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2301 09854
Aug 27, 2024
10:54 AM
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COURT FILE NUMBER	2301 09854
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	JONAH PICKLE and FRANCES WIDDOWSON
RESPONDENTS	THE UNIVERSITY OF LETHBRIDGE and THE GOVERNORS OF THE UNIVERSITY OF LETHBRIDGE
DOCUMENT:	**BRIEF OF THE RESPONDENT THE GOVERNORS OF THE UNIVERSITY OF LETHBRIDGE**
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I. INTRODUCTION

[1] The Applicants apply for judicial review of a decision made by the University of Lethbridge (the "**University**") to permit Paul Viminitz ("**Viminitz**") to book a room for Frances Widdowson ("**Widdowson**") to speak (the "**Event**") and its later decision (the "**Decision**") to cancel the room booking for the Event. This Application is not about Widdowson's views, her "thesis",[1] her "heterodox political incorrectness",[2] or "academic cancel culture".[3] Instead, this Application is narrow: was it reasonable for the University to cancel Viminitz's room booking?

[2] While the Applicants request broad declaratory and injunctive relief, the fundamental remedy they seek is *certiorari*: they wish to quash the University's Decision.

[3] The Applicants invite this Court to rule on questions far broader than necessary to decide this Application, in effect requesting that this Court overturn binding Supreme Court of Canada caselaw. There is no well-established evidentiary record to justify such broad requests and there is no need to delve into such broad claims to resolve the dispute. To support their broad claims, the Applicants rely on evidence primarily introduced through the affidavits of a paralegal[4] and without having made an application to rely on this extraneous evidence.[5] The evidence relevant to the Decision made by the University—the reasonableness of which is the primary consideration on a judicial review of this nature—is found in the Certified Record of Proceedings and is sufficient to determine the reasonableness of the Decision.

[4] As the Supreme Court has recently and repeatedly cautioned judges, courts should resolve disputes on the narrowest grounds required and avoid delving into issues that "are not necessary

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[1] Brief of the Applicants at para 2.
[2] Brief of the Applicants at para 3.
[3] Brief of the Applicants at para 3.
[4] Affidavit of Ashley Sexton, sworn July 26, 2023 [**Sexton First Affidavit**]; Affidavit of Ashley Sexton, sworn November 23, 2023 [**Sexton Second Affidavit**]; Affidavit of Ashley Sexton, sworn July 15, 2024 [**Sexton Third Affidavit**].
[5] *Alberta Rules of Court*, Alta Reg 124/2010, r 3.22 [***Rules of Court***] [**TAB 1**].

to the resolution of an appeal absent exceptional circumstances".[6] This concern is heightened when those unnecessary issues are constitutional.[7]

[5] Instead, this Application can be resolved entirely on traditional administrative law principles. The University was obligated to consider the request to book the room and to reasonably weigh the competing interests. In doing so, it needed to be guided by its policies, including the Use of University Premises for Non-Academic Purposes Policies and Procedures (the "**Booking Policy**"),[8] the Impartiality and University Facility Utilization Policy (the "**Impartiality Policy**"),[9] and, most centrally, the University's Statement on Free Expression (the "**Statement on Free Expression**").[10] As a student and an invited speaker, these policies applied to both Pickle and Widdowson. The question for this Court is whether the Decision to cancel the room booking was reasonable considering these policies. If it was not, this Court should quash the Decision and remit it for reconsideration.

[6] Alternatively, if this Court finds that traditional administrative law principles are insufficient to resolve this Application, this Court can resolve the dispute solely based on the Alberta Court of Appeal's holding in *UAlberta Pro-Life v Governors of the University of Alberta*[11] that the *Canadian Charter of Rights and Freedoms*[12] applies to universities' regulation of expression by students on university grounds.[13] The Applicant, Jonah Pickle ("**Pickle**"), was at all relevant times a student at the University and the Event was planned to occur on University grounds.[14] If the Decision implicated Pickle's right to freedom of expression, it is clear that the University considered the right to free expression, engaged in a balancing of competing interests and minimally impaired the right to free expression.[15] If the Court concludes that it was necessary

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[6] *Shot Both Sides v Canada*, 2024 SCC 12 at para 35 [**TAB 4**].
[7] *R v McGregor*, 2023 SCC 4 at para 24 [**TAB 5**], quoting *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 6 [**TAB 6**].
[8] Affidavit of Paul Viminitz, sworn July 27, 2023 at Exhibit "B" [**Viminitz Affidavit**].
[9] Viminitz Affidavit at Exhibit "C".
[10] Certified Record of Proceedings at 000004.
[11] *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 [***UAlberta Pro-Life***] [**TAB 7**].
[12] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Charter***].
[13] *UAlberta Pro-Life* at paras 148-149, 222 [**TAB 7**].
[14] Affidavit of Jonah Pickle, sworn July 27, 2023 at para 1 [**Pickle Affidavit**].
[15] Certified Record of Proceedings at 000002.

for the University to specifically refer to the *Charter* in doing so, the Court should quash the Decision and remit the matter to the University for reconsideration with the instruction to explicitly consider Pickle's *Charter* interests.

[7] As an invited speaker and not a student, the holding in *UAlberta Pro-Life* does not capture Widdowson's attendance on campus. This Court should not now, on this limited evidentiary record and where it is unnecessary to do so, expand that decision to encompass unrelated third parties.

[8] Further, and regardless of whether the *Charter* could apply to Widdowson, Widdowson's speech interests were not engaged because she requests a positive right to speech. Widdowson requests that this Court declare that the University is obligated to provide a platform for her speech. This is properly analyzed under the *Baier* framework.[16] Widdowson does not meet this test because the University's Decision did not "substantially interfere[…] with freedom of expression, or [have] the purpose of interfering with freedom of expression".[17] Widdowson attended the University and gave two classroom talks (which the professor had opened to the university community) and attempted to speak in a public space, regardless of the room booking, illustrating that the cancellation of the room booking for the Event did not "substantially interfere with freedom of expression".[18] The University did not prevent Widdowson from attending on campus.

[9] The Supreme Court of Canada, in *Mckinney v University of Guelph*, decided that the *Charter* does not apply to universities.[19] While the University first submits that considering this issue is unnecessary in this case, if the Court does consider this issue, this Court should not now purport to overrule that decision. The principles relied upon so heavily by the Applicants in this case were those raised by Justice Wilson in dissent in *Mckinney*. The majority of the Supreme Court rejected those arguments. This Court should do the same. The University is not "government".

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[16] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 [***Toronto (City)***] [**TAB 8**]; *Baier v Alberta*, 2007 SCC 31 [***Baier***] [**TAB 9**].
[17] *Toronto (City)* at para 25 [**TAB 8**].
[18] See eg CRP at 000085; see also Affidavit of Widdowson, paragraph 39.
[19] *Mckinney v University of Guelph*, [1990] 3 SCR 229 [***Mckinney***] [**TAB 10**].

II. RELEVANT FACTS AND THE UNIVERSITY'S DECISION

[10] The University is a comprehensive academic and research university constituted under the *Post-Secondary Learning Act* (the "***PSLA***").[20] The University's primary governing body is the Board of Governors. The Board of Governors is given broad statutory powers to "manage and operate" the University, and to make bylaws "for the management, government and control of the university buildings and land".[21] The Board of Governors are empowered to "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".[22] The *PSLA* empowers the Board of Governors to oversee and manage the operational function of the University. After granting the University and the Board of Governors these broad governance powers, the Government has largely backed away, leaving the University to achieve its aims on its own.

[11] Viminitz, formerly an Applicant in these proceedings,[23] was a Professor of Philosophy at the University.[24] In November 2022, Viminitz instructed an administrative assistant to request a room in Anderson Hall for the Event, which would be open to the public.[25] After some discussion, Room 175 in Anderson Hall was booked.[26] The Event was scheduled to occur on February 1, 2023 from roughly 4:30 pm to 6:00 pm.[27] Widdowson would speak on the topic of "How Woke-ism Threatens Academic Freedom".[28] Widdowson would speak and then there would be a question-and-answer section.[29] Viminitz anticipated roughly 30 people would attend.

[12] Viminitz also invited Widdowson to speak to students enrolled in the classes he taught as a Professor of Philosophy.[30] The professor opened attendance to the broader university

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[20] *Post-Secondary Learning Act*, SA 2003, c P-19.5 [**TAB 2**].
[21] *PSLA*, ss 18, 60 [**TAB 2**].
[22] *PSLA*, s 60(1)(b) [**TAB 2**].
[23] He has since been struck as an Applicant by Justice O.P. Malik: *Pickle v University of Lethbridge*, 2024 ABKB 378 [**TAB 11**].
[24] Viminitz Affidavit at para 3.
[25] Viminitz Affidavit at paras 10-13.
[26] Viminitz Affidavit at Exhibit "Q".
[27] Viminitz Affidavit at para 10.
[28] Viminitz Affidavit at para 13.
[29] Viminitz Affidavit at paras 10-13.
[30] Viminitz Affidavit at para 15.

community. These in-class lectures proceeded without issue, and were attended by both students and non-students.[31]

A. The University Receives Input on the Harms of the Event

[13] Sometime in January 2023, news of Widdowson's Event spread. The University began receiving significant commentary from faculty, students, alumni, and the public raising concerns with the Event. The Certified Record of Proceedings outlines the extent of these concerns.[32] While some of the input received raised concern with Widdowson herself, the majority focused on the Event and the harms individuals believed the Event would cause.

[14] On January 26, 2023, President Mahon released a Statement indicating that while the University "strongly disagree[d] with assertions that seek to minimize the significant and detrimental impact of Canada's residential school system", it was committed to the principles of freedom of expression as illustrated in its Statement on Free Expression.[33] After this initial statement, the University received even more feedback and information raising concerns about harms arising from the Event. Further, it became clear that a counter-protest was being planned by stakeholders, which created real risks in relation to physical safety on campus and security concerns.[34]

(i) Concerns About Widdowson's Presence on Campus

[15] Some of the concern centered on Widdowson herself. Parties indicated that Widdowson was a "well-known residential school denialist".[35] One person indicated that Widdowson's

[31] Viminitz Affidavit at para 15.
[32] Certified Record of Proceedings beginning at 000006.
[33] Certified Record of Proceedings at 000055.
[34] See eg Certified Record of Proceedings at 000120. Further, Widdowson's decision to attend on campus to make her presentation in a public area of campus also created significant security concerns: Certified Record of Proceedings at 000177-78.
[35] Certified Record of Proceedings at 000006.

presence was “deeply hurtful to me and other Indigenous students and community members” and that her attendance at a campus event did “not show reconciliation and is very hurtful”.[36]

[16] Another individual commented that Widdowson’s “denial of the harm that the residential school system has caused to Indigenous people in Canada is racist and perpetuates violence and discrimination”.[37] This was a repeated theme. Many expressed their concerns that facilitating a talk by Widdowson by providing campus space would be “harmful to the institution’s relationship with its Indigenous population, *and* minorities in general”.[38]

[17] Another wrote that Widdowson was “promoting racism, does not align with the Calls to Action, is not academically sound, and is not a best practice and is in fact promoting [hate] and racism which has direct consequences in terms of health, education, employment, and more”.[39]

(ii) Concerns about the Harm the Event Would Cause

[18] Some of the concern, and the portions that were reflected in the University’s reasons, focused on the harm that would be caused by the Event. One concerned individual wrote that the Event, and others like it, would cause “very real harms” to “Indigenous faculty, staff, graduate students, and undergrads”.[40] Another wrote to President Mahon that the University would “need to do better than this” if it wanted to be “a safe place for Indigenous students”.[41] One individual wrote that hosting Widdowson’s Event was “incredible harmful to Indigenous people and their communities, and sends a message that this university doesn’t care for their emotional well-being or safety”.[42] The same individual referred to hosting Widdowson as “entirely fucked up”.[43]

[19] Concerned parties indicated that Widdowson and other “academic freedom and ‘open inquiry’” organizations “decry ‘wokeism,’ by which they mean approaches to academic inquiry that centre social justice, refuse to debate the humanity of marginalized peoples, and

[36] Certified Record of Proceedings at 000016-000017.
[37] Certified Record of Proceedings at 000022.
[38] Certified Record of Proceedings at 000044 [emphasis in original].
[39] Certified Record of Proceedings at 000118.
[40] Certified Record of Proceedings at 000007.
[41] Certified Record of Proceedings at 000021.
[42] Certified Record of Proceedings at 000024.
[43] Certified Record of Proceedings at 000024.

acknowledge and honour the harms of systems of privilege and violence".[44] They wrote that the Event "represent[s] white supremacy and anti-Indigenous racism *in action and in real time*" and that the Event "has and will *cause(d) harm*".[45]

[20] Another individual wrote to a member of University leadership stating that hosting the Event would be "harmful to the wellbeing of many in our university community".[46] Yet another indicated that "[e]ducation should not be synonymous with harm", in requesting the Event be cancelled.[47] One individual wrote that while freedom of speech should be encouraged, "when that speech is hatred, when do we say enough?".[48] This was another theme: several individuals commented there must come a point where freedom of expression yields to harm, saying things like: "Please do not allow this event to take place, free speech does not include hate or violence".[49] Another individual stated that they would "not feel safe or welcomed" on campus if the Event proceeded.[50]

[21] Some wrote that the Event placed the "safety of Indigenous women and men … at even high risk".[51] A member of Iikaisskini Indigenous Services wrote to University leadership that it was preparing to offer additional mental health supports and had "some upset students" in its offices in anticipation of the Event.[52]

[22] In one email, Patrick Wilson, Associate Professor in the Department of Anthropology, wrote that the University "has a responsibility to not allow an event such as this to proceed".[53] Wilson wrote that the Event would "retraumatize vulnerable members of our community" and that this "psychological and emotional harm violates the safety of the members" of the University community.[54]

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[44] Certified Record of Proceedings at 000006.
[45] Certified Record of Proceedings at 000007 [emphasis in original].
[46] Certified Record of Proceedings at 000027.
[47] Certified Record of Proceedings at 000037.
[48] Certified Record of Proceedings at 000042.
[49] Certified Record of Proceedings at 000045.
[50] Certified Record of Proceedings at 000074.
[51] Certified Record of Proceedings at 000045.
[52] Certified Record of Proceedings at 000053.
[53] Certified Record of Proceedings at 000033.
[54] Certified Record of Proceedings at 000033.

[23] In another, Leroy Wolf Collar, Education Navigator: Siksika, wrote that the University's many positive steps toward reconciliation were set aside to accommodate Widdowson:

> 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 and their relationship to the Blackfoot Confederacy (Kainai, Piikani and Siksika). My trust for the University's relationship with my people is suddenly on hold because I'm not sure if the university stands up to the truth and reconciliation relationship is [sic] claims to have with Indigenous people.
>
> […]
>
> I guess the one white woman's freedom of speech is more important to protect than the lives of 500 plus Indigenous students attending UofL who may be exposed to harm mentally, emotionally, spiritually, culturally, and even physically. Safety is a huge factor in the lives of Indigenous peoples in Canada.[55]

[24] Associate Professor of Indigenous Studies Paul McKenzie-Jones wrote that permitting the Event to continue was not "an exercise in defence of academic freedom," but instead "places significant risk upon Indigenous faculty, staff, and students" and "causes actual harm to Indigenous peoples, retraumatizing and disempowering them through historical erasure and denial".[56]

[25] An Associate Professor in the Department of Women & Gender Studies wrote that the Event would create a "psychologically unsafe environment" and called for the University to cancel the Event.[57]

[26] The University of Lethbridge Students' Union compiled comments from students in a proposal requesting that the Event either be cancelled, or permission granted for a counter-protest.[58] These comments included that individuals were "worried for [their] safety", that they "no longer feel safe at the school", and that they had "been having continuous flashbacks due to

[55] Certified Record of Proceedings at 000066.
[56] Certified Record of Proceedings at 000069.
[57] Certified Record of Proceedings at 000088.
[58] Certified Record of Proceedings at 000120-000145.

all the stress, I don't feel safe walking alone".[59] The possibility of a counter-protest created risks of harm to the physical safety of individuals on campus.

(iii) Some Individuals Supported the Event Proceeding

[27] Some concerned individuals also wrote to the University to express their opinion that the Event should proceed. One individual wrote to President Mahon to "comment and thank you and the University for ensuring that" the University's Statement on Free Expression was upheld.[60] Another expressed their "support for freedom of expression and freedom of speech in our University" and stated that they felt "safer knowing this institution gives students the freedom to express their beliefs rather than be suppressed or restrained by a particular way of thinking".[61]

[28] A Professor in the Department of Philosophy wrote to University leadership suggesting that he had not seen evidence that Widdowson "was a racist" and that if she were, "there must be evidence of that in her writings and in one of the many videos that are online".[62]

B. The Decision to Cancel the Room Booking for the Event

[29] As University leadership were receiving these concerns, they discussed and debated how to best address the competing and varied interests. Leadership recognized that the issue was complex.[63] Internally, University leadership expressed the "critical balance" between "freedom of speech and respecting and supporting our indigenous and BIPOC communities",[64] the difficulty of taking a "balance[d] approach", and the aim of working together "to strike the best balance" they could.[65] It is clear that the decision-maker understood the need to undertake a careful analysis and to balance competing interests.

[59] Certified Record of Proceedings at 000133.
[60] Certified Record of Proceedings at 000072.
[61] Certified Record of Proceedings at 000076.
[62] Certified Record of Proceedings at 000100-000102.
[63] Certified Record of Proceedings at 000009.
[64] Certified Record of Proceedings at 000047.
[65] Certified Record of Proceedings at 000046.

[30] Some of those who provided their input requested that both the Event and the two lectures in Viminitz's class be cancelled.[66] The University did not do so. Instead, it actively allowed the events to proceed even after cancelling the room booking for the Event, and sent an email to students registered in the classes in which Widdowson was scheduled to speak, providing resources and excusing attendance for students if "attending Widdowson's potential in-class talk(s) will cause harm to you".[67] As discussed below, it attempted to address the concerns raised regarding harm in a minimally intrusive manner.

[31] President Mahon and University leadership reviewed this feedback, deliberated, and decided that the safety of the University community outweighed the freedom of expression interests embodied in the Statement on Free Expression. As President Mahon explained in an email:

> I heard loud and clear after my first statement from our students, community members and community leaders about the negative impact this talk would have on them, their families and extended network. It was these messages from so many people that led us to make the decision we did to not allow the lecture to take place in a sanctioned university space. But, as you point out, this is a contentious decision amongst many and we are certainly hearing a great deal from the community that believe that free speech must trump all.[68]

[32] As a result of these concerns, and after weighing the countervailing importance of free expression, the University decided to cancel the room booking for the Event (but not the in-class lectures). In an email to University Leadership on Friday, January 27, 2023, President Mahon explained the Decision.[69] The Decision was based on "the significant consultation conducted over the past 24 hours" and reflected the University's belief that "the potential harm to students, faculty and staff is significant".[70] The Statement of Free Expression guided the Decision. It made "clear that Free Speech is not an absolute right on our campus and must be considered in the context of protecting the campus community from harm".[71] Ultimately, the University found that

[66] Certified Record of Proceedings at 000022.
[67] Certified Record of Proceedings at 000168.
[68] Certified Record of Proceedings at 000175.
[69] Certified Record of Proceedings at 000003.
[70] Certified Record of Proceedings at 000003.
[71] Certified Record of Proceedings at 000003.

the risk of harm to students, faculty, and staff outweighed the risk to the expressive interests of Widdowson and others: "Our assessment, based upon all of our consultation, is that the potential for harm is too great for the event to take place".[72] President Mahon concluded the email by indicating that he and his team would craft a statement to be released on Monday to explain the Decision.[73]

[33] On January 30, 2023, Provost and Vice-President (Academic) Erasmus Okine informed Viminitz by email that Room 175 would "not be made available for the Frances Widdowson public lecture planned on February 1, 2023 from 4:30-6:00pm. No alternative University of Lethbridge facilities will be provided for this event".[74]

[34] Also on January 30, 2023, University President and Vice-Chancellor Mike Mahon posted a statement titled "Statement from the President – Controversial Guest Speaker Appearance" (the "**Reasons**").[75] The Statement provides the University's reasons for its Decision.

[35] The Reasons explain that while the University recognizes the "value and necessity of freedom of expression", there are limits.[76] The "safety of [the University's] diverse community" is one important limit.[77] After receiving guidance from individuals with "cultural, scholarly, sectoral and legal expertise", and receiving the input discussed above, the University decided to cancel the room booking for the Event due to the safety concerns.[78]

C. The Relevant Policies

[36] As noted in the Reasons, the University's Decision was rooted in its Statement on Free Expression. The Statement on Free Expression is the primary document regulating expressive activity on campus and is the key policy against which the University's Decision should be judged.

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[72] Certified Record of Proceedings at 000003.
[73] Certified Record of Proceedings at 000003.
[74] Certified Record of Proceedings at 000001.
[75] Certified Record of Proceedings at 000002.
[76] Certified Record of Proceedings at 000002.
[77] Certified Record of Proceedings at 000002.
[78] Certified Record of Proceedings at 000002.

[37] The Statement on Free Expression affirms the University's "commitment, and recognizes its obligation, to provide an environment in which freedom of inquiry and freedom of expression are prerequisite requirements in all aspects of its operation; an environment in which mutual respect, tolerance, and civility are the hallmarks of all interactions".[79] The Statement on Free Expression highlights that expression "does not protect violence or threats of violence and examples of how it is limited include Criminal Code hate speech laws, hate and discriminatory speech provisions within provincial human rights codes, and anti-defamation laws".[80]

[38] In the Statement on Free Expression, the University commits itself to the following principles, among others:

- 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.
- 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. It is for individual members of the university community, not the University as an institution to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas they oppose.
- 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 University will restrict expression that violates the law, defames an individual, that constitutes a threat or harassment or that unjustifiably invades substantial privacy or confidentiality interests.[81]

[39] Complying with these principles requires the University to retain discretion to regulate the time, place, and manner of expression:

> To achieve its purpose and mandate the University must operate free from unreasonable interference. Therefore, the University reserves the right to reasonably regulate the use of facilities, time, place, and manner of expression to ensure it does not disrupt the ordinary activity of the University.[82]

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[79] Certified Record of Proceedings at 000004.
[80] Certified Record of Proceedings at 000004.
[81] Certified Record of Proceedings at 000004-000005.
[82] Certified Record of Proceedings at 000005.

[40] The Statement on Free Expression expressly applies to all individuals or organizations making use of University property or resources, including external parties:

> 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.[83]

[41] Additionally, the University's "Visitor Health & Safety Standard", which applies to "individuals invited to University worksites for business purposes", requires visitors to "Comply with … all applicable University policies, procedures, and requirements".[84]

[42] Despite the University cancelling the room booking for the Event, Widdowson attended the University, spoke about her ideas with many in attendance and gave limited portions of her talk (with only protesters disrupting her). The University did not intervene to limit her attempts to speak and in fact its security personnel assisted Widdowson to create as much safety as possible for these engagements. Widdowson also gave two classroom lectures on campus, which were open to those outside registered students, without the University intervening.[85] In the Applicants' brief they alternate between focusing on the Decision at issue in this judicial review (the cancellation of the room booking for the Event) and some notion that the University "cancelled Widdowson's presence on campus".[86] The University did not—and has never—barred Widdowson from attending the University grounds. To the contrary, Widdowson did, in fact, attend on campus on the day of the planned Event, in addition to the classroom lectures.

[43] The Applicants appear to raise issue with the University's decision to permit Widdowson to attend the campus and give her talk.[87] They suggest that the counter-protest of individual University members and members of the public somehow itself resulted in the "cancellation" of

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[83] Certified Record of Proceedings at 000005.
[84] Certified Record of Proceedings at 000185.
[85] Certified Record of Proceedings at 000171; Brief of the Applicants at para 38.
[86] Brief of the Applicants at para 34.
[87] Brief of the Applicants at paras 38-40.

Widdowson.[88] The Applicants appear concerned that the very expressive interests they purport to champion were used by those with views contrary to their own.

[44] The University's Impartiality and University Facility Utilization Policy (the "***Facility Utilization Policy***") requires the University to "maintain the strictest impartiality with regard to any and all religious, political, social, or commercial groups, parties, organizations, bodies of opinion, or interests".[89] The "basic principle" underlying the Facility Utilization Policy is that the University "should be a place where ideas are generated and circulated with the greatest possible freedom".[90]

[45] The Use of University Premises for Non-Academic Purposes Policy (the "***Premises Policy***") applies to all uses of University premises for non-academic purposes and expressly includes "guest lectures/presentations".[91] The Premises Policy notes that the University "recognizes academic freedom and permits lawful assemblies and free speech, subject to the limits set out herein".[92] The Premises Policy also states that room bookings under it must "at all times, be in compliance with applicable… University policies, procedures, rules and regulations".[93] Individuals that submit booking requests are responsible for "exercising due care" for the safety of attendees.[94] If, in its sole discretion, the University deems that security personnel are required, it may impose a cost for security on those booking the event.[95]

[46] As noted in the input the University received, the *Occupational Health and Safety Act* was relevant to the University's decision.[96] One of the *OH&S Act*'s key purposes is the "promotion and maintenance of the highest degree of physical, psychological and social well-being of workers".[97] It obligates employers, including the University, to "ensure, as far as it is reasonably practicable" the "health, safety and welfare" or workers and "other persons at or in the vicinity

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[88] Brief of the Applicants at para 39.
[89] Viminitz Affidavit at Exhibit "C".
[90] Viminitz Affidavit at Exhibit "C".
[91] Premises Policy at section 3.1, Viminitz Affidavit at Exhibit "B".
[92] Premises Policy at section 4.3, Viminitz Affidavit at Exhibit "B".
[93] Premises Policy at section 6.2, Viminitz Affidavit at Exhibit "B".
[94] Premises Policy at sections 6.5 and 6.7, Viminitz Affidavit at Exhibit "B".
[95] Premises Policy at sections 6.11 and 6.12, Viminitz Affidavit at Exhibit "B".
[96] *Occupational Health and Safety Act*, SA 2020, c O-2.2 [***OH&S Act***] [**TAB 3**].
[97] *OH&S Act*, s 2(a) [**TAB 3**].

of the work site whose health and safety may be materially affected by identifiable and controllable hazards originating from the work site".[98] The feedback provided by employees of the University raised real and substantial concerns about risks to their psychological well-being as a result of the planned Event. This issue was raised prior to the Decision being made.[99]

III. ISSUES TO BE DECIDED ON THIS APPLICATION

[47] The Applicants frame the issues to be decided on this Application in broad terms, starting with the general application of section 32(1) of the *Charter*.[100] Instead, this Court should approach the Application narrowly, as discussed below.

[48] The University submits that the issues to be decided in this Application are:

(a) Should this Court rely on the extraneous evidence introduced by the Applicants?

(b) Was the University's Decision reasonable in light of the relevant University policies?

(c) Alternatively, did the University's Decision engage Pickle's freedom of expression?

(d) Alternatively, did the University's Decision engage Widdowson's freedom of expression?

(e) If the Decision engaged either Widdowson or Pickle's freedom of expression, was the Decision reasonable?

(f) Alternatively, is the University "government" in accordance with section 32(1) such that the *Charter* applies to all actions undertaken by the University and should this Court overturn *Mckinney*?

(g) If the Decision was unreasonable, what is the appropriate remedy?

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[98] *OH&S Act*, s 3(1) [**TAB 3**].
[99] See CRP at 000032 and 000088.
[100] Brief of the Applicants at para 50.

IV. DECIDING ISSUES NARROWLY

[49] The difference between the Applicants and the University on the proper framing of the issues means that this Court must first decide the proper approach to take in this Application. The Applicants propose a broad, wide-ranging approach, involving review of thousands of pages of documents that were not before the decision-maker, overruling Supreme Court of Canada precedent, and more. The University submits that the dispute can be resolved on narrower grounds, and that case law mandates such an approach.

[50] The Supreme Court has repeatedly instructed courts to resolve disputes on narrow grounds where possible. The principle of judicial restraint requires courts to do so. This is especially so where one of the grounds involves the constitution and the other does not.[101]

[51] For instance, in *Phillips v Nova Scotia*, one aspect of the appeal before the Supreme Court was whether a stay of the Westray Inquiry would infringe the section 7 and section 11(d) *Charter* rights of the accused. The stay had been granted on the presumption that the Inquiry, and its publicity, could prejudice jurors at a future trial of the accused. Following the hearing of the appeal at the Supreme Court, the accused instead elected to proceed to trial by judge alone. This eliminated the concern of jurors being improperly influenced by the publicity of the Inquiry, eliminating the "substratum on which the case was based".[102] Justice Sopinka, for a majority of the Supreme Court, therefore held that it was unnecessary and undesirable to decide the broader issues relating to the validity of the stay:

> This Court has said on numerous occasions that it should not decide issues of law that are not necessary to the resolution of an appeal. This is particularly true with respect to constitutional issues.[103]

[52] In *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, the Supreme Court refused to grant the "principal orders sought by the appellants" because doing so would require the Court to "resolve some complex

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[101] Peter W. Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed., (rel 2024-1) (Toronto: Thompson Reuters, 2020), § 59:11 Alternative grounds of decision.
[102] *Phillips v Nova Scotia* at para 12 [**TAB 6**].
[103] *Phillips v Nova Scotia* at para 6 [**TAB 6**].

constitutional issues".[104] These orders included declarations that "the courts of the Territories are established by Parliament within the meaning of s. 19(1) of the *Charter*", that a section in the Northwest Territories' *Official Languages Act* "is of no force or effect to the extent of its inconsistency with s. 19(1) of the *Charter*", and that their right to be heard had been infringed.[105] Making these declarations would have required the Supreme Court to consider the constitutional status of the Northwest Territories and overturn its earlier decision in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education,*[106] two dramatic and significant requests.[107]

[53] The Supreme Court declined to do so, noting that the principle of judicial restraint required it to "not decide constitutional issues that are not necessary to the resolution of the parties' dispute".[108] Instead, the core of the dispute between the parties concerned the Minister's decisions relating to applications for admission submitted by the appellant parents.[109] Resolving the reasonableness of those disputes—by finding them unreasonable—the Supreme Court was "bringing an end to the dispute between the parties".[110]

[54] The same principles apply in this case. The Court can resolve the dispute between the parties—whether it was reasonable or unreasonable for the University to cancel the room booking for the Event in light of the University's governing policies—without addressing the broad declaratory relief the Applicants propose. If this Court determines that the University's Decision was unreasonable, quashes the Decision, and remits it to the University for reconsideration, the dispute between the parties is over. Remitting the Decision to the University, including optionally with instructions to the decision-maker regarding the features of the policies they must consider more carefully or give more weight to, is ultimately the appropriate remedy.

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[104] *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para 107 [***CSFTNO***] [**TAB 12**].
[105] *CSFTNO* at para 106 [**TAB 12**].
[106] *Société des Acadiens du Nouveau-Brunswick Inc. v Association of Parents for Fairness in Education*, 1986 CanLII 66, [1986] 1 SCR 549 [**TAB 13**].
[107] *CSFTNO* at para 107 [**TAB 12**].
[108] *CSFTNO* at para 108 [**TAB 12**].
[109] *CSFTNO* at para 109 [**TAB 12**].
[110] *CSFTNO* at para 110 [**TAB 12**].

[55] To grant the broad remedies the Applicants' request, this Court must:

(a) Determine that the University, and likely all similar universities, are "government" under section 32(1) of the *Charter*.[111] Such a declaration would also have impacts on other public bodies, besides universities, which are not currently held to be "government" under section 32(1).

(b) Determine whether the limited exceptions to the requirement of vertical *stare decisis* are met such that this Court can reconsider the Supreme Court of Canada's decision in *Mckinney*, which found that universities are not "government" for the purposes of section 32(1) of the *Charter*.[112]

(c) Determine whether the Decision engaged Pickle's freedom of expression interests under section 2(b) of the *Charter*.

(d) Determine whether the Decision engaged Widdowson's freedom of expression interests under section 2(b) of the *Charter*, including whether Widdowson's claim under section 2(b) of the *Charter* is a positive rights claim, and, if so, whether Widdowson meets the *Baier* test for positive freedom of expression rights.

(e) If Widdowson or Pickle's freedom of expression rights were engaged by the Decision, determine whether the Decision was not reasonably justified considering the competing interests, as described in *CSFTNO*.

(f) Determine whether an injunction is required to obligate the University to provide a space for the Event, given the factors in *Mills* that guide this Court's crafting of a remedy under section 24(1) of the *Charter*.[113]

[56] In addition to requesting this Court grant broad remedies that go beyond the scope of the dispute between the parties, the Applicants' requested relief would deny the decision-maker at first instance of the opportunity to issue a decision in accordance with a proper understanding of the legal constraints bearing upon it. For instance, should this Court determine that the principle from *UAlberta Pro-Life* applies to Pickle's freedom of expression interests on campus and that the Decision did not adequately do so, this Court ought to permit the University to reweigh and consider the issues at stake considering that instruction.

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[111] Brief of the Applicants at para 265(a).
[112] *Canada v Carter (Attorney General)*, 2015 SCC 5 at para 44 [**TAB 14**].
[113] Brief of the Applicants at para 262.

V. STANDARD OF REVIEW

[57] There are multiple issues in this application that engage different standards of review.

[58] The University's Decision is reviewed on the reasonableness standard of review. As noted in *Vavilov*, the starting point is reasonableness.[114] None of the exceptions to reasonableness review apply, should this Court proceed on traditional administrative law principles.

[59] The University agrees with the Applicants that determining whether the Decision engaged Pickle or Widdowson's *Charter* interests is reviewed on the correctness standard of review. This standard applies to the determination of whether the *Charter* applies to Pickle or Widdowson on these facts.[115] If the answer is yes, the correctness standard also applies to determining whether the *Charter* right arises, its scope, and whether the University applied the correct framework in making the Decision:

> 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).[116]

[60] If the *Charter* applies to the Decision, it is a discretionary decision that implicated *Charter* protections. This means that the applicable legal framework is the *Doré* framework, most recently restated by the Supreme Court in *CSFTNO*.[117] The appropriate standard of review for the Decision itself would then be reasonableness.[118]

[61] The *Doré* framework has two steps. First, the reviewing court must determine whether the "administrative decision at issue 'engages the *Charter* by limiting *Charter* protections—both rights and values".[119] As in *CSFTNO*, this is a point of dispute. The Applicants submit both Widdowson and Pickle's *Charter* rights were implicated by the Decision; the University submits they were not.

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[114] *Vavilov* at para 23 [**TAB 15**].
[115] *York* at para 62 [**TAB 16**].
[116] *York* at para 63 [**TAB 16**].
[117] *CSFTNO* at para 60 [**TAB 12**].
[118] *CSFTNO* at para 60 [**TAB 12**].
[119] *CSFTNO* at para 61 [citations omitted] [**TAB 12**].

[62] If the reviewing court concludes that the Decision engaged the *Charter*, it moves onto the second step: determining "whether the decision is reasonable through an analysis of its proportionality".[120] At this stage, the court assess whether the decision reflects a "proportionate balancing" of *Charter* rights and values, on the one hand, with the competing statutory objectives, on the other.[121]

A. Applying the Reasonableness Standard in Traditional Administrative Settings

[63] For reasonableness review, the correct approach for a reviewing court is one of judicial restraint and deference.[122] The focus of the reviewing court is on the decision made.[123] The reviewing court must refrain from conducting its own analysis and from asking what decision it would have made. The reviewing court "must consider only whether the decision made by the administrative decision-maker – including both the rationale for the decision and the outcome to which it led – was unreasonable".[124]

[64] Where decision-makers have provided reasons, those are the court's starting point and primary focus for a reasonableness review.[125] Written reasons are not held to a standard of perfection.[126] Reasons do not need to address every argument, statutory provision, or evidentiary detail the parties provided.[127] Instead, reviewing courts must read the reasons in light of the institutional context and the record before the decision-maker.[128]

[65] There are two indicators of a reasonable decision: (1) the decision is based on an internally coherent and rational chain of analysis, and (2) the decision is justifiable considering

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[120] *CSFTNO* at para 67 [**TAB 12**].
[121] *CSFTNO* at para 67 [**TAB 12**].
[122] *Vavilov* at para 24 [**TAB 15**].
[123] *Vavilov* at para 83 [**TAB 15**].
[124] *Vavilov* at para 83 [**TAB 15**].
[125] *Vavilov* at para 84 [**TAB 15**].
[126] *Vavilov* at para 91 [**TAB 15**].
[127] *Vavilov* at para 91 [**TAB 15**].
[128] *Vavilov* at para 91 [**TAB 15**].

the facts and law that constrain the decision-maker.[129] These two requirements demand that decisions be "justified" and "justifiable".[130]

[66] Decisions must be rational and logical, such that a reviewing court can follow a rational chain of analysis without encountering fatal logical flaws.[131] This process must not, however, become a "line-by-line treasure hunt for error", or otherwise result in the reviewing court conducting its own analysis.[132] If the reasons avoid fatal flaws in overarching logic and provide the reviewing court with a path that could "reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived", the reasons are sufficient.[133] Put plainly: the decision-maker's reasons must "add up".[134]

[67] The decision must also be justifiable considering its legal and factual context.[135] While there is a litany of possible legal and factual considerations that could be relevant to a particular administrative decision, common relevant elements include:

(a) the governing statutory scheme;
(b) other relevant statutory or common law;
(c) the principles of statutory interpretation;
(d) the evidence before the decision-maker;
(e) the submissions of the parties;
(f) the past practices and decisions of the administrative body; and
(g) the potential impact of the decision on the individual to whom it applies.[136]

[68] The decision-maker is tasked with weighing and assessing the evidence, not the reviewing court.[137] Reviewing courts must refrain from reweighing and assessing the evidence and should

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[129] *Vavilov* at paras 85, 101 [**TAB 15**].
[130] *Vavilov* at para 86 [**TAB 15**].
[131] *Vavilov* at para 102 [**TAB 15**].
[132] *Vavilov* at para 102 [**TAB 15**].
[133] *Vavilov* at para 102 [**TAB 15**].
[134] *Vavilov* at para 104 [**TAB 15**].
[135] *Vavilov* at para 105 [**TAB 15**].
[136] *Vavilov* at para 106 [**TAB 15**].
[137] *Vavilov* at para 125 [**TAB 15**].

not intervene unless the decision-maker made a serious error, such as misapprehending the evidence or failing to consider relevant evidence.[138]

B. Applying the Reasonableness Standard in the *Doré* Framework

[69] While the reasonableness framework is very similar under traditional administrative law principles and under the *Doré* framework, there are slight differences. The reasonableness standard of review, when applied to discretionary decisions that engage *Charter* protections "must allow for a '*robust* . . . analysis' that works the same 'justificatory muscles' as the test set out in *R. v. Oakes*".[139]

[70] For a decision to be reasonable under the *Doré* framework, the decision at issue "must reflect the fact that the decision maker considered the *Charter* values that were relevant to the exercise of its discretion" and show that the decision-maker meaningfully "addressed the *Charter* protections to 'reflect' the impact that its decision may have".[140]

[71] Absent exceptional circumstances, a reviewing court must not reweigh the evidence before the decision-maker or conduct a *de novo* analysis of the issues.[141] Instead, if the decision-maker took all the relevant factors into consideration, the court must uphold the decision.[142]

[72] Reviewing courts are permitted, however, to review the weight afforded to each factor to assess if the decision-maker's balancing was proportionate.[143] If there were other options or avenues reasonably available to the decision-maker that would have reduced the impact on the right at issue, while still furthering the relevant objectives, the decision is unreasonable.[144]

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[138] *Vavilov* at paras 125-126 [**TAB 15**].
[139] *CSFTNO* at para 70 [citations omitted, emphasis in original] [**TAB 12**].
[140] *CSFTNO* at para 68 [citations omitted] [**TAB 12**].
[141] *CSFTNO* at para 71 [**TAB 12**].
[142] *CSFTNO* at para 71 [**TAB 12**].
[143] *CSFTNO* at para 72 [**TAB 12**].
[144] *CSFTNO* at para 72 [**TAB 12**].

C. Applying the Correctness Standard

[73] The correctness standard of review provides this Court with more leeway. Rather than reviewing the reasons offered by the decision-maker, this Court looks only at results. If the decision at issue does not align with the decision this Court would have made, the administrative decision must fall.[145] Put differently, it is up to this Court to select the correct decision, regardless of what the administrative decision-maker did.

VI. LAW AND ANALYSIS

A. This Court should not rely on the improperly introduced evidence that was not before the decision-maker.

[74] Judicial review applications, especially those requesting administrative decisions to be quashed, are based on limited evidence. Rule 3.22 governs the evidence the Court may consider:

> 3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (b.1) if the originating application is for relief other than an order in the nature of certiorari or an order to set aside a decision or act, an affidavit from any party to the application;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.[146]

[75] The Applicants have introduced thousands of pages of evidence through three affidavits of a paralegal of the Applicants' counsel (the "***Additional Evidence***"). Most of this evidence was not before the decision-maker and is not contained within the Certified Record of Proceedings.

[76] As a preliminary matter, the Applicants have not applied for permission to introduce the additional evidence, such that 3.22(d) cannot apply. To introduce evidence beyond the Certified Record of Proceedings, an applicant must file an application. In *Oleynik v University of Calgary*

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[145] *Vavilov* at para 15 [**TAB 15**].
[146] Alberta *Rules of Court*, Alta Reg 124/2010, r 3.22.

("***Oleynik***"), the Court struck an affidavit—and a brief relying on that affidavit—filed in a judicial review without an application:

> As for the parts of the Affidavit that are not duplicates, Dr. Oleynik must bring a proper application for new evidence – he cannot simply file an Affidavit for use in the judicial review without going through that process. The most efficient way to do this will be to strike the April 7 Oleynik Affidavit and require a proper application if Dr. Oleynik wishes to pursue that.[147]

[77] Judicial review applications should, generally, only be based on the record before the decision-maker. This principle is long-standing and only modified in exceptional circumstances. As our Court of Appeal recently affirmed:

> *Alberta Liquor Store* affirmed that the "general rule is that judicial review is conducted based on the Return filed by the tribunal ... additional affidavits and evidence are exceptional": at para 40. This is because new evidence is "irrelevant to the issues before the court on judicial review", as the court is not assessing the merits of the decision, but instead whether the decision of the administrative body is supported by the record before it, and whether that decision aligns with the rules of natural justice: at paras 43-44.[148]

[78] In *Oleynik*, the Court commented on the rationale for the requirement that judicial reviews be conducted solely on the evidence before the decision-maker: judicial reviews are not "a re-hearing but rather a review of the decision that was made and of the decision-making process of the initial adjudicator. This can only be done where the record before the reviewing court is the same as the record before the initial adjudicator".[149] The Court also referred to the words of Watson JA in *Edmonton Police Service v Alberta (Information & Privacy Commissioner)*:

> The [respondent's] concern about fresh evidence and new issues being raised for the first time on judicial review is not a mere technicality. To permit fresh or new evidence on judicial review as to the merits of the decision under review where the decider did not have that evidence, and to permit new issues on judicial review, works against the concept of judicial review.[150]

[79] The Court of Appeal in *Northern Air* identified four exceptions to this "general rule":

> 1. To show bias or a reasonable apprehension of bias, where the facts in support of the allegation do not appear on the record.

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[147] *Oleynik v University of Calgary*, 2023 ABKB 43 at para 11 [**TAB 17**], aff'd 2023 ABCA 265 at para 12 [**TAB 18**].
[148] *Northern Air Charters (PR) Inc v Alberta Health Services*, 2023 ABCA 114 at para 8 [***Northern Air***] [**TAB 19**].
[149] *Oleynik* at para 12 [**TAB 17**].
[150] *Oleynik* at para 13, quoting *Edmonton Police Service v Alberta (Information & Privacy Commissioner)*, 2021 ABCA 428 at para 19 [citations omitted] [**TAB 17**].

2. To demonstrate breaches of the rules of natural justice which are not apparent from the record.

3. Background information for other issues such as standing.

4. When the administrative decision maker makes no record, or an inadequate record: *Alberta Liquor Store* at para 41.[151]

[80] The Additional Evidence does not meet these exceptions. The Additional Evidence includes documents relating to the University's Capital Plan;[152] the University's Master Plan;[153] the University's Diversity and Employment Equity Policy;[154] the University's Administrative Organization Chart;[155] emails internal to the Ministry of Advance Education relating to sexual violence policies;[156] news articles published by the Calgary Herald and others;[157] Twitter (now X) screenshots showing Likes and Reposts from individual accounts, some of which the affiant did not herself obtain;[158] Alberta Blue Cross Wellness Spending Account information;[159] a letter from the Union of Lethbridge Graduate Assistants to Government of Alberta Ministers;[160] and more.

[81] Exception one does not apply because the Applicants do not allege a reasonable apprehension of bias. Exception two does not apply as the Applicants do not allege a breach of natural justice. Exception four similarly does not apply because the University did create an adequate record.[161]

[82] The Additional Evidence may therefore only be admitted if it satisfies exception three.

[83] General background documents are inadmissible, except for the limited purpose of "identifying, summarizing and highlighting the evidence most relevant ... the background

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[151] *Northern Air* at para 9 [**TAB 19**].
[152] First Sexton Affidavit at Exhibit "A".
[153] First Sexton Affidavit at Exhibit "B".
[154] First Sexton Affidavit at Exhibit "C".
[155] First Sexton Affidavit at Exhibit "H".
[156] First Sexton Affidavit at Exhibit "T".
[157] E.g., First Sexton Affidavit at Exhibit "GG".
[158] Second Sexton Affidavit at Exhibits "D", "E", "F", "G", and "H" and which therefore violate Rule 3.8 and 13.18 and should be struck.
[159] Third Sexton Affidavit at Exhibit "C".
[160] Third Sexton Affidavit at Exhibit "H".
[161] The Applicants assert at one point that the Certified Record of Proceedings may be deficient as it did not name all individuals in attendance at an online meeting regarding the event: see Brief of the Applicants at footnote 31 and para 30. Regardless, the additional evidence does not speak to the attendance at the meeting.

information is merely for orienting the reviewing court, not to provide evidence as to what took place before the administrative decision-maker".[162] Even then, the evidence must not be new information relating to the merits of the decision. Instead, it should only be a "a summary of the evidence relevant to the merits that was before the ... administrative decision-maker".[163]

[84] Justice Hollins aptly explained the issue in *Jones v Chaffin*.[164] There, the applicant sought judicial review of the Chief of Police's decision to dismiss her complaints against two officers. The applicant sought to introduce evidence not part of the certified record of proceedings through the affidavit of a legal assistant to counsel for the applicant.[165] The affidavit contained documents which the applicants alleged illustrated the background processes used by the Edmonton Police Service and how those processes were contrary to the *Police Act*.[166]

[85] The Court refused to consider the fresh evidence as it was not before the original decision maker and none of the "very few" exceptions applied:

> No proper application to admit this evidence was brought. Even if it had been, the threshold for admitting fresh evidence on a judicial review is very high. The purpose of a judicial review is not to replace the deliberations of the decision maker, here the Chief, with my own deliberations on the underlying issue he was asked to decide. Rather, I am reviewing his decision-making process. This Court can only do this properly if we are looking at the same evidence he had in front of him when he made his decision.
>
> Hence, the jurisprudence has established that judicial review must be a review on the record of the original proceedings. There are very few exceptions to the rule, none of which apply here; *Thurm v. Alberta Labour Relations Board*, 2018 ABQB 300 at para.11.[167]

[86] In *Northern Air*, the appellants argued that the third exception should be expanded to admit documents that provide "necessary background and context to the judicial review".[168] The Court of Appeal rejected this argument. It noted that the cases cited by the appellant related to situations where the certified record of proceedings contained no records or was inadequate.[169]

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[162] *Northern Air* at para 15 [citation omitted] [**TAB 19**].
[163] *Northern Air* at para 15 [citation omitted] [**TAB 19**].
[164] *Jones v Chaffin*, 2018 ABQB 918 [**TAB 20**].
[165] *Jones v Chaffin* at para 13 [**TAB 20**].
[166] *Jones v Chaffin* at para 15 [**TAB 20**].
[167] *Jones v Chaffin* at paras 16-17 [**TAB 20**].
[168] *Northern Air* at para 13 [**TAB 19**].
[169] *Northern Air* at para 13 [**TAB 19**].

[87] The same applies in this case. The Certified Record of Proceedings contains the records that were before the decision-maker when the University decided to cancel the room booking for the Event. The Additional Evidence contains background information which is irrelevant to the University's Decision. There is no application to admit this evidence and, even if there was, it does not meet any of the exceptions outlined in *Northern Air*. This Court should refuse the fresh evidence proffered by the Applicants.

B. The Decision was reasonable because it conformed with the Statement on Free Expression and other relevant University policies.

[88] The Decision was reasonable in light of the evidence before the decision-maker, the potential impact of the Decision, and the governing policies.[170]

[89] As illustrated in the Certified Record of Proceedings, following the announcement of the Event, the University received significant correspondence from concerned individuals. While some of these communications revealed individual preferences that the Event not proceed—which would not generally outweigh the Statement on Free Expression—some of the correspondence indicated that the Event would cause significant harm. The University heard that the Event:

(a) "has and will *cause harm*";[171]

(b) would cause "very real harms" to "Indigenous faculty, staff, graduate students, and undergrads";[172]

(c) "is very hurtful";[173]

(d) would promote "hate and racism which has direct consequences in terms of health, education, employment, and more";[174]

(e) would harm the University's status as a "safe place for Indigenous students";[175]

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[170] *Vavilov* at para 106 [**TAB 15**].
[171] Certified Record of Proceedings at 000007 [emphasis in original].
[172] Certified Record of Proceedings at 000007.
[173] Certified Record of Proceedings at 000016-000017.
[174] Certified Record of Proceedings at 000118.
[175] Certified Record of Proceedings at 000021.

(f) was "incredibl[y] harmful to Indigenous people and their communities, and sends a message that this university doesn't care for their emotional well-being or safety";[176]

(g) would be "harmful to the wellbeing of many in our university community";[177]

(h) would cause some individuals to "not feel safe or welcomed" on campus;[178]

(i) would place the "safety of Indigenous women and men … at even high[er] risk";[179]

(j) would "retraumatize vulnerable members of our community" and would cause "psychological and emotional harm" that "violates the safety of the members" of the University community;[180]

(k) would bring "harm to the Indigenous students, employees, elders and the University" and risk "harm mentally, emotionally, spiritually, culturally, and even physically" to "the lives of 500 plus Indigenous students attending UofL";[181]

(l) would place "significant risk upon Indigenous faculty, staff, and students" and cause "actual harm to Indigenous peoples, retraumatizing and disempowering them through historical erasure and denial";[182]

(m) would create a "psychologically unsafe environment";[183] and more.[184]

[90] These comments indicated a serious risk that the Event would cause significant, real harm to members of the University community. This is a countervailing consideration the University needed to consider. As the Statement on Free Expression makes clear, the University is committed to restricting some speech.[185] Speech that violates the law, defames individuals, constitutes threats or harassment, unjustifiably invades privacy or confidentiality, or which harms others may be reasonably restricted.[186]

[91] The Statement on Free Expression also obligates event organizers—in this case, Viminitz—to "ensure invited speakers and participants are made aware of the University's

[176] Certified Record of Proceedings at 000024.
[177] Certified Record of Proceedings at 000027.
[178] Certified Record of Proceedings at 000074.
[179] Certified Record of Proceedings at 000045.
[180] Certified Record of Proceedings at 000033.
[181] Certified Record of Proceedings at 000066.
[182] Certified Record of Proceedings at 000069.
[183] Certified Record of Proceedings at 000088.
[184] See e.g., Certified Record of Proceedings at 000122-000133.
[185] Certified Record of Proceedings at 000005.
[186] Certified Record of Proceedings at 000005.

commitment to these principles and University policies and procedures".[187] The Premises Policy explicitly demands compliance with other University policies, which would include the Statement on Free Expression.[188]

[92] The University's obligations under the *OH&S Act* also mitigated in favour of cancelling the Event. It obligated the University to ensure that the Event and its impacts on employers and others in its vicinity was safe.[189] This included ensuring that University sites, such as Anderson Hall, where the Event was to be hosted, would be psychologically safe for both University employees and those in the vicinity of Anderson Hall.[190] The University heard repeatedly that the Event would traumatize its employees and students.[191] The Government of Alberta's OHS Prevention Initiative defines "psychosocial hazards" as including "elements of the work environment… that pose a risk to mental health or well-being".[192] This can include exposure to harassment or traumatic events.

[93] Further, and as noted above, the University was aware of a planned counter-protest being organized by a student group, and was therefore alive to the risks that naturally arise from groups with countervailing views on a highly charged issue in close proximity. The University could not ignore the risks to its students, staff and invitees on campus arising from such a circumstance.

[94] The Reasons indicate that the University was aware of these concerns and alert to the risk to free expression interests. In the Reasons, the University refers to its earlier statement, where it "addressed the value and necessity of freedom of expression and our strong commitment to it".[193] In the earlier statement, the University repeated that it "affirms its commitment to protect free inquiry and scholarship, facilitate access to scholarly resources, and support artistic

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[187] Certified Record of Proceedings at 000005.
[188] Viminitz Affidavit at 6.2.
[189] *OH&S Act*, s 3(1) [**TAB 3**].
[190] *OH&S Act*, s 3(1) [**TAB 3**].
[191] See e.g., Certified Record of Proceedings at 36-37, 59, 65, 114, 117.
[192] Government of Alberta, "Assessment and control of psychosocial hazards in the workplace", (BP024) (September 2022), online: https://open.alberta.ca/dataset/39c76b1b-2e7d-4494-ae72-c81c6a3eb21a/resource/d11f8a38-0bc2-4571-97b8-35a006fb937a/download/lbr-ohsorp-bp024-assessment-and-control-of-psychosocial-hazards-2022-09-29.pdf.pdf>.
[193] Certified Record of Proceedings at 000002.

expression and free and open scholarship discussion of issues".[194] The prior statement also repeated the limits on expression found in the Statement on Free Expression.[195]

[95] The Reasons explain that the University weighed these concerns against the "considerable input" it received from both internal and external communities and the guidance it sought from "those with considerable cultural, scholarly, sectoral and legal expertise".[196] The Reasons reflect the University's assessment that the evidence described above indicated that allowing the Event to continue would cause harm to the University community:

> This input confirmed that assertions that seek to minimize the significant and detrimental impact of Canada's residential school system are harmful.[197]

[96] Further, it was clear to the University that the "harm associated with this talk is an impediment to meaningful reconciliation".[198]

[97] The evidence of harm also suggested that the Event should not proceed in light of the University's Visitor Health & Safety Standard.[199] It required both Viminitz and Widdowson to use care to ensure that others in the University community would not be harmed by the Event.[200] The University received input that the Event may cause psychological harm to its faculty, staff, and students,[201] which could implicate its obligations under the *OH&S Act*.[202]

[98] The University reviewed the guiding policies, sought, and assessed the evidence and input, considered the wording of its guiding documents, and explained its conclusion. Put simply: it made a reasonable Decision.

[99] Alternatively, should this Court find that the Decision was unreasonable, this Court should remit it to the University for reconsideration. As the University's policies make clear, there are

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[194] Certified Record of Proceedings at 000055.
[195] Certified Record of Proceedings at 000055.
[196] Certified Record of Proceedings at 000002.
[197] Certified Record of Proceedings at 000002.
[198] Certified Record of Proceedings at 000002.
[199] Certified Record of Proceedings at 000184.
[200] Certified Record of Proceedings at 000184.
[201] Certified Record of Proceedings at 000088.
[202] *Occupational Health and Safety Act*, SA 2020, c O-2.2, s 1(rr) ["violence", whether at a work site or work-related, means the threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence"] [**TAB 3**].

reasonable limits on security costs, as well as facility location, time, manner, and place restrictions which the University may reasonably impose on Events.[203] This University is well-suited to reconsider the Decision in light of any further guidance the Court may provide on these governing considerations. The *PSLA* clearly vests in the Board of Governors control over the operations of the University, which it in turn has delegated to members of senior administration; they are entitled to an opportunity to re-visit the Decision based on guidance from the Court if it the Court concludes that its earlier determination was unreasonable.

C. If this Court wishes to consider the *Charter*, the *UAlberta Pro-Life* decision governs whether the *Charter* applies to Pickle's speech activities on campus.

[100] Should this Court not resolve the dispute through traditional administrative law principles, the next narrowest ground for resolution is the Court of Appeal's decision in *UAlberta Pro-Life*. In that case, the Court of Appeal found that the *Charter* applies to the "specific area" of university regulation of freedom of expression by students on University grounds.[204] If the Decision qualifies as "regulation of freedom of expression by students on University grounds", then the *Charter* would apply with respect to Pickle's interests.

[101] Given its similarity to the facts in the case at hand, it is worth reviewing *UAlberta Pro-Life* in some detail.

[102] In *UAlberta Pro-Life*, a student group, UAlberta Pro-Life, and two individuals appealed a University of Alberta decision to impose security costs on UAlberta Pro-Life for hosting an "anti-abortion event" in the "Quad" area of the University of Alberta.[205] The chambers judge hearing the judicial review did not directly address UAlberta Pro-Life's submission that the *Charter* applied to the university's decision to impose costs.[206] The Court of Appeal found it necessary to analyze the issue more closely.

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[203] Certified Record of Proceedings at 000005; Premises Policy at sections 6.11-6.12, Viminitz Affidavit at Exhibit "B".
[204] *UAlberta Pro-Life* at para 148 [**TAB 7**].
[205] *UAlberta Pro-Life* at paras 3-5 [**TAB 7**].
[206] *UAlberta Pro-Life* at para 103 [**TAB 7**].

[103] Justice Watson, writing alone but concurred with on these points by Justices Crighton and Martin, began by surveying the history of universities in Canadian and Albertan history. He noted that the University of Alberta 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)".[207] As with "any other major institution", the University of Alberta "must be administratively focused on proper and effective expenditure of the funds it receives and administers while at the same time being foundationally focused on free passage of edification, opinion and information from persons possessing freedom of expression to persons possessing a freedom to listen".[208]

[104] Justice Watson noted that merely finding that the University of Alberta was acting under a statutory authority was not sufficient to find that the *Charter* applied to the University of Alberta:

> Accordingly, it is only one part of the analysis to find that the *Charter* applies to action taken under statutory authority. Acting under statutory authority may be necessary but it is not sufficient.[209]

Instead, he noted that UAlberta Pro-Life also needed to "show that the University [of Alberta] was effectively engaged in a form of governmental action when it set conditions under which Pro Life would be permitted to set up its displays".[210]

[105] Summarizing the Supreme Court's statements in *Eldridge*,[211] *Mckinney*, *Harrison*,[212] *Stoffman*,[213] *Douglas/Kwantlen*,[214] and *Lavigne*,[215] Justice Watson noted that it was "not necessary" to decide the much broader *Charter* issue of whether the University of Alberta was

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[207] *UAlberta Pro-Life* at para 109 [**TAB 7**].
[208] *UAlberta Pro-Life* at para 110 [**TAB 7**].
[209] *UAlberta Pro-Life* at para 125 [citations omitted] [**TAB 7**].
[210] *UAlberta Pro-Life* at para 127 [**TAB 7**].
[211] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 [***Eldridge***] [**TAB 21**].
[212] *Harrison v University of British Columbia*, [1990] 3 SCR 451, 1990 CanLII 61 [***Harrison***] [**TAB 22**].
[213] *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 1990 CanLII 62 [***Stoffman***] [**TAB 23**].
[214] *Douglas/Kwantlen Faculty Assn. v Douglas College*, [1990] 3 SCR 570, 1990 CanLII 63 [***Douglas/Kwantlen***] [**TAB 24**].
[215] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 1991 CanLII 68 [***Lavigne***] [**TAB 25**].

broadly subject to the *Charter*. Resolving the issue on narrower grounds was sufficient.[216] This is particularly noteworthy: *UAlberta Pro-Life* was decided on 2020, and the Court specifically did not undertake an analysis into the broader issue of the application of the *Charter* to universities when it was possible to dispose of the issue on narrow grounds. This approach binds this Honourable Court.

[106] Justice Watson next reviewed *Pridgen*,[217] *Whatcott*,[218] and *Wilson*.[219] These cases were "illuminating but not dispositive".[220] Ultimately, Justice Watson concluded that the University of Alberta's "regulation of freedom of expression by students on University grounds should be considered to be a form of governmental action".[221] There were "five overlapping reasons" for this conclusion.[222]

[107] First, educating students, "largely by means of free expression is the core purpose of the University".[223] The education of students was a responsibility given to universities by government both statutorily and constitutionally. The University of Alberta was a "means to that end, not a goal in itself".[224]

[108] Second, the University of Alberta's own view of its mandate and responsibility concurred that the education of students was its core purpose.[225]

[109] Third, the physical grounds of the University of Alberta were also "designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space".[226]

[110] Fourth, holding that the *Charter* applies to university regulation of student expression on campus was "a visible reinforcement of the great honour system which is the Rule of Law".[227]

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[216] *UAlberta Pro-Life* at para 128 [**TAB 7**].
[217] *Pridgen v University of Calgary*, 2012 ABCA 139 [***Pridgen***] [**TAB 26**].
[218] *R v Whatcott*, 2012 ABQB 231 [***Whatcott***] [**TAB 27**].
[219] *Wilson v University of Calgary*, 2014 ABQB 190 [***Wilson***] [**TAB 28**]; *UAlberta Pro-Life* at para 129 [**TAB 7**].
[220] *UAlberta Pro-Life* at para 129 [**TAB 7**].
[221] *UAlberta Pro-Life* at para 148 [**TAB 7**].
[222] *UAlberta Pro-Life* at para 148 [**TAB 7**].
[223] *UAlberta Pro-Life* at para 148(1) [**TAB 7**].
[224] *UAlberta Pro-Life* at para 148(1) [**TAB 7**].
[225] *UAlberta Pro-Life* at para 148(2) [**TAB 7**].
[226] *UAlberta Pro-Life* at para 148(3) [**TAB 7**].
[227] *UAlberta Pro-Life* at para 148(4) [**TAB 7**].

[111] Fifth, recognizing the limited application of the *Charter* to just the regulation of student expression on campus would "not threaten the ability of the University to maintain its independence or to uphold its academic standards or to manage its facilities and resources".[228]

[112] If the court concludes that the *Charter* applies to the Decision because Pickle's right to free expression was restricted, it is clear that the University in making the decision to cancel the room booking for the Event considered the free expression interests of students on campus, largely in the context of the University's Statement on Free Expression, which reflects *Charter* values in the post-secondary context. While it is clear that the Decision itself does not make specific mention of the *Charter*, it is clear that it reflects a careful balancing of the importance of free expression, and the countervailing interests including safety on campus. In the Decision, the President of the University notes the "value and necessity of freedom of expression", and the need to assess limitations on that freedom by being attentive to "the safety of our diverse community". The Decision refers to the Statement on Free Expression, and the University's ability to regulate the "time, place and manner of expression". The recognition by the University that exceptions to free expression must be justified is also manifest in an email from the President to senior members of the University's administration, where he states (in part):

> I want to inform you of a decision made by President's Executive late this afternoon regarding the potential presence of a controversial speaker on campus next Wednesday. We have decided NOT to allow the event to take place on our U of L campus. Our decision is based upon the significant consultation conducted over the past 24 hours. Thanks to each of you for your role in this consultation. This decision reflects our belief that the potential harm to students, faculty and staff is significant. We have heard this from many members of our community. Our Free Speech policy makes it clear that Free Speech is not an absolute right on our campus and must be considered in the context of protecting the campus community from harm. Our assessment, based upon all of our consultation, is that the potential for harm is too great for the event to take place.[229]

[113] Further, in making the Decision, the University limited freedom of expression on campus in a minimally intrusive manner, consistent with the requirement of the *Doré* test restated in *CSPTNO*.[230] That is, the University only cancelled the room booking for the public Event, while it

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[228] *UAlberta Pro-Life* at para 148(5) [**TAB 7**].
[229] Certified Record of Proceedings at 00003.
[230] *CSPTNO*, *supra*.

took no steps to cancel the in-class lectures provided by the very same speaker. While this was also framed as an issue of academic freedom,[231] it is clear that the University sought to limit the right to freedom of expression only insofar as it was necessary to deal with the safety risks that it had identified arising from the public Event. The in-class lectures were opened by Viminitz to the University at large, ensuring that those who wished to attend the lectures were able to.

[114] The objective and minimally intrusive manner in which the University approached the decision to cancel the room booking for the public Event is also made manifest in the message sent by the University to students enrolled in the courses in which Widdowson was scheduled to speak. The message very clearly articulates the nature of the concern to which the University was responding, and does not attempt to interfere with the recipients' right to attend:

> To be clear, I am not suggesting you should not attend because you disagree with her perspective. University is about learning to think critically about ideas presented to you, even when you disagree with them. It is about carefully evaluating evidence and relying upon academic peer-reviewed resources in the careful assessment of knowledge claims. Rather, the option to be absent from Widdowson's talk gives you the option to protect your mental health if her talk will cause harm to you. Your mental health is our priority.[232]

[115] While the record does not refer explicitly to the *Charter*, the University submits that the grounding of the decision-making process in the Statement on Free Expression and the very clear and articulate rationale offered by the University in the Decision and the surrounding records demonstrate that the Decision was a justified limitation on the *Charter* right to free expression. While it is clear that the law now requires a "clear acknowledgement of and analysis of" [233] a *Charter* right in order to satisfy the applicable legal test, the Decision and surrounding documents engaged directly with the nature of the right in issue and the rationale for a limitation on it. This goes beyond the analysis undertaken by the arbitrator in the *York* decision.

[116] If, however, the Court concludes that the York decision stands for the proposition that it was necessary for the University to <u>specifically</u> reference the *Charter* in the Decision, the University is obliged to concede that the Decision was unreasonable because the Reasons did not

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[231] See Certified Record of Proceedings at 000160.
[232] Certified Record of Proceedings at 000168.
[233] *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para 94 [***York***] [**TAB 16**].

include such a specific reference. If that is the Court's conclusion, the Decision must be quashed and ought to be remitted to the University. No further analysis is required.

D. The Decision did not implicate Widdowson's freedom of expression.

[117] If the Court wishes to consider the Decision's impact on Widdowson, the University submits that, regardless of whether the *Charter* applies, the Decision did not implicate Widdowson's section 2(b) right.

[118] Widdowson's speech claim is much more difficult than Pickle's because Widdowson seeks a positive right to access University property to deliver her message. She claims that the University infringed her section 2(b) right to freedom of expression by *not* providing her with a platform for her speech. In Justice L'Heureux-Dubé's words, Widdowson demands that the University provide her with a particular kind of megaphone.[234] This is a positive *Charter* rights claim.

[119] The distinction between a positive and negative claim depends on the "nature of *the obligation* that the claim seeks to impose upon the state".[235] If the claim requires the government to act in some way, it is positive. Claims which, if rejected, "deny the claimant access to a particular platform for expression on a subject" are positive claims, while claims which, if rejected, "preclude altogether the possibility of conveying expression on that subject" are negative.[236]

[120] Widdowson's section 2(b) claim is positive because she seeks access to a particular platform for her expression. Her concern is not that the University prohibited her from speaking—her attendance and talks at the University is evidence to the contrary. Instead, her concern is that the University did not take the steps to provide her with the *particular platform* (a University sanctioned event in a University room) she desired, in addition to the other two contemporaneous events held in University classrooms.

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[234] *Haig v Canada*, [1993] 2 SCR 995 at 1035 [**TAB 29**].
[235] *Toronto (City)* at para 20 [**TAB 8**].
[236] *Toronto (City)* at para 20 [**TAB 8**].

[121] Positive claims are subject to a different, stricter, analysis: the *Baier* test. As Professor Hogg notes, no positive claim under section 2(b) has succeeded to date.[237] This is because section 2(b) has generally been taken to impose a "negative obligation . . . rather than a positive obligation of protection or assistance".[238] The *Baier* test applies where, as here, a claimant seeks "to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression".[239] Widdowson requests that the University be obligated to permit a room booking on its premises for her to speak.

[122] The Supreme Court recently restated the *Baier* test in *Toronto (City)*. The higher standard imposed by the *Baier* test is necessary, given the "ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test".[240] Requiring positive claims to meet the elevated test "narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression".[241] In *Toronto (City)*, the Supreme Court restated the *Baier* test as a "single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression?".[242]

[123] The Applicants do not address the *Baier* test in their brief.

[124] In cancelling the room booking for the Event, the University denied Widdowson access to a particular platform for her speech, despite two other scheduled lectures proceeding. To succeed under the *Baier* test, the Applicants must also show that doing so either "substantially interfered with freedom of expression" or that the University cancelled the room booking "with the purpose" of substantially interfering with freedom of expression.[243] Neither condition is met.

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[237] Hogg, *Constitutional Law*, §43:20.50 Positive claims.
[238] *Toronto (City)* at para 16 [**TAB 8**], quoting *Baier* at para 20 [**TAB 9**], citing *Haig* at 1035 [**TAB 29**].
[239] *Toronto (City)* at para 22 [**TAB 8**].
[240] *Toronto (City)* at para 18 [**TAB 8**].
[241] *Toronto (City)* at para 18 [**TAB 8**].
[242] *Toronto (City)* at para 25 [**TAB 8**].
[243] *Toronto (City)* at para 26 [**TAB 8**].

[125] "Substantial interference" requires the lack of access to a particular platform to have "the effect of radically frustrating expression to such an extent that meaningful expression is effectively preclude[d]."[244] This is an "exceedingly high bar that would be met only in extreme and rare cases".[245]

[126] *Baier* illustrated the "height of this bar".[246] There, legislation prohibited school employees from running for election as school trustees. This was not a substantial interference with freedom of expression. Instead, while the appellants lost access to "one particular *means*" of conveying their views on educational matters, they had many others.[247]

[127] Similarly, in *Toronto (City)*, the re-organization of the ward structure still left candidates over two months to convey their message.[248] The concern was not about restrictions on content, it was about "diminished *effectiveness*".[249] This was not enough to support a positive section 2(b) claim:

> In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.[250]

[128] The same is true of Widdowson's claim. The University's Decision did not "substantially interfere" with freedom of expression because Widdowson remained able to convey the expressive content of the Event. This is clear because Widdowson did attend the University grounds and gave portions of her talk.[251] While Widdowson's expression may have been more "effective" had she been given a University room, microphone, and seats, she nonetheless remained capable of engaging with the crowd and delivering her talk to the public (though

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[244] *Toronto (City)* at para 27 [citation omitted] [**TAB 8**].
[245] *Toronto (City)* at para 27 [**TAB 8**].
[246] *Toronto (City)* at para 28 [**TAB 8**].
[247] *Baier* at paras 44, 48 [**TAB 9**].
[248] *Toronto (City)* at para 37 [**TAB 8**].
[249] *Toronto (City)* at para 38 [**TAB 8**].
[250] *Toronto (City)* at para 39 [**TAB 8**].
[251] Widdowson Affidavit at para 41.

impeded by protesters). Indeed, as Justice Watson noted in *UAlberta Pro-Life*, public spaces, such as the Atrium where Widdowson gave her talk, are well suited to the exercise of free expression.[252] Further, Widdowson did speak to students of the University during in-class presentations arranged by Viminitz, and individuals not registered in the class were also invited to attend. The University took no steps to cancel or prevent those presentations and they proceeded as scheduled.[253] Further, Widdowson then gave the presentation that was intended for the Event by way of a Zoom meeting later the same day. University stakeholders attended that event.[254]

[129] While the Applicants takes issue the fact that other students, staff, faculty, and members of the public—described in the Applicants' brief as "an enormous mob"—this counter-speech is a well-established, and protected, type of expression under section 2(b).[255] The right of individuals to engage in their own expression to counteract expression they find harmful or problematic "inheres in the recognition that the open exchange of ideas is a precondition to unlocking the value of free expression".[256] This clash of competing ideas is part of the way "that truth and democratic vision remain vigorous and alive".[257] It is somewhat ironic that the Applicants complain that the University infringed their expressive interests while simultaneously complaining when others exert expressive interests that just so happen to be contrary to the Applicants' own. Further, Widdowson's own description of the gathering of people during her attempted speech as "an enormous mob" demonstrates that the physical safety concerns identified by the University at the time of the Decision were justified.

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[252] *UAlberta Pro-Life* at para 112 [**TAB 7**]; Certified Record of Proceedings at 000162, 000171.
[253] See Certified Record of Proceedings at 000160, 000162, 000168.
[254] Ibid. See also Affidavit of Widdowson at para 43.
[255] Brief of the Applicants at para 38.
[256] *Hansmen v Neufeld*, 2023 SCC 14 at para 81 [**TAB 30**].
[257] *R v Keegstra*, [1990] 3 SCR 697 at 766 [**TAB 31**].

E. The University is not "government" in accordance with section 32(1) of the *Charter* such that the *Charter* applies to all actions undertaken by the University.

[130] The broadest claim asserted by the Applicants is that this Court should, for the first time in Canadian history, recognize that universities in Alberta are "government" by nature.[258] This finding would subject the entirety of university operations to *Charter* scrutiny, not just the regulation of student expression on campus. As noted above, the Court of Appeal in *UAlberta Pro-Life* expressly found that it was "not necessary" in that case to decide whether universities are "more broadly" subject to the *Charter*.[259]

(i) <u>The University is not "government" by nature</u>

[131] The University is not "government". The Supreme Court of Canada decided this issue in *Mckinney*, where it held that universities and their actions "do not fall within the ambit of the *Charter*".[260] The Supreme Court reached this decision despite, as thoroughly referenced by the Appellants, the dissenting reasons of Justice Wilson noting that universities are heavily funded and regulated by government.[261] The majority explicitly left open that the *Charter* could apply to specific activities undertaken by universities where "it can fairly be said that the decision is that of government, or that the government sufficiently partakes in the decision".[262] As noted, our Court of Appeal found as such in *UAlberta Pro-Life* with regard to the regulation of student expression on campus.

[132] Bodies that are highly controlled by government, such as the community colleges at issue in *Douglas/Kwantlen* and *Lavigne*, are "government" under section 32 and are subject to the *Charter*. The test is about the degree of control the government exercises over the public body; the degree of control must be high:

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[258] Brief of the Applicants at para 42.
[259] *UAlberta Pro-Life* at para 128 [**TAB 7**].
[260] *Mckinney* at 275 [**TAB 10**].
[261] As Professor Hogg notes, the Supreme Court has rejected Justice Wilson's approach in her dissent in *Stoffman*, where she proposed three tests: (1) a control test, (2) a governmental function test, and (3) a government entity test. He writes that such an approach would be "a recipe for unbridled judicial discretion" (Hogg, *Constitutional Law*, §37:10, ftn 10).
[262] *Mckinney* at 274 [**TAB 10**].

> Also included [in the term "government"] are those Crown corporations and public agencies that are outside the formal departmental structure, but which, by virtue of a substantial degree of ministerial control, are deemed to be "agents" of the Crown.[263]

[133] In *Douglas/Kwantlen*, the community college was subject to the *Charter* because of this substantial degree of government control. The board of the college was "not only appointed and removeable at pleasure by the government; the government may at all times by law direct its operation".[264] In this way, the college was "wholly different" than the universities at issue in *Mckinney* and *Harrison*, which "though extensively regulated and funded by government, are essentially autonomous bodies".[265] Merely being "heavily regulated and funded by government does not, by that mere fact" render a body "government" for the purposes of section 32.[266] The thrust of the Applicants' submissions focus on the current nature of this "extensive regulation", but this is not sufficient to distinguish the autonomy of the University here from the universities considered in *Mckinney* or subsequent cases.

[134] Unlike in *Douglas/Kwantlen*, the members of the University Board of Governors are not all selected by the Lieutenant Governor in Council and do not all hold office at pleasure. Further, unlike in *Douglas/Kwantlen*, the Minister does not have the authority to issue directives to the University.[267] Lastly, the *College and Institute Act* at issue in *Douglas/Kwantlen* expressly stated that the college was an agent of the Crown.[268] No such relationship exists here.

[135] In *Lavigne*, the legislation gave the Minister—not the Council of Regents—the power to govern and simply empowered the Minister to be "assisted" by the Regents.[269] The government retained the power of "routine or regular" control. The *PSLA* contains no such provision. It is clear: the Board of Governors govern. The mere fact that some of them are selected, and some of their funding comes from government is not enough:

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[263] Hogg, *Constitutional Law*, §37:10.
[264] *Douglas/Kwantlen* at 584 [**TAB 24**].
[265] *Douglas/Kwantlen* at 584 [**TAB 24**].
[266] *Douglas/Kwantlen* at 585 [**TAB 24**].
[267] *Douglas/Kwantlen* at 579 [**TAB 24**].
[268] *Douglas/Kwantlen* at 579 [**TAB 24**].
[269] *Lavigne* at 311 [**TAB 25**].

> As stated by the majority in *Douglas* (at p. 584), 'Its status is wholly different from the universities in … *Mckinney v. University of Guelph* [also issued concurrently with *Douglas*] … and *Harrison v. University of British Columbia*… which, though extensively regulated and funded by government, are essentially autonomous bodies.'[270]

[136] That the University implements a "public service" is irrelevant to its status as "government":

> Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of government. These can includes railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purpose.[271]
>
> This question [whether the Vancouver General hospital was part of the "administrative branch" of government] cannot be answered by simply pointing out that the provision of health care is an important part of the legislative mandate of provincial governments, and that the Vancouver General was incorporated for the express purpose of providing such care and services.[272]

[137] The University is not an "agent" of the Crown, in the common law sense and there are no provisions in the *PSLA* making the University an "agent" of the Crown. The University is not controlled by any minister or cabinet. Of course, if the University is found to be "government" in nature, by virtue of simply being an agent of the Crown, Crown immunities and privileges would also extend to the University.[273]

[138] Further, while the Applicants have provided information from freedom of information requests to government, they have not provided a similar analysis of the underlying regulation existing in relation to the University of Guelph, for example, when *Mckinney* was decided to illustrate any substantive difference in the nature of the control exercised by the provincial government. There is no evidence that the government exercises "routine or regular control" over

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[270] *Lavigne* at 312 [**TAB 25**].
[271] *Mckinney* at 269 [**TAB 10**].
[272] *Stoffman* at 511 [**TAB 23**].
[273] See eg, Hogg, *Constitutional Law*, §10:2-10:4. For example, in *Westeel-Rosco Ltd v South Saskatchewan Hospital Centre*, [1977] 2 SCR 238, the Supreme Court found that the Board of Governors of the Hospital Centre was "far removed from those of a Crown agency which is subject at every turn to the control of the Crown in executing its powers" (para 40). If the Board in that case was a Crown agency, then a provision barring enforcement of a claim for unpaid funds. The Crown—and its agents—were immune in certain circumstances.

universities in Alberta. Indeed, in 2012, Justice Paperny of the Court of Appeal in *Pridgen* undertook a lengthy review of section 32 jurisprudence in light of the *PSLA* and she did not conclude that the University of Calgary was part of government by its nature. There is an insufficient evidentiary record to indicate that the nature of control exercised by the Province in 2012 is substantially different from that in 2023.

(ii) The room booking system is not an exercise of a statutory power of compulsion

[139] If the University is not "government" in nature, some of its particular actions may still be subject to the *Charter* if those actions are "inherently governmental" and it exercises the compulsive power of statute.[274]

[140] As Professor Hogg explains, bodies exercising "statutory authority" are also subject to the *Charter* if that authority "involves a power of compulsion that is not possessed by a private individual or organization".[275] If the body only exercises powers available to any person—such as typical contractual or proprietary rights—the *Charter* does not apply. This is why the *Charter* did not apply to the mandatory retirement policies at issue in *Mckinney* and *Stoffman*. Both the hospital and the university "were not possessed of powers any larger than those of a natural person".[276] As Professor Hogg aptly states, "[i]t is the exertion of a power of compulsion granted by statute that causes the *Charter* to apply".[277]

[141] The Appellants point to three potential "government policies or programs" which they claim are the "implementation of a specific statutory scheme or a government program" such that the implementation of that policy or program is subject to *Charter* scrutiny.[278]

[142] The first is "university education". The proposition that this is a "specific government policy or program" was expressly rejected by the Ontario Court of Appeal in *Lobo v Carleton University*.[279] There, the university denied a student group's application to display controversial

[274] *Eldridge* at para 42 [**TAB 21**].
[275] Hogg, *Constitutional Law*, §37:8.
[276] Hogg, *Constitutional Law*, §37:8.
[277] Hogg, *Constitutional Law*, §37:8.
[278] *Eldridge* at para 44 [**TAB 21**].
[279] *Lobo v Carleton University*, 2012 ONCA 498 ["***Lobo***"] [**TAB 32**].

materials in the university's quad.[280] Representatives of the student group commenced an action against the university alleging, among other things, breaches of *Charter* rights. The Superior Court struck the action on the grounds that the pleadings failed to disclose how the university "effected a specific government program or statutory scheme".[281] The Court of Appeal rejected the appellants' submission that the "delivery of post-secondary education" was the "specific government program" being administered by the university, stating:

> 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*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.[282]

[143] Justice Watson agreed that the "delivery of education" was not a "specific government policy or program" in *UAlberta Pro-Life*, noting the need for "judicial discipline and, for that matter, some degree of judicial humility, in assessing what should be within the reach of judicial review via s 32 of the *Charter*".[283] As Justice Watson noted, the concept of "delivery of education" was surely in the minds of the majority Justices in *Mckinney*, who rejected the wider path proposed by Justice Wilson.[284]

[144] Courts have also found that management of university campuses, the third of the Applicants' proposed "specific government policies or programs", is not a "specific government policy or program". In *BC Civil Liberties Association v University of Victoria*, the British Columbia Court of Appeal found that the provision of public forums for expression on university campuses was not a "specific government policy or program" as required by *Eldridge*.[285]

[145] A student group at the University of Victoria applied for and received permission to use outdoor space at the university for a demonstration. Subsequently, the university learned that the group had been sanctioned by the university's student society for harassment, and consequently revoked permission for the event. Nonetheless, the student group held the event.

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[280] *Lobo v Carleton University*, 2012 ONSC 254 at para 2 [**TAB 33**].
[281] *Lobo v Carleton University*, 2012 ONSC 254 at para 17 [**TAB 33**].
[282] *Lobo* at para 4 [**TAB 32**].
[283] *UAlberta Pro-Life* at para 145 [**TAB 7**].
[284] *UAlberta Pro-Life* at para 145 [**TAB 7**].
[285] *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at para 32 [***BCCLA***] [**TAB 34**].

In response, the university suspended the group's booking privileges. A member of the group and the BCCLA sought judicial review.

[146] The British Columbia Supreme Court found that the decision at issue related to the university's "allocation of its outdoor space for use by UVSS student clubs".[286] The university's governing legislation—as the *PSLA* in this case—provided for "autonomous operational decision-making" by the university regarding its lands and buildings.[287] As such, the *Charter* did not apply.

[147] The Court of Appeal agreed:

> Applying the criteria *Eldridge* suggests we must use, I cannot find the specific impugned acts of the University of Victoria to be governmental in nature. The government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom, s. 43(1) of the *Education (No. 2) Act 1986* (UK), c. 61, which imposes an obligation on universities and colleges to
>
> > … take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.
>
> The *University Act*, by contrast, does not describe a <u>specific</u> governmental program or policy which might have been affected by the impugned decisions and there was no evidence before the judge of any legislation or policy that does so. There is no basis upon which it can be said on the evidence that when the University regulated the use of space on the campus it was implementing a government policy or program.[288]

[148] Lastly, the Applicants suggest that the "specific government policy or program" at issue is "campus free speech". This is captured by the Court of Appeal's holding in *UAlberta Pro-Life*. The University accepts that the *Charter* applies to it in so far as it regulates student expression on campus.

[149] As noted in *Eldridge*, there must be a direct and precisely defined connection between the impugned conduct and the program or policy at issue.[289] The Decision that purportedly breached the Applicants' *Charter* rights was the cancellation of the room booking for the Event. The process of booking rooms for events is not a government policy or program—any entity

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[286] *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39 at para 149 [**TAB 35**].
[287] *BC Civil Liberties Association v University of Victoria* at para 149 [**TAB 35**].
[288] *BCCLA* at paras 32-33 [emphasis in original] [**TAB 34**].
[289] *Eldridge* at para 51 [**TAB 21**].

whatsoever may have room booking policies. Room booking is, in the words of the Supreme Court in *Eldridge* "simply a matter of internal [University] management".[290]

[150] Put plainly: none of the three proposed "programs or policies" have the required level of specificity contemplated by *Eldridge*. Nothing in the University's governing legislation requires it to provide a forum for extra-curricular expression. There is no specific government policy relating to room booking carried out by universities in Alberta. While the University has policies on room booking, the government does not retain responsibility for how the University books rooms.[291]

F. If the Decision to cancel the room booking was unreasonable, the appropriate remedy is to remit the Decision to the University.

[151] If the University's Decision to cancel the room booking was subject to the *Charter*, the substance of the *Charter* right was adequately considered based on the Decision and the supporting records, as noted above. If the Court concludes that it was necessary for the University to specifically refer to the *Charter*, then the University is obliged to concede that the Decision was unreasonable.[292] This Court should quash the Decision and remit it to the University for reconsideration considering the *Charter* interests at stake.

[152] Remitting the Decision would show deference to the administrative scheme and permit the initial decision-maker to properly weigh with the evidence and issues, with guidance from this Court on the proper factors to consider. As the Supreme Court has recognized, albeit in a different context, where a decision-maker has not grappled with a question, reviewing courts should "show restraint" before making a decision without first providing the decision-maker with the opportunity to decide.[293]

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[290] *Eldridge* at para 51 [**TAB 21**].
[291] *Eldridge* at para 42 [**TAB 21**].
[292] Brief of the Applicants at para 255.
[293] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55 [**TAB 36**]

VII. CONCLUSION

[153] This case is about a narrow decision: the Decision to cancel a room booking for a roughly 30-person talk. After receiving substantial input from students, staff, faculty, and members of the public that the Event would cause harm, the University decided to cancel the room booking for the Event, while permitting two classroom lectures by the speaker to proceed. In doing so, the University weighed the competing interests and made the Decision it believed was best. Considering the evidence before the decision-maker and the governing policies, this Decision was reasonable.

[154] While the University submits any *Charter* analysis is unnecessary in this case, should this Court find it necessary to do so having regard to the binding principles of judicial economy, the principle stated in *UAlberta Pro-Life* is sufficient to resolve the case. For the reasons noted, the Decision and the surrounding records demonstrate that the University balanced the right to free expression with countervailing interests, and minimally impaired the right to free expression; the limitation was ultimately proportionate. If the Court concludes that the University was required to specifically refer to the *Charter*, the University acknowledges that its Reasons do not expressly refer to the *Charter*. If that is the case, the University is obliged to concede that the Decision was unreasonable. If so, the only appropriate remedy would be to quash the Decision and remit it to the University for reconsideration.

[155] The *Charter* did not apply to Widdowson's attendance at the Event. Regardless, Widdowson's claim is for a positive right to a particular platform for her expression and is not made out. The Decision did not substantially interfere with her ability to convey her expression.

[156] The University is not "government" in nature. This was settled by the Supreme Court of Canada in *Mckinney*. The University was not exercising statutory powers of compulsion in cancelling the room booking and was not implementing a specific government policy or program.

VIII. RELIEF SOUGHT

[157] The University respectfully requests:

(a) That the application for judicial review be dismissed;

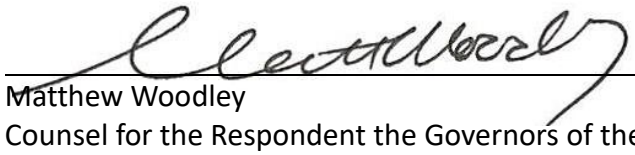
(b) In the alternative, that the Decision be found to be unreasonable on administrative law grounds, quashed, and remitted to the University for reconsideration;

(c) In the further alternative, that the Decision be found to be unreasonable on the basis that the University failed to consider Pickle's *Charter* rights, quashed, and remitted to the University for reconsideration; and

(d) That costs be awarded to the University.

RESPECTFULLY SUBMITTED this 27th day of August, 2024

REYNOLDS MIRTH RICHARDS & FARMER LLP

Per: 

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28. *Wilson v University of Calgary*, 2014 ABQB 190
29. *Haig v Canada*, [1993] 2 SCR 995
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31. *R v Keegstra*, [1990] 3 SCR 697
32. *Lobo v Carleton University*, 2012 ONCA 498
33. *Lobo v Carleton University*, 2012 ONSC 254
34. *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162
35. *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39
36. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61