undertake,"[409] it is established (and maintained) to perform, exclusively, tasks assigned by government.

b. The government entrusts public facilities to the UofL, funds the maintenance and operation of such facilities, and funds UofL's operations in exchange for the UofL delivering government approved university education to Albertans.[410]

c. Post-secondary education is a program for which the government clearly "retains responsibility":

d. The BOG is "accountable" to the Minister. IMA's are the "primary accountability instrument" between universities and government;

e. The Minister selects, at least, half of the BOG and, through various controls, provides coordination, strategic goals, funding, and performance metrics;

f. The government treats post-secondary education as a "public service" delivered to Albertans along with health (which is a "government program" - *Eldridge*) and K-12 education (delivered by "government entities" - *York*).[411]

g. UofL is subject to extensive ongoing government surveillance and control.[412]

h. The government says:

> *Advanced Education supports Albertans by providing the education and training opportunities they need to prepare for the workforce. [emphasis added]*[413]
>
> and
>
> *With the implementation of a performance based funding model … we will set our graduates up for success. … performance metrics … will work to ensure our*

[408] See above at Parts IV.C.i.b "Investment Management Agreements," IV.C.e. "Program Approval," and IV.C.ii. "Objectives"].
[409] *McKinney*, para 31.
[410] See above at Parts IV...b. "Investment Management Agreements" and IV...f. "Power of the Purse".
[411] See above at Part IV.C.iii. "Nature"
[412] See above, for example, Part IV.C.i. "Control".
[413] Sexton First Affidavit, Exhibit "Z" [PDF page 677].

graduates have the knowledge, skills, and competencies needed to find rewarding careers.[414]

i. The government devotes 10% of its annual operating budget to post-secondary education where the only larger areas of government funding are health care (a government program) and K-12 education (a government service delivered by government).[415] The government refers to its massive funding as an "investment in adult education."[416]

ii. Campus Free Speech

224. UofL's mandate is to deliver university education. As observed by the Court of Appeal of Alberta, a *sin qua non* of a university education is freedom of inquiry including freedom of assembly and speech.[417] UofL confirms, "freedom of inquiry and freedom of expression are prerequisite requirements in all aspects of [the UofL's] operation."[418]

225. This essential feature is embedded in UofL's mandate and materials. Its mandate includes being, "[f]ounded on the principles of liberal education,"[419] fostering "… a learning community emphasizing … information literacy … [and] applied learning opportunities," [420] and maintaining, "an innovation ecosystem that encourages transdisciplinary innovation, including social innovation, for students and faculty." [421]

226. "Liberal education" reflects the *raison d'etre* of a university: enlightenment,[422] which is reflected[423] in UofL's motto, "*Fiax Lux*" meaning "let there be light." The UofL explains:

> *… Liberal Education … encompasses four main … pillars:*
>
> *1. Breadth of knowledge across disciplines. Students are exposed to multiple ways of looking at and studying the world beyond their own disciplinary boundaries.*
>
> *…*

[414] Sexton Third Affidavit, Exhibit "B" [PDF page 53].
[415] See above at Part IV.C.f. "Power of the Purse".
[416] Sexton Third Affidavit, Exhibit "F" [PDF page 946].
[417] *UAlberta*, paras 109 – 117.
[418] Viminitz Affidavit, Exhibit "I".
[419] Sexton Second Affidavit, Exhibit "A" [PDF page 369].
[420] Sexton Second Affidavit, Exhibit "A" [PDF page 369].
[421] Sexton Second Affidavit, Exhibit "A" [PDF page 372].
[422] *UAlberta*, para 110.
[423] Viminitz Affidavit, Exhibit "K" [PDF page 56].

> *3. Critical thinking and problem solving skills. Students develop skills to identify arguments, evaluate evidence and reasoning, produce informed decisions, and communicate and defend those decisions.*
>
> *4. Education for citizenship. Students are encouraged to be contributing community members on all levels from local to global, and to participate in the running of their communities.*[424]

227. These pillars lead to students possessed of "information literacy," who can "prepare and defend arguments," who can "understand complex social issues from multiple viewpoints," who have "questioning mind[s], curiosity," who have the "ability to work toward public good [and] make informed and evidence-based decisions [and] … engage difference," and who demonstrate "leadership skills."[425]

228. UofL emphasizes it is a "… place where students and faculty have the freedom to think, create, and explore together."[426] UofL, "protects free inquiry and scholarship … and supports … the free and open scholarly discussion of issues."[427] UofL tells students:

> *We encourage and protect free inquiry and expression, and model collegial and civil debate, dissent and controversy to critically explore and resolve issues.*
>
> *…*
>
> *We are student-centred, and help students achieve their full potential by facilitating their intellectual growth and personal excellence in an atmosphere of engagement within and beyond the classroom.* [428]

229. Free speech, as a cornerstone of university education, is infused throughout UofL's materials. For example, it's Impartiality Policy (applicable to the Event), which states:

> *The purpose of the university is to formulate ideas, to test them, to criticize them, to accept them, to reject them. The university by definition cannot become the curator of any particular viewpoint, or the defender of a faith, the guardian of an ideology.*[429]

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[424] Viminitz Affidavit, Exhibit "N" [PDF page 311].
[425] Viminitz Affidavit, Exhibit "N" [PDF page 311].
[426] Viminitz Affidavit, Exhibit "K" [PDF page 55], Exhibit "N" [PDF page 236], and Sexton First Affidavit, Exhibit "J" [PDF page 393].
[427] Sexton Second Affidavit, Exhibit "A" [PDF page 372].
[428] Viminitz Affidavit, Exhibit "K" [PDF pages 61 – 62]
[429] Viminitz Affidavit, Exhibit "C".

230. The only programs UofL may offer are those approved by the government. Such approval is guided by[430] the *Ministerial Statement on Quality Assurance of Degree Education in Canada, 2007*[431] which expects of a graduates:

> *The ability to gather, review, evaluate, and interpret information … and to compare the merits of alternate hypotheses …*
>
> *The capacity to engage in independent research or practice in a supervised context*
>
> *Critical thinking and analytical skills inside and outside the discipline*
>
> *The ability to review, present, and critically evaluate qualitative and quantitative information to (i) develop lines of argument; (ii) make sound judgments … (iii) apply underlying concepts, principles, and techniques of analysis, both within and outside the discipline; and (iv), where appropriate, use this knowledge in the creative process*

231. Which is all to say that an essential ingredient of UofL's mandate to deliver university education for government is freedom of inquiry which includes the freedom to hear a range of perspectives, the freedom to independently consider them, and the freedom to express one's own perspectives. Largely for the reason, the Court of Appeal in *UAlberta* found a government program of (at least) the "regulation of freedom of expression by students on University grounds."[432]

232. However, that universities are to deliver freedom of expression as a program for government has become even more clear as a result Premier Jason Kenny's mandate to adopt the "Chicago Principles"[433] The "Chicago Principles" are a set of principles protecting freedom of expression, "an essential element of the University's culture:"

> *… it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn … it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.* [434]

233. In July 2019 the Minister wrote to all university board chairs, including UofL's BOG chair, and asked them to substantively adopt the Chicago principles "as stewards of your

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[430] Sexton First Affidavit, Exhibit "KK".
[431] See above at para 182.
[432] *UAlberta*, para 148.
[433] Sexton Third Affidavit, Exhibit "A" [PDF page 6].
[434] Sexton First Affidavit, Exhibit "QQ".

institutions accountable to the Minister." [435] UofL requested an extension of the deadline[436] and provided a draft to the Minister, which the Minister approved, requiring it be posted to UofL's website.[437]

234. UofL's "Statement on Free Expression" provides that UofL is committed to protect "free inquiry" and the "free and open scholarly discussion of issues" – which policy UofL links to its motto "Fiat Lux", its mandate of liberal education, and its commitments to "free and critical inquiry." Specifically, the policy provides that:

> *… All members of the University community are guaranteed the broadest possible latitude to speak, write, listen, challenge, and learn.*
>
> *Members of the University community have the right to criticize and question views expressed on campus but they may not obstruct or interfere with others' freedom of expression.*
>
> *…*
>
> *Mutual respect, tolerance, and civility are valued within the University but do not constitute sufficient justification for closing off the discussion of ideas or shielding students from ideas or opinions, no matter how offensive or disagreeable they may be to some members of the University community, or those outside of the University.*
>
> *…*
>
> *The Board of Governors of the University of Lethbridge affirms this commitment with the understanding that it applies to individuals or organizations making use of University of Lethbridge property or resources, including individuals and organizations external to the University.*

235. Following the Decision, and in response to it[438], the Minister increased the pressure on institutions by announcing new requirements to provide annual free speech reporting to the Minister.[439] Notwithstanding UofL's concerns,[440] on April 14, 2023, the Minister advised all

[435] Sexton Second Affidavit, Exhibit "B" [PDF page 571].
[436] Sexton Second Affidavit, Exhibit "B" [PDF page 572].
[437] Sexton Second Affidavit, Exhibit "B" [PDF page 580].
[438] Sexton First Affidavit, Exhibit "HH" and Widdowson Affidavit, para 40.
[439] Sexton First Affidavit "II" and Sexton Third Affidavit, Exhibit "B" [PDF page 210].
[440] Sexton Third Affidavit, Exhibit "B" [PDF page 631].

post-secondary board chairs, including UofL's, of the details of the new annual reporting requirements.[441]

236. Therefore, UofL also clearly delivers a government program of free speech. Importantly, it does not just protect the right to speak, it protects also the rights to "listen, challenge, and learn" and applies to "individuals or organizations making use of University of Lethbridge property or resources, including individuals and organizations external to the University." In other words, it also protects Widdowson.

iii. Management of University Campuses

237. As set-out above, UofL's campus is a public asset which is ultimately owned and controlled by government but managed, within a narrowly defined area of discretion, by the BOG.[442] Should the beneficiary of this arrangement, the government, wish to collapse it, it can do so.[443] The nature of this relationship is clear:

a. To the UofL, which refers to itself as a "fiduciary"[444] of lands "accessible to members of the general" to which the University "encourages" use by external users.[445]

b. The Government, which refers to BOG as "stewards of your institutions accountable to the Minister"[446] and which treats UofL's revenues and expenses as revenues and expenses of the Government.

c. In UofL's statutory mandate which includes public access including, for example, "public speaker series and events [which] engage, enrich, and challenge the surrounding communities through individual guest speakers … who present their research and invite discussion on important issues" – reinforced by the Statement on Free Expression.

d. The *PSLA* and the remaining regulatory environment including grant agreements and IMA's which subject UofL's assets and operations to significant control and oversight.

[441] Sexton Third Affidavit, Exhibit "B" [PDF page 711].
[442] See above at IV.C.d.3. "Assets and Capital" and IV.C.f "Power of the Purse".
[443] See above at para 153.
[444] See para 173, above.
[445] Viminitz Affidavit Exhibit "D" [PDF page 1].
[446] See above at para 233.

e. UofL confirms that “guest speakers who are presenting on campus to our campus community are afforded the same commitment to freedom of expression as members of our campus community.”[447]

238. The management of UofL’s campus (and operations) is, therefore, a form of government program akin to a property management agreement. It is a program that can be “ascribed” to government (the government is the owner and “client”), it is a program for which the government retains responsibility (both “ultimately” and through detailed systems of routine and regular control), and it is a form of government “action.”[448]

239. *Eldridge* is premised on the principle that government is not permitted to escape *Charter* through delegation. Government must likewise be prohibited from escaping *Charter* scrutiny by delegating, through commercial or private arrangement, the operation of public assets. This holds especially true for public assets which are the public’s “classic forum for expression”[449] and locations of “of discourse, dialogue and the free exchange of ideas; all the hallmarks of a credible university and the foundation of a democratic society.”[450]

iv. Other Programs

240. UofL delivers other government programs too numerous to mention. To name but a few:

a. improving indigenous access and success in a program of university education;[451]

b. like in *Zaki*, adopting a sexual violence policy;[452]

c. expanding worker integrated learning;[453]

d. targeted program expansion;[454]

e. expansion of post-secondary programs for internationally educated nurses to address workforce needs in the health sector;[455]

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[447] Widdowson Affidavit, Exhibit “H”.
[448] *UAlberta*, para 124.
[449] *UAlberta*, para 112.
[450] *Pridgen*, para 122.
[451] See for example, Sexton First Affidavit, Exhibit "K" [PDF pages 402 - 406], Sexton Second Affidavit, Exhibit "A" [PDF pages 44, 49, 150, 362, and 368] and Sexton Third Affidavit, Exhibit "B" [PDF pages 523 and 694].
[452] See for example, Sexton Second Affidavit, Exhibit "B" [PDF pages 571 and 599] and Sexton Third Affidavit, Exhibit "B" [PDF pages 503, 529, 571, and 680].
[453] See for example, Sexton Second Affidavit, Exhibit "A" [PDF page 367].
[454] See, for example, Sexton Third Affidavit, Exhibit "B" [PDF page 305].
[455] See, for example, Sexton Third Affidavit, Exhibit "B" [PDF page 738].

f. the expansion of rural medical training to improve rural retention of doctors;[456]

g. mental health programs;[457]

h. offering micro-credentials; and[458]

i. diversifying sources of revenue.[459]

v. Conclusion

241. The UofL is clearly delivering a number of programs on behalf of the government: it operates campus for the benefit of students and the public, it delivers university education, it ensures an environment conducive to free inquiry.

242. All of these activities are squarely ascribed to Government. Government effectively owns the UofL (campus and operations). Government pays UofL in exchange for the delivery of university education to students. The BOG is accountable to the Government to deliver its mandate. The BOG may not exceed its mandate or offer any program not authorized by the government. Government specifically instructs UofL to perform these programs and exercises detailed and regular oversight over UofL in such performance.

243. Government is deeply enmeshed in the assets and operations of Alberta universities. The *Charter* must therefore apply. In the words of Watson J.A.:

> *… there are no places where the government is present by proxy and yet the Charter writ does not run.*[460]

E. Freedom of Expression

244. The freedom of expression at issue in this action arises at the heart of its fundamental purposes: the search for truth and participation in social and political decision-making. The subject matter of the cancelled expression was of profound importance: defence of the fundamental requirements for the truth-seeking[461] function of universities including freedom from censorship. Censorship, according to Widdowson's thesis:

[456] See, for example, Sexton Third Affidavit Exhibit "B" [PDF page 559, 620, and 686].
[457] See, for example, Sexton Second Affidavit Exhibit "A" [PDF page 30, 150, and 255].
[458] See, for example, Sexton Second Affidavit Exhibit "A" [PDF page 228 and 362].
[459] See, for example, Sexton Third Affidavit, Exhibit B [PDF page 215].
[460] *UAlberta*, para 148.
[461] As opposed to truth-prescribing.

> *…will tend to prolong and aggravate an already dire situation. For indigenous peoples, censorship, however well-meaning or virtuous, will be disastrous.*[462]

245. The test under section 2(b) of the *Charter* is easily satisfied in relation to both applicants.

246. The Event had expressive content. Section 2(b) protects both speakers and listeners. Both Widdowson and Pickle intended to speak and listen. Neither the method of expression nor location removes that protection. The method was a peaceful talk. The location was an event room on a public university campus – a location of "discourse, dialogue and the free exchange of ideas; all the hallmarks of a credible university and the foundation of a democratic society." The more general cancellation of Widdowson, personally, from campus events also meets the test because the UofL refused to permit <u>any</u> peaceful expressive efforts by her at any time.

247. The cancellation in both purpose and effect restricted freedom of expression. The purpose was to restrict the content of expression on campus, to control access to certain messages (anything which "minimized" prescribed "truths"), and to limit the ability of Widdowson, specifically, to express herself along with anyone else who might wish to attend the Event or participate in the question-and-answer session. In other words, the UofL's purpose was to "deplatform" Widdowson and her speech, thoughts, beliefs and opinions. The purpose of silencing Widdowson was to insulate the students – including Pickle – staff and faculty from both her "harmful" presence and from her speech, thoughts, beliefs and opinions. This is an intention, therefore, to control the thoughts, beliefs and opinions of students including Pickle.

248. The UofL can not claim "safety" was its purpose. Its purpose was to prohibit expression which was not "the truth" for reasons including "reconciliation" and "safety" but:

> *If the government's <u>purpose</u> is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it <u>necessarily</u> limits the guarantee of free expression.*[463]

249. Even if the purpose was not to restrict the content of expression, in effect the cancellation interfered with the applicant's intention to convey a meaning (and to hear a meaning) reflective of the principles underlying freedom of expression: truth seeking, democratic participation, and self-fulfillment.

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[462] Widdowson Affidavit, para 19.k.
[463] *Irwin*, para 50.

250. Finally, UofL's interference takes on a "more serious dimension" demanding robust judicial scrutiny and an effective remedy because – having declared as an institution that Widdowson's "abhorrent"[464] views are permanently banned from campus as inherently "unsafe" (including, formally, through Mahon's public statements, and informally, through the numerous faculty and administration public communications which vilified Widdowson and her perceived views and demanded her cancellation) the UofL systemically targets a particular group in society: advocates of Enlightenment principles including liberal education through freedom of inquiry and empiricism.

251. Only if it is determined that the UofL is not government is it necessary to demonstrate a direct and precisely-defined connection between the cancellation and a particular government program. In any event, the connection is readily apparent. With respect to the program of:

a. University education – the UofL itself repeatedly declares the connection between freedom of inquiry and university education. For example, UofL's:

> *… obligation, to provide an environment in which freedom of inquiry and freedom of expression are prerequisite requirements in all aspects of its operation.*

Free speech is a *sin qua non* of a university education.[465]

b. Campus free speech – there can be no more direct and precisely defined connection than between a government program of providing free speech and the UofL's decision to supress (and to praise the suppression of) free speech.

c. Management of campus – the UofL is, effectively, the Government's property manager of its campus which is the "classic forum for expression." The Reasons expressly leverage the UofL's power to "regulate the use of facilities, time, place and manner of expression" providing the necessary link. The UofL's Decision was, in part, an exercise of its power as "property manager."

F. Freedom of Assembly

252. The applicants sought to physically assemble for the purpose of exercising their fundamental freedom of thought, belief, opinion and expression. In connection with this

[464] CRP000055.
[465] *UAlberta*, paras 109 – 117.

physical assembly the same analysis applies as under 2(b) above and a violation is established.

253. In addition:

a. Physical assembly would have provided the applicants benefits beyond mere expression, namely, more effective and interactive expression and a larger audience.[466]

b. Mahon praised the suppressive protest and noted the "power" of the large group and it being a "coming together of our community to show support for each other and a reflection of the values of the University of Lethbridge."[467] Of course, by cancelling the Event he denied to those outside "our community," including Widdowson and Pickle, their right to enjoy the power, community, support and a show of values that physical assembly permits.

G. Justification

254. The UofL cannot meets its burden of showing that the Decision's limitation of the *Charter* freedoms of expression and peaceful assembly were justified.

255. First, nowhere in the Reasons does the UofL even acknowledge that the *Charter* applied to its Decision.[468] This is fatal. It demonstrates conclusively that UofL did not engage in the required *Charter* balancing exercise at all.

256. Second, the Reasons fail to recognize that the Decision engaged the *Charter* freedoms of expression and peaceful assembly. UofL did not correctly identify the relevant scope of those *Charter* freedoms or apply the appropriate framework for analyzing those rights. The Reasons' consideration of "freedom of expression" is devoid of the necessary "clear acknowledgement of and analysis of" the *Charter* rights to freedom of expression and association:[469] rather, the Reasons only purport apply the UofL's Statement on Free Expression. This, like the arbitrator in York only applying the arbitral framework to privacy rights rather than appreciating that the grievors' s. 8 *Charter* rights were directly at stake, is also a fatal error.

[466] Widdowson Affidavit, para 43, Pickle Affidavit, para 20.
[467] Widdowson Affidavit, Exhibit "S".
[468] See *York*.
[469] See *York*, para 94.

257. Third, even if the *Charter* freedoms of expression and peaceful assembly were acknowledged by the Reasons, the Reasons give mere lip service to freedom of expression – no real weight was assigned to that value. There is, for example, no acknowledgement of the impact on Widdowson, who had already been publicly vilified by the UofL as holding "abhorrent" views, or others, including Pickle, who planned to attend the "abhorrent" Event in an earnest search for truth.[470]

258. Neither do the Reasons contemplate the damage censorship was likely to do to the very important empirical search for the causes of massive socioeconomic disparity between indigenous and other Canadians – the objective of Widdowson's life work. Rather, the premise was that such facts were already known – a direct violation of the principles underlying the need for free inquiry. The university is not the guardian of the truth; it is the guardian of the search for truth. Also, while Mahon references the Statement on Free Expression, he applies, as an exception to the policy, UofL's "commitment to the calls to action of the … TRC." As explained at paragraph 27.e above, the calls to action are not an exception to the UofL's Statement on Free Expression. Rather, they were inserted into Mahon's January 26, 2023, statement *as if* they were a part of the Statement on Free Expression. Mahon was not actually dealing with the Statement on Free Expression *as written*.

259. Finally, and critically, even if the UofL had engaged in balancing the *Charter* with a statutory objective, the question becomes, "what statutory objective?" As discussed above at paragraph 9, its not clear that UofL's statutory objectives include "reconciliation" or implementation of the calls to action of the TRC - depending, of course, on what "reconciliation" may be understood to mean and which calls to action the UofL is referencing.

260. In any case, what is apparent from the record is that UofL interpreted this competing objective as necessitating the violation of its core statutory mandate: the delivery of university education (which, by definition, includes free inquiry even as to views that are perceived as "abhorrent"). In other words, in an apparent act of reconciliation, it denied a university education to its students, including its indigenous students. This outcome is so at odds with UofL's mandate, including increasing indigenous access to and success in university education, that it could never be supported by intelligible and rational reasoning.

[470] See *York*, para 94.

V. REMEDY

261. Section 24(1) of the *Charter* grants the court wide discretion in crafting a remedy. In *R v. Mills*[471] the SCC held at paragraph 278 that:

> *[i]t is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.*

262. The Court has provided four guiding principles for a court's exercise of discretion when crafting a 24(1) *Charter* remedy:

a. The remedy must be meaningful and responds to the circumstances of the violation and the claimant;

b. respect for the role of the legislature and the executive;

c. reliance on judicial functions and powers; and

d. fairness to the party against whom the remedy is directed.[472]

263. In *Doucet*, the trial judge granted injunctive relief by ordering "reporting" sessions against the province to update the court on the status of construction of francophone schools in Nova Scotia (on finding of a section 23 breach). The SCC restored the trial judge's injunction, and held that this was appropriate and permissible injunctive relief, based on the 4 factors listed above.

264. In *Canada (Attorney General) v. PHS Community Services Society*[473] the Court found the Minister's denial of an exemption to operate a supervised injection site violated s 7. Instead of a declaration, the Court granted a mandatory order against the Minister to grant the exemption. The Court held that it was the particular facts of the case which necessitated a mandatory order rather than declaratory relief.

265. The applicants respectfully request that this Honourable Court provide four remedies:

a. A declaration that the *Charter* applies to the UofL as "government" under section 32(1) or, in the alternative, that the *Charter* applies to the UofL insofar as it delivers

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[471] *R v. Mills*, [1986] 1 SCR 863, 1986 CanLII 17 (SCC), para 278.
[472] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 ("***Doucet***"), paras 51-59.
[473] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, para 141.

university education, regulates the campus free speech of anyone, or manages campus.

b. A declaration that the Decision constitutes an unjustified infringement of the applicants' fundamental *Charter* freedoms of thought, belief, opinion and expression, under section 2(b), and fundamental *Charter* freedom of peaceful assembly under section 2(c).

c. An injunction:

   i. requiring UofL to permit the Event to proceed on campus without any conditions not originally imposed on the Event at a reasonable future date, time and location; and

   ii. prohibiting UofL from imposing any security fee or any unreasonable or unusual condition on any future campus events proposed by or featuring Widdowson.

d. A remedy as to costs. The applicants propose the parties provide brief submission on costs following this Honourable Court's decision.

266. The applicants' submit that the requested injunction satisfies the *Mills* test. A mere declaration will have precedential value to Canadians but potentially offers little meaningful remedy to the applicants in the circumstances.

267. UofL was already under a clear legal and constitutional duty to operate a university and to permit campus free speech. Notwithstanding, the UofL unreasonably cancelled the Event. UofL has, therefore, demonstrated recalcitrance with respect to its statutory and constitutional duties.

268. The discretion to regulate the "time, place, and manner" of expression was already misused by UofL to ban Widdowson, and her perceived opinions, from campus events. A recalcitrant university wishing to further supress disfavoured free speech on campus can avail itself of a host of discretionary tools including unreasonable security fees[474], other unreasonable putative "time, place and manner" requirements, or simply better "papering its file" to withstand scrutiny under *CSFTNO*. Kairvee Bhatt, the Student's Union President who was assisting and guarding the electric guitar during the 700-person-strong suppressive protest (praised by UofL's President), proposed that UofL impose a security fee on Viminitz "to

[474] *UAlberta*, para 176.

escort both the speaker and the professor to and from the event."[475] Only by an injunction can this Court ensure, for the applicants, meaningful compliance with UofL's constitutional duties.

269. A declaration also potentially fails to provide a meaningful remedy to Widdowson who has been personally and publicly declared "abhorrent" by the UofL and permanently banned from planned events on campus. Again, to ensure meaningful compliance with UofL's constitutional duties, a remedy tailored to her unique circumstances is appropriate.

270. Injunctions are common judicial remedies consistent with the role of the legislature and the executive, which rely on judicial functions and powers, and which are more than fair to UofL given its misconduct.

VI. CONCLUSION

271. Therefore, the applicants pray that this Honourable Court grant the remedies referred to in Part V "Remedy".

ALL OF WHICH IS RESPECTRULLY SUBMITTED this 16 day of July 2024.

Glenn Blackett
Counsel for the Applicants

[475] CRP000142.

VII. LIST OF AUTHORITIES

TAB	CASELAW
1.	*Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904.
2.	*BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162.
3.	*Bedford v. Canada (Attorney General),* 2013 SCC 72.
4.	*Bérubé c. Ville de Québec*, 2019 QCCA 1764.
5.	*Cameron v. Canadian Pacific Railway* (1918), [1918] 2 W.W.R. 1025, 1918 CanLii 165, 1918 CarswellSask 106 (SKCA).
6.	*Canada (Attorney General) v. Confédération des syndicats nationaux,* 2014 SCC 49.
7.	*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30.
8.	*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2.
9.	*Carom v.Bre-X Minerals Ltd.*, 2010 ONSC 6311.
10.	*Carter v. Canada (Attorney General)*, 2015 SCC 5.
11.	*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.
12.	*Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10.
13.	*Doré c Québec (Tribunal des professions),* 2012 SCC 12.
14.	*Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 S.C.R. 570.
15.	*Edmonton Journal (The) v Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.
16.	*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R.
17.	*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
18.	*Fraser v. Nova Scotia (A.G.)* (1986), 30 D.L.R. (4th) 340, 1986 CanLII 3977 (NS SC).
19.	*Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844.
20.	*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.
21.	*Harrison v. University of British Columbia* [1990] 3 S.C.R. 451.
22.	*Irwin Toy Ltd. v. Quebec (Attorney General*), [1989] 1 S.C.R. 927.
23.	*Lavigne v. O.P.S.E.U.*[1], [1991] 2 S.C.R. 211.
24.	*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.
25.	*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.
26.	*Lobo v. Carleton University* 2012 ONCA 498.
27.	*Lobo v. Carleton University* 2012 ONSC 254.
28.	*Lobo v. Carleton University*, 2011 ONSC 4680, 2011 CarswellOnt 11689.
29.	*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.
30.	*Montréal (Ville) v 2952-1366 Québec Inc.*, 2005 SCC 62.

31.	*Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1.
32.	*Ontario (A.G.) v. Dieleman,* (1994) 20 O.R. (3d), 1994 CanLII 10546.
33.	*Pridgen* v. *University of Calgary*, 2010 ABQB 644.
34.	*Pridgen v. University of Calgary*, 2012 ABCA 139.
35.	*R v. Comeau*, 2018 SCC 15.
36.	*R v.Couture*, 2007 SCC 28.
37.	*R. v. Behrens*, 2001 CarswellOnt 5785 , [2001] O.J. No. 245 (Ont. C.J.)
38.	*R. v. Collins*, [1982] O.J. No. 2506.
39.	*R. v. Ingram*, (1981), 1981 CanLII 2093, 12 Sask. R. 242, 1981 CarswellSask 25. (SKQB)
40.	*R. v. Keegstra*, [1990] 3 S.C.R. 697.
41.	*R. v. Lucas*, [1998] 1 S.C.R. 439.
42.	*R. v. Sullivan*, 2022 SCC 19.
43.	*R. v. Whatcott*, 2012 ABQB 231.
44.	*R. v. Zundel*, [1992] 2 S.C.R. 731.
45.	*Real Estate Council of Alberta v. Henderson,* 2007 ABCA 303.
46.	*Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FCR 406.
47.	*Sriskandarajah v. United States of America*, 2012 SCC 70.
48.	*Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483.
49.	*Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33.
50.	*UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1.
51.	*York Region District School Board v Elementary Teachers Federation of Ontario*, 2024 SCC 22.