

Court of King's Bench of Alberta



Citation: Pickle v University of Lethbridge, 2026 ABKB 659

Date:
Docket: 2301 09854
Registry: Calgary

Between:

Jonah Pickle and Frances Widdowson

Applicants

- and -

**The University of Lethbridge and the Governors of the
University of Lethbridge**

Respondents

**Reasons for Decision
of the
Honourable Justice C.D. Simard**

I. Introduction

[1] In November 2022, Dr. Paul Viminitz, a philosophy professor at the University of Lethbridge (the **University**), invited Dr. Frances Widdowson to speak at the University from 4:30 – 6:00 pm on Wednesday, February 1, 2023, on the topic of “How Woke-ism Threatens Academic Freedom” (the **Event**). The format of the Event was to be a lecture by Dr. Widdowson, followed by a question and answer session. The Event would be free of charge, and open to all members of the University community and the public. Professor Viminitz booked Anderson Hall at the University for the Event, following the required room-booking procedures.

[2] Mr. Pickle was an undergraduate student at the University. He was interested in the Event and planned to attend it.

[3] After notice of the Event was published, the University received numerous complaints from members of the University community and the public, calling on the University to cancel the Event.

[4] On January 30, 2023, the University cancelled the Event (the **Decision**).

[5] Mr. Pickle and Dr. Widdowson apply for judicial review of the Decision. They say that the Decision breached their freedom of thought, belief, opinion and expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the **Charter**) and their freedom of peaceful assembly under section 2(c) of the *Charter*. They ask me to make a declaration that these *Charter* rights have been breached, and to grant an injunction “requiring the [University] to permit the Event to proceed on campus without any conditions not originally imposed on the Event at a reasonable future date, time and location.”

[6] I heard the Applicants’ judicial review application on April 10, 2026.

II. Issues

[7] I must decide the following issues:

- (a) what evidence should I consider in this judicial review application?
- (b) what is the applicable standard of review in this judicial review application?
- (c) does the University constitute “government” under section 32 of the *Charter*?
- (d) if the University is “government”:
 - (i) did the Decision engage the Applicants’ rights under section 2(b) of the *Charter*;
 - (ii) did the Decision breach the Applicants’ rights under section 2(b) of the *Charter*;
 - (iii) if so, were the breaches reasonable or justifiable; and
 - (iv) if there were unreasonable or unjustifiable *Charter* breaches, what is the appropriate remedy?

[8] There are two other issues that were raised earlier in this case, but that are not before me. The first is whether Dr. Viminitz’s *Charter* rights have been breached. He was originally a co-Applicant in this proceeding, alongside Dr. Widdowson and Mr. Pickle. However, he grieved the Decision under the collective bargaining agreement governing his employment at the University (the **CBA**). On June 25, 2024, Malik J of this Court struck Dr. Viminitz’s claims in this judicial review proceeding, finding that he was bound to arbitrate his dispute with the University pursuant to the CBA. As a result, Dr. Viminitz is no longer a party to this proceeding.

[9] The second issue that is not before me is whether the *Occupational Health and Safety Act*, RSA 2000, c O-2.2 (the **OHSA**) is constitutional. On November 7, 2024 Mr. Pickle and Dr. Widdowson applied to amend their Originating Application in this proceeding, to add a challenge to the constitutionality of the *OHSA*. Feasby J of this Court dismissed that application. On September 23, 2025, the Court of Appeal upheld his decision: **Pickle v University of**

Lethbridge, 2025 ABCA 318 (*Pickle ABCA*). The Court of Appeal found that Feasby J did not err in deciding that to allow the amendment would unnecessarily expand the scope of this judicial review application. However, the Court of Appeal also affirmed that the Applicants would be free in this application, even without the requested amendment, to argue that it was unreasonable for the University to interpret the application of the *OHSa* as it did in making the Decision, because such interpretation was unconstitutional.

[10] For the reasons that follow, I have concluded that:

- (a) I can consider some, but not all, of the additional evidence submitted by the Applicants;
- (b) I need not, and therefore have not, decided whether the University, by its nature, constitutes “government” under section 32 of the *Charter*. However, the University’s act in making the Decision was governmental in nature;
- (c) the standard of review that applies to the University’s making of the Decision is correctness;
- (d) in making the Decision, the University failed to appreciate and expressly consider Mr. Pickle’s and Dr. Widdowson’s rights under section 2(b) of the *Charter*, as a result of which the Decision was fundamentally flawed;¹ and
- (e) the appropriate remedy is to set aside the Decision.

III. Analysis

A. What Evidence Should I Consider in this Judicial Review?

1. Introduction

[11] The University has filed a Certified Record of Proceedings, and a Supplemental Record of Proceedings (collectively, the **Record**). The parties also filed an Agreed Statement of Facts dated November 28, 2023, to which the Applicants referred in their submissions. There is no dispute that these documents are properly admitted as evidence.

[12] However, there is a dispute about whether I should admit and consider the following additional evidence filed by the Applicants:

- the Affidavit of Ashley Sexton, sworn July 26, 2023;
- the Affidavit of Ashley Sexton, sworn November 23, 2023;
- the Affidavit of Ashley Sexton, sworn July 15, 2024;
- the Affidavit of Dr. Widdowson, sworn July 26, 2023;
- the Affidavit of Professor Viminitz, sworn July 27, 2023; and
- the Affidavit of Mr. Pickle, sworn July 27, 2023

¹ Because I have come to this conclusion, I need not decide and am not deciding whether the Applicants’ rights to free assembly under section 2(c) of the *Charter* were breached. The parties did not make any substantial argument on that issue; their submissions were focused almost exclusively on section 2(b) of the *Charter*.

(collectively, the **Additional Evidence**).

[13] The Applicants ask me to admit the Additional Evidence and the Respondents oppose that request.

2. The Applicable Law

[14] This application is a judicial review of the Decision, commenced by Originating Application. It is not a lawsuit, commenced by Statement of Claim, in which Mr. Pickle and Dr. Widdowson allege *Charter* breaches and seek remedies. The law is clear that the scope of judicial review applications is narrow. I am not to ask what decision I would have made in place of the University, nor conduct a *de novo* analysis, nor seek to determine the correct solution to the problem. Rather, I am only to consider whether the Decision was reasonable or unreasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 83.

[15] Consistent with the limited scope of judicial review applications, the evidence that courts can consider in such applications is also limited. Generally, the reviewing court is only able to consider the decision under review itself and the information that was before the administrative body when it made the decision (commonly called the “record” or the “record of proceedings”). As noted by Waston JA in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2021 ABCA 428 at para 19: “[t]o 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.”

[16] This approach is reflected in Rule 3.22 of the *Alberta Rules of Court*. That Rule governs what evidence I can consider in this judicial review application. Its relevant parts state:

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.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;

...

(d) any other evidence permitted by the Court.

[17] In *Northern Air Charters (PR) Inc v Alberta Health Services*, 2023 ABCA 114, our Court of Appeal recently reviewed and summarized the law regarding the court’s discretion in judicial review applications to admit evidence other than the certified record, under Rule 3.22(d). I summarize those principles as follows (from paras 8 – 10):

- the general rule is that judicial review is conducted based on the certified record, and admitting additional evidence is “exceptional”;

- this is because new evidence is usually irrelevant to the issues before the court in a judicial review (where the court does not consider the merits of the decision under review, but instead whether it was supported by the record, and whether it aligned with the rules of natural justice);
- there are four limited exceptions, where extrinsic evidence may be admitted:
 - to show bias or a reasonable apprehension of bias, where the facts in support of the allegation do not appear on the record;
 - to demonstrate breaches of the rules of natural justice which are not apparent from the record;
 - as background information for other issues such as standing; or
 - when the administrative decision maker makes no record, or an inadequate record; and
- even where the reviewing court decides it is appropriate to permit additional evidence, the applicants are not entitled to turn the judicial review application into a trial *de novo* on the merits of the issue that was before the tribunal.

3. The Parties' Positions

[18] The Respondents argued in their August 27, 2024 Response Brief that I cannot consider the Additional Evidence, for two reasons. First, the Applicants had not made a formal application for its admission, which the Respondents say is fatal. Second, they say that the Additional Evidence meets none of the four *Northern Air* exceptions.

[19] The Applicants, after receiving the Respondents' written Response Brief, amended their Originating Application to include, among other things, a formal application under Rule 3.22(d) to admit the Additional Evidence. The Respondents consented to this amendment. The Applicants say that they do not need to make this formal application, and are only doing so out of an abundance of caution. Substantively, they argue that I should admit the Additional Evidence, on four different bases:

- under Rule 3.22(b.1) because the relief they seek in this application is not *certiorari*, but instead is a declaration of *Charter* breaches, and a mandatory injunction forcing the University to allow the Event to proceed;
- under the fourth *Northern Air* exception, because the Record is inadequate and incomplete;
- the restrictive rules of evidence in Rule 3.22 contemplate "traditional" judicial reviews, in which an applicant seeks redress from a decision after an administrative hearing where both sides were represented and allowed to enter evidence, but the Decision does not fit within that model; and

- the Additional Evidence is largely background information that explains the legislative framework in which the University exists and operates, which is evidence that is necessary to support the Applicants' *Charter* arguments.

4. Applying the Law to the Facts

[20] I generally summarize the contents of the Additional Evidence as follows.

[21] Ms. Sexton is a paralegal who worked with the Applicants' legal counsel. Her affidavits contained:

- (a) a large volume of documents created by the University, including capital plans, master plans, policies, collective agreements, budgets, reports, agreements and other statements. She obtained these from the University's website;
- (b) records she obtained by making Freedom of Information (**FOIP**) requests to the Province of Alberta (the **Province**), including:
 - (i) various agreements between the University and the Province;
 - (ii) correspondence between the University and the Province; and
 - (iii) various documents governing and describing the Province's administration of post-secondary education in Alberta;
- (c) various documents regarding the Province's and the government of Canada's (**Canada**) involvement in post-secondary education in Alberta, which she obtained from the Province's website and Canada's website;
(collectively, the **University/Government Documents**);
- (d) various articles about post-secondary education and free speech in Alberta, which she obtained from the websites of news publications; and
- (e) social media posts regarding the Event, which she obtained on social media websites or apps.

[22] In her affidavit, Dr. Widdowson described:

- (a) her academic background and research interests, including in particular her interest in free speech and academic freedom;
- (b) the background of the Event, including Dr. Viminitz's invitation to her and the intended content of her presentation;
- (c) various people's reactions to the Event, after it was announced;
- (d) the University's announcement of the cancellation of the Event on January 30, 2023;
- (e) her attendance at the University on February 1, 2023 to attempt to give her lecture, and the events that followed;
- (f) her attendance to speak in Dr. Viminitz's class on January 31 and February 2, 2023; and

- (g) examples of correspondence and commentaries by various people regarding these events.

[23] In his affidavit, Dr. Viminitz described:

- (a) his academic background and research interests, including in particular his interest in free speech and academic freedom;
- (b) his invitation to have Dr. Widdowson speak at the Event, and his dealings with the University to book the Event; and
- (c) his opinion on the Event, how it related to the University's principles and policies, and the likely consequences of its cancellation.

[24] In his affidavit, Mr. Pickle described:

- (a) his attendance at the University as an undergraduate student;
- (b) his interest in liberal education and freedom of speech and his opinion about how the University operates *vis-à-vis* these principles;
- (c) his interest in attending the Event; and
- (d) his perspective on the cancellation of the Event and his observations of what occurred when Dr. Widdowson attended on February 1, 2023 to attempt to give her lecture.

[25] Rule 3.22(b.1) does not apply in this case to permit the admission of the Additional Evidence.² The Applicants have not expressly pleaded a request that I set aside the Decision or grant *certiorari*, but that is what they are seeking in substance. While there have been numerous jurisprudential debates about the scope and applicability of the historical prerogative writ of *certiorari*, the essential nature of the remedy in its modern form is not in doubt: it is a discretionary remedy by which a superior court can review and quash (*ie.* set aside) the decision of a lower tribunal: *Martineau v Matsqui Institution Disciplinary Board*, 1979 CanLII 184 (SCC); *Skogman v R*, 1984 CanLII 22 (SCC). That is exactly what the Applicants ask me to do here: review the Decision and quash it/set it aside. In fact, I could not logically grant the injunction they seek without first setting aside the Decision. Doing that would illogically require me to somehow allow the Decision to stand, but then order the University to do something inconsistent with the Decision. That makes no sense.

[26] I find that the only admissible Additional Evidence are the University/Government Documents contained in Ms. Sexton's affidavits. They are admissible under the third *Northern Air* exception. In this application, the Applicants seek to establish that the University is "government" by its nature under section 32 of the *Charter* and they are entitled to make that argument. The University/Government Documents are therefore relevant and material to disputed issues in this application. The Record contains little, if any, evidence that would allow a court to understand the University's relationship to the Province and to Canada, and its legislatively-authorized mandate of delivering post-secondary education. Therefore, the University/Government Documents provide background information that is reasonably necessary for me to be able to decide a disputed issue.

² Rule 3.22(b.1) could not apply to admit Ms. Sexton's affidavit or Dr. Viminitz's affidavit in any event, because they are not parties to this application.

[27] However, the balance of the evidence in Ms. Sexton’s affidavits (articles and social media posts) is inadmissible. Those materials are hearsay evidence that is not relevant, that has not been shown to be reliable or necessary, and that satisfy none of the *Northern Air* exceptions.

[28] The evidence in Dr. Widdowson’s, Dr. Viminitz’s and Mr. Pickle’s affidavits is also not admissible, for many reasons. I will list only some of the major problems with that evidence. Those three affiants’ statements about their subjective beliefs, feelings, disappointments and opinions on numerous topics (free speech, academic freedom, liberal education at the University, “wokeism,” “cancel culture,” the perceived merits of the Event and the harms caused by the Decision) are irrelevant to the narrow issue I must decide in this judicial review application: the propriety of the Decision. That type of information is also more properly characterized as argument, rather than evidence. These affiants’ evidence about third parties’ reactions to and commentary about the Event and the Decision is equally irrelevant, and it is also unreliable and unnecessary hearsay. The evidence about what happened after the University made the Decision is also completely irrelevant and outside the proper scope of this judicial review application. Purely as a matter of timing, it cannot have formed part of the information the University considered when it made the Decision.

[29] The Applicants’ arguments that the Widdowson, Viminitz and Pickle affidavits should be admitted because the context of the Decision was “non-traditional”, because the University’s Record was inadequate and because they provide “context and background” are not persuasive. The information in these three affidavits goes well beyond the limited scope of what evidence should be heard in a judicial review application, including the *Northern Air* exceptions.

B. What is the Standard of Review in this Judicial Review Application?

1. The Applicable Law

[30] To explain my decision about the standards of review that I am apply in this application, it is necessary to revisit the evolution of this issue in Supreme Court of Canada cases over the last 15 years.

[31] In *Doré v Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada clarified that when courts assess whether a discretionary administrative decision violated the *Charter*, they are to follow an administrative law/judicial review approach, not the section 1 framework developed in *R v Oakes*, 1986 CanLII 46 (SCC). The Court provided the following guidance about how to carry out this assessment in *Doré* (at paras 35 – 58):

- administrative decision-makers are empowered, and indeed required, to consider *Charter* values within their scope of expertise;
- an administrative decision-maker exercising a discretionary power under their home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values;
- the standard of review to be applied to the decision-maker’s decision is reasonableness, but the reasonableness must be assessed in the context of the particular type of decision-making involved and all relevant factors. This is an essentially contextual inquiry;

- an administrative decision-maker applies *Charter* values in the exercise of statutory discretion by balancing the *Charter* values with the statutory objectives:
 - the decision-maker should first consider the statutory objectives;
 - then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives;
- on judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play; and
- if, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[32] In *Doré*, there was no question that the administrative decision-maker, the Quebec tribunal des professions, was subject to *Charter* scrutiny. It was also not contested that *Charter* issues (in that case, freedom of expression) were engaged – the appellant had expressly argued his *Charter* rights in front of the Tribunal, who had expressly ruled on them.

[33] At the time *Doré* was decided, the leading Supreme Court of Canada decision governing the standard of review that applied to judicial review of administrative decisions, generally, was *Dunsmuir v. New Brunswick*, 2008 SCC 9. That changed in 2019 when the Court issued its decision in *Vavilov*.

[34] I summarize the key principles that the Supreme Court set out in *Vavilov* that are relevant in this case, as follows (at paras 13 – 83):

- there is a presumption that reasonableness is the applicable standard of review when a court reviews the merits of an administrative decisions;
- this presumption of reasonableness can be rebutted in two types of situations:
 - where the legislature has indicated that it intends a different standard to apply; and
 - where the rule of law requires that a standard of correctness be applied, which will be the case for certain categories of cases, namely:
 - constitutional questions;

- general questions of law of central importance to the legal system as a whole; and
 - questions related to the jurisdictional boundaries between two or more administrative bodies;
- the presumptive reasonableness standard is justified for a number of reasons related to the role of administrative decision-makers (and reviewing courts should not try to evaluate which of these bases apply in a specific case):
 - their relative expertise regarding the statutory scheme they administer;
 - their greater proximity and responsiveness to their stakeholders (compared to courts);
 - their ability to render decisions promptly, flexibly and efficiently; and
 - their ability to provide simplified and streamlined proceedings intended to promote access to justice;
- reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review; and
- the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem.

[35] The Supreme Court’s decision in *York* represented a further significant development in the law regarding how courts are to conduct judicial review applications in which *Charter* issues are engaged. In *York*, a public school principal surreptitiously read and recorded private electronic communications that two teachers at the school had been carrying out in a private, password-protected log on their school board laptop computers. The school board issued written reprimands to the teachers, based on the communications that the principal had seen. The

teacher's union grieved the reprimands and a labour arbitrator dismissed the grievance. In their submissions to the arbitrator, the parties had referred to section 8 *Charter* jurisprudence and principles from that jurisprudence, but they did not expressly argue or raise their *Charter* rights. The arbitrator relied on *Charter* principles and referred to some *Charter* cases in her decision, but she did not expressly mention the *Charter*, nor say that she was deciding *Charter* rights.

[36] The teachers applied for judicial review. They raised *Charter* issues expressly for the first time in the judicial review proceeding, arguing that their right to be free from unreasonable search or seizure under section 8 of the *Charter* had been violated by the school administrator.

[37] The majority of the Supreme Court held as follows (at paras 62 - 64):

- the correctness standard applied to determining whether the *Charter* applied to the school board as this was a constitutional question that required a final and determinate answer by the courts, which would apply generally and was not dependent on the particular circumstances of the case; and
- the correctness standard also applied to reviewing the arbitrator's decision. As explained by the majority:

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” ...

The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary “depending on how the state has chosen to delegate and wield its power” ... The presumptive standard of reasonableness is, thus, rebutted and correctness applies. [citations omitted]

[38] The majority stated that it was applying *Vavilov*, and that the reason it used the correctness standard was because the *Charter* issue before it fell into the “constitutional questions” category of exceptional cases, thereby displacing the presumptive reasonableness standard of review (at paras 63 – 65). In conclusion on this issue, the majority stated as follows (at para 68):

Ontario public school teachers are protected from unreasonable search and seizure in their place of employment under s. 8 of the *Charter*. Despite their apparent functional resemblance, a right to a reasonable expectation of privacy that is entrenched in the Constitution is distinct in source and nature from an arbitral right to privacy. For one, state actors cannot disavow their constitutional obligations no matter the terms of the collective agreement. At its core, the arbitrator's reasons disclosed a fundamental error because she had the wrong right in mind. The arbitrator ought to have applied the *Charter*, but failed to do so. Once she failed to appreciate the constitutional dimension of the searches

conducted by the principal, there was no intelligible way for her to continue the analysis while fully engaging with the gravity of the alleged violations of the *Charter* right at issue. Courts cannot dilute the sacrosanct nature of *Charter* rights by accepting a different substitute. Nor can courts supplant the reasons proffered by the decision-maker and read the reasons as if it applied a *Charter* right when in fact it applied a different right.

[39] The majority concluded that the arbitrator's failure to expressly address the parties' *Charter* rights was a "fatal" and "fundamental" error (at paras 68, 69 and 94), and forcefully rejected the notion that the arbitrator might be found to have avoided this error if she had considered *Charter* principles in substance, but merely failed to expressly mention them (at para 94):

The appellant and my colleagues [in the Court's minority opinion] suggest that while the arbitrator did not *say* that she was doing a s. 8 analysis, that is what, in effect, she *did*. This is not persuasive. ... When a *Charter* right applies, it is not sufficient that the arbitrator made some references to the *Charter* jurisprudence. ... when a *Charter* right applies, there must be clear acknowledgment of and analysis of that right. While I recognize that administrative justice may not always take the form of judicial justice, nowhere in the arbitrator's reasons, read functionally and holistically, did she indicate that she was considering the Grievors' s. 8 *Charter* right. This is so because she failed to appreciate that s. 8 right was directly at stake and instead proceeded to conduct her analysis entirely within the arbitral framework and examined the Grievors' privacy right solely through the common law lens. This error is fatal. ... In sum, the arbitrator did not do what, as a matter of law, she was required to do, that is to apply the s. 8 *Charter* right. [emphasis in original]

[40] The majority in *York* did not discuss the Court's previous decision in *Doré*.

[41] The Supreme Court of Canada's decisions in *Doré* and *York*, and its silence about how the two decisions are to interact in practice, create confusion by potentially suggesting two different standards of review when assessing an administrative decision that engages *Charter* rights. Appellate courts have commented on this confusion (see e.g. *Vabuolus v British Columbia (Information and Privacy Commissioner)*, 2025 BCCA 83 at para 96). It appears that appellate courts have generally attempted to reconcile the potential inconsistency in the two cases by synthesizing from them a two-part test, with two different standards of review. On this approach, reviewing courts are to:

- first, apply a correctness standard to the preliminary question of whether the *Charter* applies and the scope of its application; and
- second, apply the reasonableness standard to the administrative decision-maker's balancing of *Charter* values against other statutory objectives

Vabuolus at para 96; *Christian Heritage Party of Canada v Hamilton (City)*, 2026 ONCA 195 at para 26; *Minister of Justice and Public Safety v Forum des maires de la Péninsule acadienne Inc*, 2025 NBCA 99 at para 64.

2. The Parties' Positions

[42] The parties agree that I am to apply the correctness standard to decide whether the University is "government" under section 32 of the *Charter*, in accordance with *York*. They also

agree, in general, that I should use the correctness standard to decide whether the Decision engaged a *Charter* right, the scope of that *Charter* right and whether the University used the appropriate framework for analyzing that *Charter* right.

[43] Their approaches then diverge. The Respondents say that if I find that *Charter* rights were engaged in the Decision, I should then employ the *Doré* framework, and assess the merits of the Decision on the basis of reasonableness. In contrast, the Applicants argue that I will never get to that stage, because the University failed to expressly address *Charter* rights in the Decision, which was a fundamental and fatal error, per *York*.

3. Applying the Law to the Facts

[44] I agree with the parties that I am to apply the correctness standard to determine whether the *Charter* applied to the University when it made the Decision, whether the Decision engaged a *Charter* right, the scope of that *Charter* right and whether the University used the appropriate framework for analyzing that *Charter* right. For the reasons the follow, I need not decide what standard of review applies to assess the merits of the Decision.

C. Does the University Constitute “Government” Under Section 32 of the *Charter*?

[45] I am analyzing this issue on the correctness standard.

1. The Applicable Law

[46] The *Charter* only applies to government action. The *Charter* is essentially an instrument for checking powers of government over individuals. It does not apply to private activity: *McKinney v University of Guelph*, 1990 CanLII 60 (SCC) at 261 – 262.

[47] Therefore, the Applicants must establish that they were subject to government action, to be able to allege that their *Charter* rights were breached. There are two ways that the *Charter* can be found to apply to an entity like the University:

- (a) if the entity, by its nature, or by virtue of the degree of government control exercised over it, is properly characterized as “government”. The focus of this type of inquiry is on the nature of the entity. If the entity is government, the *Charter* applies to all its actions; or
- (b) if an entity undertakes an act that is “governmental” in nature. The focus of this type of inquiry is on the nature of the entity’s act.

UAlberta Pro-Life v Governors of the University of Alberta, 2020 ABCA 1.at para 128; *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) at para 44; *York* at para 73.

2. The Parties’ Positions

[48] The Applicants make two alternative arguments on this issue:

- (a) they say that all public universities in Alberta, and the University in particular, are “government” by their very nature. This is because the Province has established a highly sophisticated system of control over universities through legislation, regulation and financing. The Province exercises these powers on a routine basis, with no resistance from the universities, and the University is prohibited from pursuing any truly independent objective whatsoever. The Applicants say that the

only thing the University does is to implement government objectives and policy. In support of this argument, they point to the Government/University Documents; and

- (b) in the alternative, they argue that the University's regulation of freedom of expression by students on campus (of which the Decision was an example) is an act that is "governmental" in nature, so that the University is subject to the *Charter* in the course of carrying out this type of activity.

[49] The Respondents deny that the *Charter* applies here. They say the University is not "government" by nature, as the evidence does not establish that the Province has the very high degree of control over the University necessary to justify such a finding. They also say that the Decision was not a regulation of freedom of expression; rather, it was merely a decision to cancel a room booking on campus, which is not a governmental act. In the alternative, they argue that if the Decision did constitute an act that was governmental in nature, it could only have involved regulation of Mr. Pickle's speech, because he was a student, but not Dr. Widdowson's, because she was a legal stranger to the University.

3. Applying the Law to the Facts

[50] For the reasons that follow, I find it unnecessary to decide whether the University is government "by nature." This is because I have concluded that, in making the Decision, the University was acting to regulate freedom of expression by students on campus. That act was "governmental" in nature, so the University's act in making the Decision was subject to the *Charter*.

a. I am not Deciding Whether the University is "Government" by its Nature

[51] No court in Canada has found a university to be "government" by its nature. In *McKinney* and *Harrison v University of British Columbia*, 1990 CanLII 61, the majority of the Supreme Court of Canada found that the universities who were before it were not government by their nature. The Court came to the opposite conclusion regarding a college and a council of college regents, respectively, in *Douglas/Kwantlen Faculty Association v Douglas College*, 1990 CanLII 63 and *Lavigne v Ontario Public Service Employees Union*, 1991 CanLII 68. While the legal tests and principles in these Supreme Court of Canada cases are binding on me, the specific conclusions made by the Court, which were dependent on the specific facts in the cases before them, are not.

[52] I have concluded that I do not need to decide whether or not the University is "government" by its nature, for two reasons.

[53] First, the principle of judicial restraint requires that I not decide issues of law that are not necessary to resolve the parties' dispute. This principle applies with particular force to disputes about constitutional issues: *Pickle ABCA* at para 27. Because I have concluded that the University was engaged in governmental action when it regulated student speech on campus in making the Decision, I do not have to decide if the University is "government" by nature. Such a finding is not only unnecessary, it could also have consequences that go far beyond the issues in dispute between these parties. Those consequences could impact innumerable parties who were not before me in this application, in ways that it is impossible to foresee.

[54] The second reason I am not deciding this issue is that the evidential record before me is an unsuitable basis on which to do so. While I have decided that the Government/University Documents are admissible, after reviewing them I have concluded that they do not provide a sufficiently reliable basis on which I could decide how to characterize the nature of the University. I have no idea exactly what Ms. Sexton requested in her FOIP requests. I am satisfied that the materials she received back are authentic, but I have no idea whether they are complete and comprehensive. The Applicants conceded in oral argument that they did not put into evidence all the materials that Ms. Sexton received in response to her FOIP requests. I am unable to determine if these materials accurately and comprehensively explain the relationship between the University, the Province and Canada. If this proceeding had been commenced by Statement of Claim as an action, with record production and pre-trial questioning processes, the University would have had an opportunity to ensure that the evidential record on this issue was complete. However, that did not occur.

b. The Detailed Law About Whether a University's Act is Governmental in Nature

[55] I turn now to the issue of whether the University, in making the Decision, was undertaking an act that was “governmental” in nature. In *Eldridge* at para 44, the Supreme Court of Canada provided the following guidance about how to answer this question:

This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly “governmental” in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

[56] Paperny JA in *Pridgen v University of Calgary*, 2012 ABCA 139 described this type of conduct as “non-governmental bodies implementing government objectives.”

[57] Our Court of Appeal comprehensively discussed the regulation of freedom of expression on a university campus in *UAlberta Pro-Life*. There, the appellant student group (**Pro-Life**) had previously held an authorized anti-abortion event in a large open area on the University of Alberta (**U of A**) campus, which had attracted a large protest. When Pro-Life later applied to U of A for permission to hold a similar event, U of A approved its request, but on the condition that Pro-Life pay for the cost of security for the event, estimated to be \$17,500. Pro-Life argued that this cost was prohibitive and that imposition of the payment condition amounted to a denial of their exercise of freedom of expression under section 2(b) of the *Charter*. Pro-Life sought judicial review of U of A's decision.

[58] Watson JA wrote an extensive judgment on the *Charter*, with which the other two judges concurred. He did not consider or decide whether U of A, by its nature, was “government.” Instead, after reviewing voluminous evidence about the history and rules of the U of A as well as its public statements, he concluded that U of A's regulation of Pro-Life's request to hold an on-campus event constituted regulation of freedom expression by students on university grounds, which was a form of governmental action subject to *Charter* scrutiny. His reasons for this finding were that (at para 148):

- the education of students “largely by means of free expression” was and had always been the “core purpose” of U of A. This was a responsibility that government had given to U of A both by statute and under the *Constitution Act*, 1867;
- U of A acknowledged this was its core purpose;
- a central feature of this core purpose was the ability of students to learn and debate and share ideas, and the physical grounds of the university were designed as a community space to permit this;
- recognizing the *Charter* as applicable to the exercise of freedom of expression by students on the campuses of the university was a “visible reinforcement of the great honour system which is the Rule of Law”; and
- the recognition that U of A was subject to the *Charter* in relation to freedom of expression by students on university grounds did not threaten its ability to maintain its independence or autonomy.

[59] Watson JA’s specific listed reasons for his finding were of course based on the specific factual record in the case before him. They are not binding on me because the evidence in this case regarding the Decision is different. I list them here, however, because they are illustrative of the manner in which he analyzed and characterized the U of A’s act in that case.

c. Was the Act of Making the Decision Governmental in Nature?

[60] What was the nature of the act that the University engaged in when it made the Decision? The Applicants say that it was the regulation of freedom of expression on campus. The Respondents deny this, and say that the University did no more than cancel a room booking, engaging no *Charter* issues.

[61] For the reasons that follow, I find that in making the Decision, the University was engaged in the regulation of student speech on campus, which was a governmental act subject to the *Charter*.

[62] The Record establishes the following relevant facts about the Decision, including its context and background.

[63] On December 12, 2019, the Board of Governors of the University approved a policy entitled “University of Lethbridge Statement on Free Expression” (the **2019 Policy**). The material parts of this document state that:

- with reference to its strategic plan, including its motto “*Fiat Lux*” (“let there be light”), the University reaffirmed its commitment and recognized its obligation, to provide an environment “in which freedom of inquiry and freedom of expression are prerequisite requirements in all aspects” of its operation;
- freedom of speech is “inextricably associated with freedom of expression and is afforded the same commitments with bounds determined by the requirements of Canadian Law.” References were then made to legal limits on freedom of expression, including hate speech and discriminatory speech;

- the Board of Governors of the University was committed to a number of principles, “subject to the limits set by Canadian Law” with respect to “members of the University community”. This list included, generally:
 - free and open critical inquiry;
 - guarantees of the broadest possible latitude to speak, write, listen, challenge and learn;
 - the right to criticize and question views expressed on campus, but not to obstruct or interfere with others’ freedom of expression;
 - reserving for individuals the right to contest speech they disagree with;
 - promoting mutual respect, tolerance and civility but noting that those things do not justify closing off discussion or shielding students from ideas or opinions, no matter their content; and
 - reserving to the University the right to restrict expression that violates the law, is defamatory, is a threat or harassment, or unjustifiably invades privacy or confidentiality interests;
- the University reserved “the right to reasonably regulate the use of facilities, time, place, and manner of expression to ensure it does not disrupt the ordinary activities of the University”;
- the 2019 Policy in no way limited academic freedom, or the terms of collective agreements or employment agreements to which the University was party;
- the 2019 Policy applied to individuals and organizations making use of University property or resources, including external individuals and organizations; and
- it was the responsibility of event organizers to ensure that speakers and participants were made aware of the University’s commitment and its other policies and procedures.

[64] Dr. Viminitz invited Dr. Widdowson to speak at the Event, to be held at 4:30 p.m. on Wednesday, February 1, 2023. Dr. Viminitz also invited Dr. Widdowson to speak in two of his classes at the University that same week, on Tuesday, January 31, 2023 and Thursday, February 2, 2023 on the topic of “Indigenous Ways of Knowing” (the **Two In-Class Lectures**).

[65] Beginning on January 26, 2023, after knowledge of the Event became public, Mike Mahon PhD, the President of the University (the **President**) and other executive-level employees at the University received a large volume of email correspondence from members of the University community (faculty, students and alumni) and third parties, expressing their opposition to the Event and to the views of Dr. Widdowson. Some commentators characterized Dr. Widdowson as a racist, and/or a residential school denier. Many stated their opinions that

the Event would cause harm to members of the University community, particularly Indigenous individuals. At least one person also asked the University to cancel the Two In-Class Lectures as well. One or more petitions were organized for signature by people who opposed the Event, and a student group organized a “counter-lecture” about residential school denialism, to be held at the same time as the Event. The University’s Student Union organized what they described as a “peaceful demonstration,” to occur at the same time and place as the Event.

[66] On Thursday, January 26, 2023, the President issued a statement (the **First Statement**), in which he said, among other things:

- the University had become aware of the Event, and the University did not agree with the guest speaker’s³ views because they conflicted with a number of the University’s values, including commitment to the Truth & Reconciliation Commission’s Calls to Action;
- the University had heard from many people who expressed disappointment that the Event was being held and had asked the University to cancel the Event;
- the University affirmed its commitment to free inquiry and discussion;
- the 2019 Policy applied to the guest speaker and permitted free speech and free expression, within the bounds permitted by Canadian law; and
- the University recognized that the Event may adversely effect members of the University community, and it offered support through various resources.

[67] On January 26 and 27, 2023, after the President issued the First Statement, he and other executive-level University employees continued to receive a large volume of correspondence. The majority of the correspondence was critical and asked the University to cancel the Event, although a small number stated support for the Event proceeding.

[68] At 6:08 p.m. on Friday January 27, 2023, the President sent an internal email advising various University personnel that his executive had decided that afternoon to cancel the Event, after consultations carried out over the previous 24 hours (the **January 27 Email**). The President explained that the Decision had been made to prevent the potential harm the Event would bring to students, faculty and staff. He also referenced the 2019 Policy and that it allowed limits to be placed on free expression on campus.

[69] At 9:26 a.m. on Monday, January 30, 2023, the Provost and Vice-President (Academic) of the University sent an email to Dr. Viminiz informing him that the room booked for the Event would not be made available, and that no alternative University facilities would be provided for the Event.

[70] On January 30, 2023, the President issued a statement about the Decision (the **Second Statement**). In the Second Statement, he:

- referenced his First Statement, including that in the First Statement:

³ Dr. Widdowson was not mentioned by name in this First Statement.

- he had expressed the value and necessity of freedom of expression and the University's commitment to it; and
- also highlighted that there are limits to freedom of expression, including the safety of the University's diverse community;
- reported that since the Event had been publicized, the University had been in communications with internal and external stakeholders;
- reported that those communications "confirmed that assertions that seek to minimize the significant and detrimental impact of Canada's residential school system are harmful";
- referenced the 2019 Policy, including that it permitted the University to reasonably regulate "the use of facilities, time, place and manner of expression"; and
- stated that the University had cancelled the Event, to ensure that the University's community was safe.

[71] The January 27 Email and the Second Statement together provide the University's rationale for the Decision. In essence, the University cancelled the Event to safeguard its campus community by preventing potential harms to students, faculty and staff, while acknowledging that doing so was limiting the freedom of expression of students on campus. The Record shows that the University did not expressly mention the *Charter* in deliberating about or making the Decision.

[72] The University did not cancel the two In-Class Lectures, and Dr. Widdowson attended and spoke at both of them.

[73] Applying *Eldridge* requires me to inquire into the nature of the activity that the University was carrying out when it made the Decision. Given the contents of the 2019 Policy, and the fact that the University repeatedly referred to it in both the First Statement and the Second Statement, it is clear that the University was knowingly involved in regulating students' freedom of expression on campus when it made the Decision. In *UAlberta Pro-Life* (at para 148), our Court of Appeal found that this "specific area of action" constituted government action under section 32 of the *Charter* on the facts before it. The facts of this case support the same conclusion here.

[74] I am not convinced by the University's argument that the Decision did not involve the regulation of student expression on campus, and instead was simply a matter of cancelling a room booking or regulating the use of spaces on campus (as was found in *Lobo v Carleton University*, 2012 ONCA 498 and *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39). The University's adoption of the 2019 Policy, and the University's express references to it in First Statement and the Second Statement, distinguish this case from those two reported decisions, and make it clear that the University was knowingly regulating the freedom of expression of students on campus.

D. Did the Decision Engage the Applicants' Rights Under Section 2(b) of the Charter?

[75] Having found that in making the Decision the University was engaged in government action that was subject to Charter scrutiny, I must now decide whether the Decision engaged the Applicants' Charter rights.

[76] I am analyzing this issue on the correctness standard.

[77] Freedom of expression "protects listeners as well as speakers": *Edmonton Journal v Alberta (Attorney General)*, 1989 Can LII 20 (SCC) at 1339. Therefore, Mr. Pickle's section 2(b) Charter right to freedom of expression included the right to be able to attend and listen to what was said at the Event. The Decision was governmental action that engaged that Charter right.

[78] Whether the Decision engaged Dr. Widdowson's section 2(b) Charter right requires a different analysis. She was not a member of the University community. She was not a student nor a faculty member, but the invitee of a faculty member.

[79] The University argues that Dr. Widdowson is seeking to not merely assert a negative Charter right, but a positive right, and that she does not meet the more stringent test required to do that. Dr. Widdowson rejects that characterization.

[80] The Supreme Court of Canada recently discussed the distinction between negative and positive section 2(b) Charter rights, in *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34. The majority in that case stated at paras 16 – 17 [some citations omitted]:

[section] 2(b) has been interpreted as "generally impos[ing] a negative obligation ... rather than a positive obligation of protection or assistance" ... A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" ...

In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" ...

[81] I am satisfied that Dr. Widdowson is seeking to assert a negative Charter right in this case. As a result of Dr. Viminitz's invitation, she had been given a platform to speak at the University. The University does not suggest that Dr. Viminitz did not have the right to invite her or that, after receiving the invitation, Dr. Widdowson did not have the right to come to the campus and speak. The very fact that the University felt that it had to make the Decision to stop the Event supports this observation. Prior to making the Decision, Dr. Widdowson had some kind of authorization, by virtue of Dr. Viminitz's invitation, to come and speak at the University. The effect of the Decision was to remove that authorization. To paraphrase from *Toronto (City)*, the proper characterization of Dr. Widdowson's assertion of her Charter rights in this judicial review application is the challenge of an action that had the effect of suppressing an expressive activity in which she otherwise would have been free to engage.

[82] I wish to make clear that I say nothing in this decision about whether uninvited persons or academic staff have any section 2(b) Charter rights on the University campus. Those factual

scenarios are outside the scope of this case. As noted by Watson JA at paras 136 – 138 of *UAlberta Pro-Life*, academic staff are in a much different position than students, and academic freedom raises very distinct issues, none of which are engaged in this case.

E. Did the Decision Breach the Applicants' Section 2(b) Charter Rights?

[83] The facts of this case fall squarely within the fact pattern of *York*. Here, as in that case, the University did not expressly identify that *Charter* values were engaged by the Decision, or that it was deciding *Charter* issues in making the Decision. Although it referenced the concept of freedom of expression, it did not expressly discuss the *Charter*, let alone section 2(b). The majority decision in *York* clearly holds that when an administrative decision-maker fails to recognize that its decision engages *Charter* rights and fails to expressly discuss those *Charter* rights in its decision, that decision is not only reviewable on the correctness standard, but it is also fundamentally and fatally flawed. Given the facts of this case, the majority decision in *York* is binding on me.

[84] As a result, I conclude the Decision was fundamentally and fatally flawed. The University erred in law by not expressly considering and mentioning the *Charter* in making the Decision. Given the clear direction in *York*, I need not decide and am not deciding whether the Decision was reasonable on its merits.

F. What is the Appropriate Remedy?

[85] Having found that the Decision breached the Applicants' section 2(b) *Charter* rights, I must determine the appropriate remedy.

1. The Parties' Positions

[86] The Applicants ask me to grant the following remedies:

- (a) a declaration that the University breached the Applicants' *Charter* rights; and
- (b) an injunction requiring the University to permit the Event to proceed on campus without any conditions not originally imposed on the Event at a reasonable future date, time and location.

[87] The Respondents asked, in the event that I found a *Charter* breach, that I should quash the Decision and remit it back to the University for reconsideration.

2. The Appropriate Remedy

[88] The Event was to be held on February 1, 2023, more than three years ago. As a practical matter, holding the Event is now impossible. Therefore, I find that it would be inappropriate to grant either the mandatory injunctive relief sought by the Applicants (to force the University to allow the Event to proceed) or to require the University to reconsider whether to let the Event be held, as the Respondents request. Because I did not analyze the merits of the Decision, I am not granting the declaration requested by the Applicants.

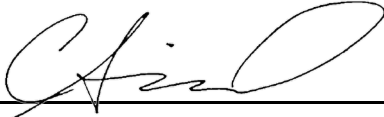
[89] For reasons similar to those stated by the Courts in *York* at para 95 and *UAlberta Pro-Life* at paras 215 and 230, the only appropriate remedy at this time is to set aside the Decision. I do so, for the reasons summarized at paragraphs 83 and 84 above.

IV. Conclusion

[90] The only remaining issue is the costs of the application. The parties did not substantively address that issue in their written or oral submissions. If they cannot agree on that issue within 45 days, they have leave to each provide written submissions on costs, not exceeding five pages (excluding attachments).

Heard on the 10th day of April, 2026.

Dated at the City of Calgary, Alberta this 17th day of September, 2026.



C.D. Simard
J.C.K.B.A.

Appearances:

Glenn Blackett

for the Applicants Jonah Pickle and Frances Widdowson

Matthew Woodley

for the Respondents the University of Lethbridge and the Governors of the University of Lethbridge