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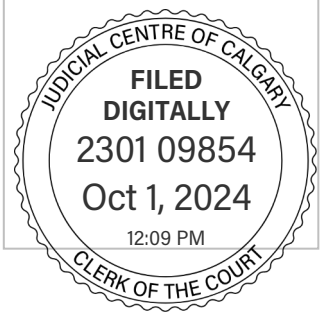

REPLY BRIEF OF THE APPLICANTS,

JONAH PICKLE and FRANCES WIDDOWSON

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I. INTRODUCTION

1. The Respondent's argument comes down to this: it was reasonable for the university to cancel free inquiry because it was dangerous and harmful and because the university could have cancelled free inquiry even more completely but did not.

2. The *Charter* demands, of course, that infringements of rights be reasonable, prescribed by law, and demonstrably justified in a free and democratic society.[1]

3. In a free and democratic society, few locations are more important to the search for truth, democratic dialogue, and self-fulfillment than university campuses.

4. Free inquiry is the *sine qua non* of universities. Like sunlight which is the best disinfectant, free inquiry is the best, if not only, means of exposing the errors in our views. Hence the university's motto, "*Fiat Lux*."

5. A student receiving a "university education" practices and develops critical thinking by engaging in free inquiry. This engagement distinguishes a university education from indoctrination. Hence the university's prohibitions on conduct which suppresses free inquiry.

6. The fundamental *Charter* freedoms to speak, listen, and peacefully assemble on a university campus, therefore, may only be suppressed where a robust analysis, leading transparently, rationally and intelligibly from evidence to conclusion, identifies no reasonable options that would give effect to *Charter* protections while sufficiently advancing valid statutory objectives.[2]

7. When viewed through the lens of *Doré*, the Respondent's argument falls well short of the mark.

8. Throughout the CRP, in its Reasons (such as they were), and in its brief the Respondent says it undertook a careful analysis and balancing.[3] The Respondent talks about its Statement on Free Expression. The Respondent talks about its concern for safety and its commitment to truth and reconciliation. But the *Charter* and *Doré* require so much more.

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[1] Charter, s. 1; The applicants adopt the defined terms in its original brief filed July 16, 2024 (the "Applicants' Brief").
[2] *CFSTNO*, para 72.
[3] For example, Respondent's Brief, paras 6, 29, 54, 112 and 154.

9. The *Charter* requires that these things be evaluated and understood to determine how they might be reconciled and, to the extent they are irreconcilable, the weight which ought to be assigned to them in the "critical balance."[4]

10. No such analysis can be found in the record or in the Respondent's Brief. While certain "evidence", values and statutory objectives are mentioned and ostensibly placed in the balance, the "evidence" goes unassessed, other values and statutory objectives go unaddressed, the *Charter* goes unmentioned or dismissed, and no analysis is undertaken to demonstrate how it all might be reconciled or weighed in the balance.

11. The UofL received allegations of "harms" which it failed even to disambiguate, much less scrutinize, understand and weigh. It did nothing, in other words, to understand how the objective of avoiding these alleged "harms" might be "sufficiently advanced."

12. It stated its "position regarding free expression" but misstated and misapplied its government-mandated "Statement on Freedom of Expression." It did not, in other words, understand how that objective might be "sufficiently advanced."

13. It did nothing to determine whether its "commitments" were valid statutory objectives.

14. It did not acknowledge that suppression is not protected expression.

15. It did not ask itself even basic questions like:

> *"Is it not inconsistent with the university's mandate to shield the '100% accurate'[5] 'truth' from the scrutiny of free inquiry?"*

or

> *"Is in not a betrayal of our commitment to improve indigenous access to and success in university education to shield indigenous students from free inquiry – on the premise, no less, that free inquiry would injure them?"*

or

> *"Are people alleging all of these different harms and risks in earnest or as is this mere pretext? Are these harms real? How do we control them?"*

16. And so on.

[4] CRP000047.
[5] CRP000110.

17. Instead, the UofL vaguely recognized there were "countervailing interests" (most pressingly, perhaps, avoiding "government blow back"[6] while advancing truth and reconciliation) and picked one. And which one did it pick? It picked the one it was vilified for not picking, the one it was told it must if it wanted reconciliation, the one that hundreds of censors angrily demanded.

18. Its decision, therefore, is neither reasonable on its face or in its outcome.

19. The Respondent has failed to meet its burden under s. 1.

20. In its brief, the Respondent also makes a number of procedural arguments which are resolved once the nature and scope of this application are properly understood. This honourable Court should consider the evidence before it, should consider the *Charter*, and should, most definitely, not remit the Decision back to the Respondent.

21. The Respondent had its kick at the can – and it seriously and recklessly botched it.

22. Remitting this matter back to the Respondent, who gratuitously, baselessly and publicly vilified Widdowson (and, by extension, those who might wish to engage with her ideas) as dangerous, immoral, and uninformed "psychosocial hazards", is a recipe for nothing but further conflict, litigation and waste.

23. The *Charter* demands an effective remedy.

II. FACTS and ARGUMENT

A. Scope of the Application

24. The Respondents' Brief incorrectly states, "[t]he Applicants apply for judicial review of a decision made by the University of Lethbridge … to permit Paul Viminitz … to book a room …"[7] This application clearly relates solely to the Decision to cancel the event.[8]

25. The Respondents' Brief incorrectly states, "… the fundamental remedy [the applicants] seek is *certiorari*: they wish to quash the University's Decision.…"[9] Neither do the applicants seek *certiorari* (they seek a declaration and injunction[10]) nor is the remedy available or appropriate in the circumstances.[11] If *certiorari* were granted, the UofL would be required to

[6] CRP000155.
[7] Respondent's Brief, para 1.
[8] Originating Application for Judicial Review, filed July 26, 2023 (the "**Application**"), paras 9 to 12.
[9] Respondent's Brief, para 2.
[10] Application, paras 15 and 16.
[11] *The Redeemed Christian Church of God v. New Westminster (City)*, 2021 BCSC 1401, para 71.

reconsider the cancellation of a February 1, 2023, Event. Reconsideration of the Decision would be, therefore, academic - it would be based on the deficient and outdated evidence in the CRP and it could only lead to the restoration of an Event two years too late.[12] Courts do not determine academic questions, engage in speculation, or grant orders that are moot.[13] The only appropriate and effective remedy in these circumstances – which can lead to the meaningful restoration of the Event – is the requested declaration and injunction.[14]

26. The Respondent's Brief encourages this honourable Court to resolve this dispute on the "narrowest grounds required." However, a court may not, except in rare circumstances (none of which have been raised by the Respondents or apply in the circumstances), decide issues or grant orders that have not been pleaded by a party.[15] Further, the rare exceptions only apply for the benefit of applicants – neither respondents nor a court can not force an applicant to seek a remedy.

27. Compliant with *Rule* 3.8(1)(b) the applicants stated their "claim and the basis for it" and "the remedy sought" which included no claim for *certiorari*, and no allegation of "traditional administrative law principles."[16] The purpose of the requirement to sufficiently plead the grounds and requested remedy in an action is to avoid prejudice and ambush of the parties and the Court.

28. The applicants have not raised *certiorari* nor (subject to arguments under *Doré*[17] framework) "traditional administrative law principles" in their application or in their original brief (the "**Applicants' Brief**"). The applicants have neither an obligation nor intention to now raise the Respondent's preferred claims in this reply brief.

29. In any case, for the reasons given at Section II.H. (Remitting the Cancellation Is Not an Appropriate or Just Remedy) below, *certiorari* is not an effective remedy.

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[12] See below at Section B.F. (Application to Admit Evidence) for a discussion of the unique factual and legal context of the within judicial review.
[13] *R. v. Ontario (Labour Relations Board)* (1969), 7 D.L.R. (3d) 696, C.U.P.E., Re (1971), 3 N.B.R. (2d) 613, *Alberta (Attorney General) v. Westcoast Energy Inc.* (1997), 208 N.R. 154, C.U.P.E., *Local 873 v. British Columbia (Attorney General)* (2010), 2010 BCSC 593.
[14] See below at Section II.H. (Remitting the Cancellation Is Not an Appropriate or Just Remedy).
[15] *Thibaudeau v. R*, [1995] 2 SCR 627, para 223, *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, paras 173-175, *D.W.H. v. D.J.R.*, 2013 ABCA 240, para 42, *Wagner v. Wagner*, 2014 ABCA 428, para 27, *Mazepa v. Embree*, 2014 ABCA 438, paras 8 and 9, *DGS v. HAS*, 2019 ABQB 887, 2019 CarswellAlta 2467, paras 52 to 61, *Sihota v. Chohan*, 2019 ABCA 390, para 26, *Warren v. Cowling*, 2019 ABQB 403, paras 40 to 44, *PetroBakken Energy v. Northridge Energy*, 2020 ABCA 470, para 28, *Woodbridge Homes Inc. v. Palmer*, 2023 ABKB 649, para 23
[16] Respondent's Brief, para 5.
[17] *Doré v. Barreau du Québec*, 2012 SCC 12 ("***Doré**")*

30. The Respondent's Brief also misstates the nature of the "narrow grounds" principle. The Respondent states: "[t]he 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."[18] [emphasis added] In other words (and bearing in mind that the "broad declaratory relief" the Respondent wishes to avoid is a determination of whether the *Charter* applies and was breached) the Respondent effectively asserts that if the Court can dismiss any cause of action, it should dismiss all causes of action. The Respondent likewise asserts that the Court can dismiss the Application on the grounds the Decision was somehow reasonable, without knowing even whether any *Charter* rights apply. That is obviously not the rule. The rule generally operates, as it did in *Commission scolaire francophone des Territoires du Nord-Ouest c. Territoires du Nord-Ouest (Éducation, Culture et Formation)*, 2023 SCC 31 ("***CSFTNO***"), only where the court is "ruling in favour of the appellants"[19] and granting, substantively, the orders sought.[20]

31. If this honourable were to find the Decision reasonable solely on traditional administrative law principles (had they been raised) it would then become necessary to address the *Charter*. Otherwise, if there were infringements of the applicants' *Charter* rights, this Court would leave the applicants' *Charter* rights unaddressed and unremedied.

B. Scope of the Reasons for the Cancellation

i. Widdowson was Cancelled, Not Just the Event

32. The Respondent's Brief incorrectly asserts that "[t]his application is not about Widdowson's views…"[21], that 'the majority [of the input] focused on the Event,"[22] and that the UofL did not cancel "Widdowson's presence on campus."[23]

33. That assertion is totally inconsistent with the record.

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[18] Respondent's Brief, para 54.
[19] *CSFTNO*, para 110.
[20] The rule did not actually operate in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97. That was an application of the rule against unnecessary *obiter dicta*. At para 5: "[i]t is … unnecessary and undesirable to decide this case on a basis that has disappeared …" [emphasis added].
[21] Respondent's Brief, para 1.
[22] Respondent's Brief, para 13.
[23] Respondent's Brief, para 42.

34. Virtually every person who sought to cancel the Event referred – solely – to Widdowson's (purported) views and not to the subject matter of the Event.[24] A rare few gave the ostensible appearance of addressing the Event itself by (falsely) asserting that the Event's subject-matter would be whatever (purported) view of Widdowson the complainant found most objectionable. For example, Vice-Provost, Indigenous Relations, Leroy Wolf Collar (who's objection appears to have been high persuasive to the UofL[25]) claimed:

> *"… the University is going to allow a racist individual to come to the University to share her racist views and denial of the TRUTH about the Indian residential schools and Blackfoot Ways."*[26]

35. Wolf Collar continued:

> *"… the University of Lethbridge is not doing enough to keep this racist person off campus. MRU did it, I don't see why UofL can't do it." [emphasis added]*

36. The UofL, itself, stated unambiguously that the Event was being cancelled for Widdowson's views:

    a. Mahon originally wrote:

    > *"The University of Lethbridge has become aware of a guest speaker … whose views are in conflict with a number of values held by the University …" [emphasis added]*[27]

    b. That statement was circulated by email under the subject:

    > *"Documents and Letters re: current controversial guest speaker appearance." [emphasis added]*[28]

    c. UofL's Vice Provost (Students) advised students:

    > *"… the University … has become aware of a guest speaker invited by one of our faculty members. The speaker's views are in conflict with a number of the values and commitments strongly held by the University."[emphasis added]*[29]

    d. The Decision to cancel was communicated internally by email, in which Mahon wrote:

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[24] See also see the Applicants' Brief at paragraphs 21 to 37.
[25] CRP000002.
[26] CRP000066, see also, for example, CRP000048, CRP000069, CRP000077, CRP000087, CRP000153, and CRP000154.
[27] CRP000055.
[28] CRP000105.
[29] CRP000056, CRP000108, and Sexton Third Affidavit, Exhibit "Q".

"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 …" [emphasis added][30]

e. When UofL publicly communicated the cancellation the Event Mahon's statement read:

"Today, I write with an important update …. regarding a controversial speaker … to deliver a talk …" [emphasis added][31]

37. That the Event itself was not the "focus" of the cancellation is also made plain by the fact that virtually no one, including the UofL, appeared to know or even consider what the actual content of the Event was – only that it would feature a "controversial" speaker with "abhorrent" views. In fact, only two objectors even referred the actual subject matter of the Event ("How Woke-ism Threatens Academic Freedom"):

a. Professor Jason Laurendeau, who, *inter alia*, objected to Widdowson's purported views ("Widdowson is a well-known residential school denialist …") and objected to the actual subject matter of the Event arguing that to "debate the merits of so-called open-inquiry," is "white supremacist violence" which, he claimed, would inflict "very real harms" which he refused to explain, saying "… I will "[block] the settler colonial gaze that wants those stories."[32]

b. Associate Professor Paul McKenzie-Jones, who also objected to Widdowson's purported views ("Widdowson is a well-known residential school denialist who … dismissed and debased the lived experiences of Indigenous peoples…") and objected to the actual subject matter of the Event claiming (falsely) that Widdowson would "… [call] for the cancellation of 'woke' freedom of speech."[33]

ii. UofL Cancelled Widdowson as Fully as it Could

38. That the UofL "… took no steps to cancel or prevent [in-class] presentations and they proceeded as scheduled,"[34] was, according to UoL's Provost and Vice-President Academic, Erasmus Okine, only because UofL lacked the power to do so.[35]

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[30] CRP000003.
[31] CRP000002
[32] CRP000066.
[33] CRP000069.
[34] Respondent's Brief, paras 93, 128.
[35] CRP000160.

39. To the maximum extent of its (perceived) powers, UofL cancelled Widdowson's presence (from booked space) on campus – regardless of the actual subject matter of the Event – permanently.[36]

iii. Not Cancelled for "Real Risks" from Protest

40. The Respondent's Brief submits that a proposed "counter-protest" created "real risks in relation to physical safety," which formed part of the reasons for the cancellation.[37]

41. A few clarifications are necessary.

42. First, the Respondent finds it necessary here to disambiguate "real risk" from "risk," and "physical safety" from "safety," because those and other terms (especially "harm") are used, throughout the CRP, to refer to a wide variety of perceived negatives (as discussed below in Section II.B.iv (What Harms Actually Lead to Cancellation?)).

43. This Section II.B.iii. relates only to the Respondent's asserted "real risks in relation to physical safety" arising from the "counter-protest."

44. Second, UofL appears to have been made aware of the purported physical risks posed by the "counter-protest" only after its decision to cancel was made, but before cancellation was publicly communicated.[38] In fact, significant portions of the CRP post-date the Decision to cancel on January 27, 2023, in the "late afternoon,"[39] but pre-date public communication of the cancellation.

45. Third, it was a "protest" not a "counter-protest": the Event itself was a public lecture and not a protest.

46. Forth, the term "counter-protest" invites the misapprehension that two groups of opposing protesters were likely to interact. The Respondents even asserts that "groups with countervailing views on a highly charged issue" would be in close proximity."[40] There is nothing in the CRP to support this view. The record shows only that proposed protesters held a "view" on a highly charged issue (residential schooling "denialism") but shows nothing about the "views" of the Event's anticipated attendees on this issues.

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[36] CRP000001.
[37] Respondent's Brief, paras 14, 26.
[38] CRP000120 is an email sent January 30, 2023, whereas the Decision to cancel was made on January 27, 2023 (CRP00003) at about 4:30 p.m. (CRP000087) and communicated publicly on January 30, 2023, at about noon (CRP000002).
[39] CRP000003.
[40] Respondent's Brief, para 93.

47. The Event itself was not about this "highly charged issue" but, rather, about "How 'Woke-ism' Threatens Academic Freedom". The actual subject of the Event was apparently not so highly charged because virtually no one in the record so much as mentioned it.[41]

48. Perhaps by "highly charged issue" the Respondent is referring, instead, to the issue of:

    a. whether open inquiry on a university campus is valuable; or

    b. whether people with the wrong views should be cancelled.

49. If so, then it would be fair to say attendees appeared to have an opposing viewpoint.

50. Finally, the record does not evidence "real risks in relation to physical safety" arising from the protest. The Respondent refers to UofL's Student Union President, Kairvee Bhatt's, request for permission to hold a "safe and peaceful protest"[42] in the hallways and rooms surrounding the Event in Anderson Hall.

51. Interestingly, as part of Bhatt's request she proposes that students not be disciplined for participation in the protest "in any capacity."[43] This can only be understood as a request that UofL condone breaches of the UofL's "Principles of Student Citizenship"[44] and "Statement on Free Expression"[45] which prohibit efforts to supress expression (such as Bhatt's own suppressive conduct during the protest when it moved to the Atrium[46] - for which she was not disciplined[47]).

52. Apart from the proposed protest, and the implication that efforts would be made to suppress expression, there is nothing in the CRP to suggest the proposed protest presented any physical safety risk to anyone. In stark contrast to the voluminous assertions of various "harms" in the CRP, there are not even bald assertions of physical risk.[48]

53. The one record cited by the Respondent as evidence of some "real risk to physical safety"[49] came after the cancellation and related to a significantly different protest.[50]

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[41] See above at para 37.
[42] CRP000120 cited at Respondent's Brief para 14.
[43] CRP000136 and CRP000141.
[44] Viminitz Affidavit, Exhibit "G".
[45] CRP000004.
[46] Pickle Affidavit, para 17.
[47] Viminitz Affidavit, para 27, Pickle Affidavit, para 21.
[48] Save Wolf Collar's claim, see para 76 below.
[49] CRP000177-CRP000178 cited at Respondent's Brief para 14.
[50] CRP000177 relates to a protest which was held inside the Atrium where Widdowson attempted to speak in direct proximity to "protesters" without the benefit of a booked room.

54. In addition to there being no evidence of "real" physical risk from Bhatt's proposed protest, the record otherwise suggests UofL perceived none. The Respondent cites:

a. the Booking Policy[51] which prohibits UofL from approving the use of space where "Prohibited Conduct" (including the use of force or violence or conduct that threatens or interferes with the operation of the UofL, which would include efforts to supress free inquiry) is reasonably likely and which policy permits UofL to impose security fees on activities following a "determination" of appropriate security requirements;[52]

b. the University's Visitor Health & Safety Standard[53] which obligates UofL to report hazards involving visitors in an online safety report;[54] and

c. the *Occupational Health and Safety Act*, SA 2020, c O-2.2, s. 1 ("***OHSA***")[55] which obligates UofL (under threat of fine or imprisonment)[56] to take all precautions necessary to protect the health and safety of every worker[57], advise workers of foreseeable hazards[58], and to prepare hazard assessments.[59]

55. UofL did none of this.

56. If the UofL perceived a "real risk to physical safety" arising from Bhatt's requested protest it could or should have done a number of things to substantially if not entirely mitigate that risk. It could have, most obviously:

a. refused to permit a protest inside Anderson Hall – it could have allowed it outside, for example;

b. clearly warned Bhatt and students that efforts to suppress expression would be disciplined;

c. completed an online safety report;

d. implemented security measures including (if Bhatt was contemplating suppressive misconduct including violence) discussing a security fee with her;

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[51] Viminitz Affidavit, Exhibit "O", cited at Respondent's Brief, paras 5, 45, 91, 99
[52] Ss. 6.11 and 6.12.
[53] Respondent's Brief, paras 41 and 97.
[54] CRP000185.
[55] Respondent's Brief, paras 49 and 97.
[56] *OHSA*, s. 48.
[57] *OHSA*, s. 4(a)(i).
[58] *OHSA*, s. 4(b).
[59] *Occupational Health and Safety Code*, Alberta Regulation 191/2021, s. 7.

e. warned staff of hazards from the protest; and

f. if all of that was still deemed insufficient, denied permission to protest (as required under the Booking Policy) because it perceived a reasonable likelihood of force or violence.

57. UofL did none of those things either. [60]

58. More to the point, nowhere, including in his January 27, 2023, email[61] or his January 30, 2023, public statement[62] did Mahon so much as mention the protest or any physical risk associated with it. Rather, Mahon only mentions the amorphous concepts of "harm" and "safety" (discussed below at Section II.B. (What Harms Actually Lead to Cancellation?)).

59. While a delegate's reasons can, where appropriate, be inferred from the "institutional context … [and] history of the proceedings" a court may not "fashion its own reasons," "reformulate a tribunal's decision" or "speculate as what the tribunal might have been thinking."[63]

60. To suggest the Event was cancelled due to any real or perceived physical risk from the protest is entirely speculative and squarely contradicted by the record. It is, therefore, an impermissible attempt to bootstrap the reasons given.

61. The Court should consider the implications of accepting the Respondent's "physical safety" argument, which are profound. While one might reasonably conceive of someone getting hurt during any protest (or any contest of ideas or assembly of people for that matter) to treat that conceived scenario, without more, as reasonable grounds for cancellation is, in substance, the grant of an unvarnished heckler's veto.

iv. What Harms Actually Lead to Cancellation?

62. Much of the Respondent's argument rests on the assertion that the UofL reasonably balanced expressive rights against "countervailing interests including safety on campus."[64]

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[60] The closest the record comes to any assessment is CRP000059 in which Nolan Meyer, Emergency and Security Services Manager, advised the UofL scheduling office he had "heard about a 'counter-rally'" and asked for "information." Virtually no information was provided and the record indicates no further security involvement until after cancellation.
[61] CRP000003.
[62] CRP000002.
[63] *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 S.C.R. 65 ("***Vavilov***"), paras 91, 94, 96, 97 and 98.
[64] Respondents' Brief, para 6, 29, 112, and 154.

63. The Respondent's Brief does little to elucidate what "countervailing interests" and "safety" issues it references and does little to attempt to link those to any valid statutory objective.

64. To confirm whether or not any purported balancing exercise was reasonable it is first necessary to scrutinize the record to understand what, exactly, these "countervailing considerations" were.

65. While the Respondent refers to "safety," Mahon's various statements referred to both "safety"[65] and "harms."[66] It is necessary, therefore, to further disambiguate the various claims of "harm" and threats to "safety" alleged in the record.

66. In the section above (II.B.iii.) it is demonstrated that by "harm" and "safety" Mahon was apparently not referring to "real risks in relation to physical safety" arising from the proposed protest.

67. Virtually every objection received by the UofL argued for cancellation on the basis that Widdowson's purported views or the purported content of the Event were false representing, therefore, a risk of harm to settled truth ("**Truth Harm**"). For example:

    a. Indigenous Student Representative, Nathan Crow, called for cancellation on the theory Widdowson shared "false narratives" and asserted the UofL had a "duty to … students to provide accurate and true information;"[67]

    b. The Department of Indigenous Studies called for cancellation claiming Widdowson "disputes the veracity" of unmarked graves and arguing that reconciliation necessitated that indigenous "histories, cultures, memories, and lives, past and present, [be] represented faithfully, truthfully, and safely …;" and[68]

    c. Vice-Provost, Indigenous Relations, Leroy Wolf Collar, objected to the fact that the UofL was "… going to allow a racist individual … to share her racist views and denial of the TRUTH …"[69]

[65] CRP000055 (Mahon's January 26, 2023, public statement), CRP000002 (Mahon's January 30, 2023, public statement)
[66] The same records as above and CRP000003 (Mahon's January 27, 2023, internal email in which he refers only to "harms")
[67] CRP000110.
[68] CRP000078.
[69] CRP000066; see other input summarized at Applicants' Brief, paras 22, 23, 24.c to 24.e and Respondent's Brief, paras 14 – 17 and 24.

68. A few objections claimed that Widdowson's expression itself constituted "violence"[70] including the above quoted Professor, Jason Laurendeau[71], and Associate Professor, Paul McKenzie Jones who went so far as to claim that "[s]uch discourse … is an assault."[72] The applicants understand such uses of the to term "violence" to be hyperbolic variations on Truth Harm: a dissenting viewpoint is alleged to do "violence" to someone else's viewpoint. Otherwise, such uses of the term "violence" are obvious nonsense.

69. Just as common as asserted Truth Harms were calls to cancel the event on the argument that platforming Widdowson was harmful to reconciliation ("**Reconciliation Harm**"). For example:

a. An anonymous *alumnus* argued, "If the university is truly working towards reconciliation with Blackfoot, Metis, and all Indigenous nations, you will not allow this discourse to take place on campus;"[73]

b. Assistant Professor, Tiffany Prete, expressed concern, "… about the damage this will do, especially if the U of L is serious about reconciliation work;"[74]

c. The Department of Indigenous Studies claimed reconciliation necessitated cancellation;[75]

d. Associate Professor, Athena Elafros, claimed that, "in allowing this talk to take place on campus the U of L is betraying its commitments [*sic*] to Indigenous peoples;"[76]

e. The key stakeholder, Leroy Wolf Collar, argued, "[a]ll of a sudden the reconciliation relationship with Indigenous peoples at the University is pushed aside …"[77]

f. Associate Professor, Caroline Hodes, claimed, "This is a betrayal of the University of Lethbridge's commitment to Indigenization and reconciliation."[78]

[70] CRP000045.
[71] CRP000006.
[72] CRP000069.
[73] CRP000022.
[74] CRP000063.
[75] CRP000078.
[76] CRP000079.
[77] CRP000112.
[78] CRP000088.

70. Many calling for cancellation claimed there would be harm in the form of risks to "emotional well being"[79], a "wide range of emotions"[80], "emotional harm"[81], "upset"[82], "harm … spiritually and culturally"[83], people not "feel[ing] safe or welcomed"[84], and "distress and anxiety"[85] ("**Emotional Harm**").

71. Many argued for cancellation on the basis that Widdowson's purported views or expression constituted "hate"[86] or discrimination[87] with some even claiming the Event constituted a hate crime[88] ("**Discrimination Harm**").

72. Associate Professor McKenzie-Jones claimed:

> *"Such discourse [denialism], freely disseminated, causes actual harm to Indigenous peoples, retraumatizing and disempowering them through historical erasure and denial." [emphasis added]*[89]

73. The Department of Indigenous Studies echoed this claim:

> *"… honoring [indigenous people] must include a commitment … must be a commitment from all faculty to vigorously reject ideologies which continue to propagate violence against Indigenous Peoples through the rhetoric of historical erasure, dismissal, diminishment, and dehumanization."*[90]

("**Erasure Harm**")

74. Some seemed to claim Widdowson's views perpetuated literal violence,[91] including the Department of Indigenous Studies,[92] while others claimed her views would perpetuate intolerance[93], discrimination,[94] hate,[95] or that:

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[79] CRP000024.
[80] CRP000110.
[81] CRP000006.
[82] CRP000063.
[83] CRP000066
[84] CRP000074 and CRP000133 (Bhatt's January 30, 2023, submission)
[85] CRP000045.
[86] CRP000039, CRP000045, CRP000065, CRP000079, CRP000087, CRP000120, CRP000153, CRP000154.
[87] CRP000035, CRP000088 and CRP000110.
[88] CRP000071 and CRP000078.
[89] CRP000069.
[90] CRP000076.
[91] CRP000022.
[92] CRP000078.
[93] CRP000033.
[94] CRP000022.
[95] CRP000158 (Bhatt's January 29. 2023, submission)

> *"Giving these topics a pedestal only serves to embolden people who already have these dangerous views …"*[96]

("**Indirect Harm**")

75. Many sought cancellation on the basis of assertions of "harm" or "safety" which were undefined[97] or ambiguous[98], including Professor Jason Laurendeau, who (as discussed above at paragraph .a) expressly refused to explain what "very real harms" he predicted[99] ("**Undefined Harm**").

76. Finally, many calling for cancellation alleged that Widdowson's presence on campus would cause psychological harm, including "trauma"[100] ("**Psychological Harm**"). For example, Wolf Collar opined:

> *"I guess the one white woman's freedom of speech is more important to protect than the lives of 500 plus Indigenous students attending the UofL who may be exposed to harm mentally, emotionally, spiritually, culturally, and even physically."*[101]

77. Given this diverse constellation of asserted "harms", it is necessary to analyse which of them were actually relevant to the Decision. What supposed "harms" did the Respondent actually weigh against free inquiry?

78. In Mahon's January 26, 2023, public statement[102] refusing to cancel the Event he expressly referenced Reconciliation Harm[103], Truth Harm[104] and Emotional Harm[105] but not, obviously, Psychological Harm, as he asserted that the UofL would "… not tolerate behaviour that undermines … safety …"

79. When Mahon internally communicated the Decision to cancel the Event on January 27, 2023, and says:

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[96] CRP000037.
[97] CRP000021, CRP000024, CRP000045, CRP000120 at CRP000133 (Bhatt's January 30, 2023, submission)
[98] CRP000032, CRP000071.
[99] CRP000007.
[100] CRP000033, CRP000037, CRP000069, CRP000088,
[101] CRP000066.
[102] CRP000055.
[103] "… whose views are in conflict with a number of values by the University – including the University's stated commitment to the Calls to Action of the Truth and Reconciliation Commission of Canada…"
[104] "… assertions that seek to minimize the significant and detrimental impact of Canada's residential school system … concurrent evidence-based counter lecture …"
[105] "… this issue may personally adversely affect many members of our university community and support is available."

> *"[o]ur assessment, based upon all of our consultation, is that the potential for harm is too great for the event to take place," [106]*

the "harm" to which he was referring may have been Truth Harm, Reconciliation Harm, Emotional Harm, Discrimination Harm, Erasure Harm, Indirect Harm, Undefined Harm, or Psychological Harm, however, the only harm he specifically referenced is Reconciliation Harm.

80. Mahon said, a "… small team from [the President's Executive] will craft a communique …" pleading not to leak the email because "the potential for government blow back is real and we will spend the weekend on this. Leakage of this decision would severely harm our [government relations]."

81. Mahon's January 30, 2023, public announcement is the "crafted" result. In that statement, Mahon referred, generally, to "safety" and "harms" but then specified only Truth Harm[107] and Reconciliation Harm.[108] Following the cancellation, Mahon confirmed to Associate Professor Michelle Hogue that the "decision is rooted in the TRC."[109] The Respondent's Brief also confirms the cancellation resulted from weighing expressive freedom against, "…respecting and supporting our indigenous and BIPOC communities."[110]

82. Given the foregoing, and subject to the observations at paragraph to , the UofL only clearly considered:

a. Truth Harm; and

b. Reconciliation Harm,

but may also have considered one or more of:

c. Emotional Harm;

d. Discrimination Harm;

e. Erasure Harm;

f. Indirect Harm;

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[106] CRP000003.
[107] " … assertions that seek to minimize the significance and detrimental impact of Canada's residential school system are harmful."
[108] "We are committed to the calls to action of the Truth and Reconciliation Commission (TRC) of Canada. It is clear that the harm associated with this talk is an impediment to meaningful reconciliation."
[109] CRP000180.
[110] Respondent's Brief, para 29, quoting CRP0000047.

g. Undefined Harm; and

h. Psychological Harm.

83. The Respondent's Brief does little to clarify which of these harms may even have been relevant to the Decision, rendering meaningless its argument that it undertook a careful analysis to balance competing interests. Identifying, with some basic clarity, the relevant "harms" is just the first necessary step in rational chain of analysis.

C. Scope and Nature of the Record

84. The Respondent's argument rests in large part on the premise that the UofL is a quasi-judicial decision-maker subject to traditional judicial review: a claim for *certiorari*. That is incorrect. Clarity about the nature of the Respondent, this application, and the "record" is essential for a proper determination of, both, substantive and procedural issues.

85. The reasonableness review demanded by *Doré* depends on legal and factual context[111] including, as observed in *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City),* 2018 ABCA 154,[112] the nature of the tribunal.

86. The *Rules* contemplate a record of proceeding that includes evidence and exhibits tendered by participating parties.[113] Parties, therefore, normally have control over the contents of the record of proceeding by tendering evidence at a hearing. Parties also normally have the ability to interrogate evidence tendered by the opposing party. Normally, the tribunal is the subject of review, rather than the respondent. For this reason the *Rules* contemplate a Form 8 Notice to Obtain Record of Proceedings.[114]

87. The general rule against "fresh evidence" is intended to safeguard against the applicable standard of review being subverted by the introduction, on review, of new evidence not before the original tribunal, which would affect a sort of *de novo* hearing.[115]

88. In cancelling the Event, UofL was not a tribunal exercising quasi-judicial or adjudicative functions. There was nothing resembling a hearing, no *audi alterem partem*, no notice, no disclosure, no participatory rights, no adversarial system of evidence and argument. The applicants had no right or opportunity to submit any evidence.

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[111] *Vavilov*, para 90.
[112] Paras 30 to 35.
[113] Rule 3.18(2)(d).
[114] Rule 3.18.
[115] *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, para 46

89. Here, the UofL was the recipient only of a narrow range of relevant and material evidence:

a. communications of objection and support; and

b. records authored by the UofL including:

i. such UofL policies, agreements, mandates, calendars, government communications, etc. as it chose to consider;

ii. submissions of UofL's senior administration, including the key submission of its Vice-Provost, Indigenous Relations;

iii. records which it chose to generate and consider, including safety hazard investigations, harassment investigations, investigations into the veracity of various claims made about the Event, etc.[116]

90. The record does not contain records UofL chose not to create or chose not to consider.

91. While the record of proceedings is normally a "discrete and well-defined body of material"[117] maintained by the tribunal which is the subject of the judicial review, here there is no such well-defined body of evidence.

92. Here, the tribunal is the Respondent resisting judicial review and, therefore, has an interest in the outcome of the proceedings.

93. For whatever reason, the CRP does not contain, *inter alia*:

a. Records which demonstrate the relationship between the Provincial government and the UofL for the purpose of a *Charter* s. 32 analysis including government programs which the UofL delivers. As the Respondent observes, this is because the UofL chose not to "grapple" with the question,[118] leaving its own evidentiary record "insufficient."[119] Had the UofL, instead, chosen to grapple with the question (as was required) the "… thousands of pages of evidence [in the] three affidavits of a paralegal …"[120] relevant to the issue would have been in the CRP because those records were, largely, in the possession of UofL or would have been readily available to it had it sought them out. They include agreements signed by UofL, correspondence to and from UofL, and policies and other records authored by UofL.

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[116] See above at para 54.
[117] *C.M. v. Alberta*, 2022 ABKB 716, para 28.
[118] Respondent's Brief, para 152.
[119] Respondent's Brief, para 138.
[120] Respondent's Brief, para 75.

b. The statement of the University of Lethbridge Faculty Association, which did not call for cancellation but, rather, called for opposing expression.[121]

c. The "Calls to Action of the Truth and Reconciliation Commission of Canada" central to the cancellation decision.[122]

d. Applicable policies including the University of Lethbridge Principles of Student Citizenship and Code of Conduct – Employees.[123]

e. Records relevant to the applicants' *Charter* ss. 2(b) and 2(c) claims because, again, the UofL simply failed to "grapple" with the issue.

f. Mahon's statement of "appreciation" for the mob which censored Widdowson in the Atrium.[124]

g. The text of the petition received in the critical period between January 26, 2023, and the Decision to cancel.[125]

h. The Government of Alberta, "Assessment and control of psychosocial hazards in the workplace", (BP024) (September 2022), referenced in the Respondent's Brief at footnote 192.

i. The evidence and records in the Statement of Agreed Facts filed November 28, 2023, which the Respondent previously argued impacted the scope of Viminitz's *Charter* rights.

j. The records contained in the Supplemental Record of Proceedings filed August 27, 2024.

94. What is and is not in the CRP is, therefore, largely the product of UofL's, and not the applicants, control.[126]

95. The applicants view an application under *Rule* 3.22(d) as, both, unnecessary and an obvious waste of party and Court resources. The Respondent's objection to the admission of affidavit evidence is not consistent with the purpose and intention of the Rule, including fairly and justly resolving issues in a timely and cost-effective way.[127] However, out of an

[121] Widdowson Affidavit, Exhibit "L"
[122] See Section II.D.iv. - The Meaning of "Harm" and "Safety", below.
[123] Viminitz Affidavit, Exhibits "G" and "H".
[124] Widdowson Affidavit, Exhibit "S".
[125] Sexton Third Affidavit, Exhibit "Q"; for text of petition, see Widdowson Affidavit
[126] See further discussion below under Section II.F. (Application to Admit Evidence)
[127] Rule 1.2.

abundance of caution the applicant's have formally applied under *Rule* 3.22(d), which argument is addressed below in Section II.F. (Application to Admit Evidence).

D. Correctness Review

96. The standard of correctness applies[128] to three issues:

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

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

c. A new issue, raised in response to the arguments made in the Respondent's Brief, whether impugned portions of *OHSA* sections 1(n), 1(rr), 2(a) and 3(1) should be struck down under s. 52 of the *Constitution Act, 1982*.[129]

i. Section 32

97. The Respondent claims the applicants are "… in effect requesting that this Court overturn binding Supreme Court of Canada caselaw."[130]

98. This is incorrect and premised on a misunderstanding of *stare decisis.* The applicants request that this Court apply the legal principles laid down in that caselaw.[131]

99. Contrary to the Respondent's assertion that "… the Supreme Court of Canada … decided that the *Charter* does not apply to universities,"[132] La Forest J. expressly (and gratuitously) cautioned that the court's conclusion was specific to the contemporary evidence before it:

> *"My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the Charter, but rather that the appellant universities are not part of government given the manner in which they are presently organized and governed." [Emphasis added]*[133]

100. This is just a restatement of trite law. *Stare decisis* only binds a court to apply legal principles from prior decisions to the facts before the court. It does not bind a court to:

a. apply findings of facts from a prior decision;

b. ignore evidence before it which contradicts findings of facts from a prior decision; or

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[128] *Vavilov*, para 57.
[129] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11
[130] Respondent's Brief, para 3, 48(f).
[131] Respondent's Brief, paras 42, 141, and 221.
[132] Respondent's Brief, para 9.
[133] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 ("***McKinney***"), para 46.

c. arrive at the same outcome as the prior decision.[134]

101. If *stare decisis* operated as proposed by the Respondent – to bind courts to the facts and outcome of prior decisions – the legal principles expressed in prior caselaw would be rendered totally inert. Only the outcome would bind, regardless of legal principle. This would be a complete inversion of *stare decisis*.

102. Rather, consistent with the doctrine of *stare decisis*, this Honourable Court should apply the legal principles expressed in *McKinney* and its companion cases[135] (the "***University Cases***") (and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 ("***Eldridge***") *, UAlberta Pro-Life v. Governors of the University of Alberta, 2020 ABCA 1 ("**UAlberta**"),* and others) to the contemporary state of affairs in the evidence before it about the university before it.

103. Doing so leads, inexorably, to the conclusion that the *Charter* must apply to UofL. To hold otherwise is to simply carve-out a vast area of vital government activity from *Charter* scrutiny. Worse yet, this carve-out would apply at university campuses, which are *loci*:

> *"… of discourse, dialogue and the free exchange of ideas; all the hallmarks of a credible university and the foundation of a democratic society."136 [emphasis added]*

104. The Respondent's argument, in fact, distorts *stare decisis* even further. Quoting Justice Watson in *UAlberta* (speaking in *obiter*) it suggests the *Charter* should not even apply pursuant to the principles outlined in *Eldridge* because that would contradict the outcome in *McKinney*.[137] *Eldridge* was decided after the *University Cases* and is a different test. The *University Cases* set-out a test to determine what constitutes a "government entity" whereas *Eldridge* sets-out the principles to determine what "private entity" is nonetheless subject to the *Charter*. To suggest, as the Respondent does, that if the *Charter* does not apply pursuant to *McKinney* it must therefore not apply pursuant to *Eldridge* is really to say: "ignore *Eldridge*."

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[134] Applicants' Brief, para 113.
[135] McKinney, *Harrison v. University of British Columbia* [1990] 3 S.C.R. 451 ("***Harrison***"), *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 ("***Stoffman***"), and *Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 S.C.R. 570 ("***Douglas***").
[136] *Pridgen v. University of Calgary*, 2012 ABCA 139 ("***Pridgen***"), para 122.
[137] Respondent's Brief, para 143.

105. The Respondent claims "the Court can resolve the dispute solely on based on the … holding in …," *UAlberta*.[138] This is incorrect. With respect even to Pickle's *Charter* claims, the Respondent seems to argue the cancellation did not constitute "regulation of freedom of expression by students on University grounds" (i.e. the government program identified in *UAlberta*).[139] With respect to Widdowson's *Charter* claims, the Respondent admits *UAlberta* does not apply[140] but suggests, essentially, that this Court simply ignore Widdowson's constitutional rights[141] and not, "… on this limited evidentiary record and where it is unnecessary to do so, expand [*UAlberta*] to encompass unrelated third parties."[142] Neither is the evidentiary record limited, nor is Widdowson some "unrelated" third party – she was the direct target of the cancellation. If *UAlberta* does not confirm Widdowson's *Charter* rights, then this court must inquire into matters that, for reasons of "judicial discipline" and "judicial humility", Justice Watson, in *UAlberta,* elected not to.[143]

106. The Respondent asserts there is a "limited evidentiary record" of some "thousands of pages."[144] The applicants have assembled a thorough evidentiary record sufficient to demonstrate UofL is governmental in nature, pursues governmental objectives, is subject to a high degree of regular and routine government control, and delivers a number of government programs. These records consist largely of "legislative fact" evidence which is in UofL's possession or control or is readily available to it. That UofL chose not to turn its mind to the *Charter*, or to populate the CRP with these same records, renders its CRP deficient: it does not render the evidence deficient.

107. The UofL does not dispute the facts proven by the evidence, it just ignores them and encourages this Court to follow suit. It simply states, with no analysis whatsoever: "There is no evidence that the government exercises 'routine or regular control' …"[145]

108. Even if it were determined that courts were forevermore bound to the outcome of the *University Cases*, regardless of the "manner in which they are presently organized and governed", *stare decisis* is "not a straitjacket that condemns the law to *stasis*." Applying a "high threshold," a court may reconsider binding precedent where:

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[138] Respondent's Brief, para 6.
[139] Respondent's Brief, para 100 and 112.
[140] Respondent's Brief, para 7.
[141] Respondent's Brief, paras 6 and 100.
[142] Respondent's Brief, para 7, 49 and 74.
[143] *UAlberta*, para 145.
[144] Respondent's Brief, para 49.
[145] Respondent's Brief, para 138.

a. a new legal issue is raised – including arguments not raised in the precedent (much of the applicants' legal arguments are not addressed in the *University Cases*, whatever may have been "in the minds"[146] of the Justices); or

b. there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" – as opposed to merely an "alternative analysis of existing evidence" (the applicants' evidence demonstrates a significant shift in the relationship between the UofL and government as compared to the University of Guelph in 1990).[147]

109. The Respondent also claims the applicants rely heavily on the principles raised by Justice Wilson in dissent in *McKinney*.[148] That is false. The applicants rely on the principles set-out by the majority which were also applied by Justice Wilson. The disagreement between the majority and dissent was largely one of application. Wilson's judgment is only quoted by the Applicant for her useful discussion of various s. 32 categories.[149] It is true, however, that the applicants seek the same outcome as Justice Wilson's dissenting opinion: with respect to a different party, at a different time, and on different evidence.

110. The Respondent states, "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…"[150] While that may be technically true, neither did Justice Paperny find the university was not part of government. Rather, her judgment proceeded along the lines of *Eldridge*, looking for "specific activities where it can fairly be said that the decision is that of the government."[151] She found that:

> *"Applying the Eldridge analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion."*[152]

111. It should also be noted that the Justice rendered her decision on the basis of the *PSLA* and the student calendar alone. Had Justice Paperny the benefit of the evidence now before this

[146] Respondent's Brief, para 143.
[147] Applicants' Brief, para 114.
[148] Respondent's Brief, para 9.
[149] Applicants' Brief, para 54.
[150] Respondent's Brief, para 138.
[151] *Pridgen*, para 66 – 67.
[152] *Pridgen*, para 105.

honourable Court, and had it been argued, she may likewise have held that, "applying the *McKinney* analysis to the facts of this case is another possible approach."

112. The Respondent states that, if the UofL is not "government" in nature, it may still be subject to the *Charter* in connection with "inherently governmental" action which are "compulsive power of statute."[153] Neither is "statutory compulsion" an argument advanced by the applicants nor is it relevant to an *Eldridge* analysis.

113. Contrary to paragraph 142 of the Respondents' Brief, *Lobo v. Carleton University*, 2012 ONCA 498 ("***Lobo CA***") was not decided on evidence, but was a decision relating purely to pleadings.[154] In any case, it relates to a different university subject to a different regulatory regime.

114. Contrary to paragraph 144 of the Respondents' Brief, courts have not found that "management of university campuses … is not a 'specific government policy or program." The court in *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 ("***UVic***") found, rather, that the mere fact that a decision had been made pursuant to a power granted under the constating legislation was insufficient to attract *Charter* scrutiny.[155] The applicants' evidence and arguments go far beyond the mere fact of statutory power. The Court should be cautious applying *UVic* (which is not binding) for reasons, including primarily, that the applicants in that case advanced no argument or evidence to distinguish the *University Cases*.[156] In addition, as shown in the Respondent's Brief,[157] *UVic* relied, in part, on the absence of an express government mandate to protect free speech whereas, on these facts, that mandate is clear.[158]

115. Regarding the "precisely defined connection" element of the *Eldridge* test, the Respondent argues that the "process of booking rooms for events is not a government policy or program."[159] That is a *non-sequitur*. The applicants do not argue the relevant policy or program is "booking rooms for events." The applicants demonstrate, rather, that UofL is delivering government programs when it, "… operates campus for the benefit of students and the public, … delivers university education, [and] … ensures an environment conducive

[153] Respondent's Brief, para 139.
[154] Applicants' Brief, para 109 to 111.
[155] *UVic*, paras 23 to 25.
[156] Applicants' Brief, para 112.
[157] Respondent's Brief, para 147; quoting *UVic*, para 51.
[158] See Applicants' Brief, paras 219 – 236.
[159] Respondent's Brief, para 149.

to free inquiry."[160] *Eldridge* demands a direct and precisely-defined connection between the government program and the impugned conduct.[161] The impugned conduct is the cancellation. There is a razor-sharp connection between UofL's government programs, for example, "ensuring an environment conducive to free inquire", and its Decision to cancel free inquiry.[162]

ii. Section 2(a)

116. The Respondent offers no argument that Pickle's *Charter* s. 2(a) and 2(c) rights were not infringed – it only argues the decision to infringe his s. 2(b) rights (if he has any) was reasonable.[163]

117. The Respondent offers no argument that Widdowson's *Charter* s. 2(c) rights were not infringed and no argument that any infringement of her *Charter* rights were reasonable – it only argues Widdowson has no s. 2(b) rights and, if she did, that they were not engaged.[164]

118. Provided Widdowson establishes an infringement of her *Charter* rights, the Respondent has, by necessity, failed to meet its onus under s. 1 of the *Charter*.

119. The Respondents asserts that Widdowson claims a positive s. 2(b) right pursuant to *Baier v Alberta*, 2007 SCC 31 ("***Baier***"). That is incorrect. *Baier* has no application.

120. A positive s. 2(b) right claim is made where, due to underinclusive legislation or action, an applicant does not have access to a given platform.[165] A negative s. 2(b) right claim is made where an applicant seeks relief from government coercion or constraint.[166] Widdowson had access to the platform.[167] Her access was terminated by the cancellation – an exercise of government constraint. Stated simply, had the UofL done nothing there would have been no *Charter* violation.

121. There is another significant factor that characterizes Widdowson's *Charter* claim as negative. Content restrictions are negative rights claims:

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[160] Applicants' Brief, para 241.
[161] Applicants' Brief, para 99.
[162] Applicants' Brief, para 251.
[163] Respondent's Brief, paras 112 - 116.
[164] Respondent's Brief, paras 117 - 129.
[165] *Baier*, para 26.
[166] *Baier*, para 25, quoting
[167] Viminitz Affidavit, para 12, Booking Policy, s. 2.1 (Viminitz Affidavit, Exhibit "B") and Respondent's Brief, para 5: "… Booking Policy … As a student and an invited speaker, these policies applied to both Pickle and Widdowson."

> *"Expressive activity is in issue, although what is restricted is the platform on which that expression may take place rather than the content of the expression."*[168]

122. As later stated by Justice Deschamps:

> *Care must be taken not to confuse the notion of an underinclusive platform for expression with government limits on the content of expression.*[169]

123. As also stated in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, ("***Irwin***"):[170]

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

124. The cancellation unequivocally related to content: Widdowson's "views."

125. It is important, therefore, to be especially aware of the misstatement at paragraph 1 of the Respondents' brief. The applicants do not "… apply for judicial review of a decision … to permit Paul Viminitz … to book a room."

126. Even if *Baier* did apply, Widdowson meets the test. A "positive" rights claimant can demonstrate a breach either by demonstrating "substantial interference" or by demonstrating that government "had the purpose of interfering with freedom of expression."[171] This was clearly UofL's purpose. The Event was cancelled because:

> *"… assertions that seek to minimize the significant and detrimental impact of Canada's residential school system are harmful." [emphasis added]*[172]

127. Further, the Respondent's arguments that UofL did not "substantially interfere" with Widdowson's freedom of expression are wrong in significant respects.

128. The Respondent's claims that Widdowson "gave portions of her talk" and remained able to "convey the expressive content of the Event" are totally at odds with the evidence. Widdowson was able to engage "briefly in a rational conversation with a single protester."[173] About what? That conversation was terminated notwithstanding the man's plea to the

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[168] *Baier*, para 33.
[169] *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, para 32.
[170] *Irwin,* para 50.
[171] *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, para 25.
[172] CRP000002.
[173] Widdowson Affidavit, para 41.

crowd: "when you silence her you silence me".[174] To whom, then, has the Respondent proven Widdowson was “able to convey” the message of her Event? The Respondent’s professor of English, Jay Gamble, at least understood the nature of the protest:

> *Drummed the fuck out on her ear.*[175]

129. The argument that the “… Atrium … is well suited to the exercise of free expression”[176] is also a *non sequiter*. That the Atrium is well suited to expression does not mean that people can well express themselves there. As it turns out, the Atrium, when filled with a raucous mob of cancellers, is hostile to the exercise of free expression.

130. That the UofL took no steps to cancel the in-class lectures[177] is equally irrelevant. They related to a different topic and were to a different audience. Further, as discussed above, the UofL only failed to cancel those lectures because it did not think it had the power to do.[178]

iii. An Anemic Conception of Charter Rights

131. In connection with its s. 2(a) argument, the Respondent (and, it must be remembered, the tribunal to whom it requests this court remit the reconsideration of the applicant’s *Charter* rights) makes the follow arguments.

132. First, UofL argues that, having been:

a. publicly vilified by UofL representatives including the university’s own president as holding “abhorrent,” harmful, dangerous, and non-evidence-based views;[179]

b. permanently and personally cancelled by the UofL;

c. run off campus by a mob which was later praised[180] by UofL faculty and administration, including its president,

Widdowson has no constitutional complaint because, after all, she could still go away and talk to someone.[181]

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[174] Pickle Affidavit, para 18.
[175] Widdowson Affidavit, para 44.b. and Exhibit “T”
[176] Respondent’s Brief, para 128.
[177] Respondent’s Brief, para 128.
[178] See above at para 38 and 39.
[179] CRP000006 and CRP000055.
[180] Widdowson Affidavit, Exhibit “S”.
[181] Respondent’s Brief, para 128.

133. That is totally inconsistent with the purpose and intent of the *Charter*:

> *"The interpretation should be … a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."*[182]

134. There was little else the UofL was capable of doing to "substantially interfere" with Widdowson's freedom of expression than it did – without bothering itself with any specific or evidence it chose to join the broad campaign of cancellation against Widdowson that has been ongoing since 2020.[183] It should be noted, parenthetically, that Widdowson's termination by Mount Royal University has recently been determined by a labour arbitrator to have been improper.[184]

135. Second, the Respondent argues, incredibly, that it is actually the applicants who are hostile to free speech because they objected to the Atrium cancel mob:

> *"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."*[185]

136. There are serious evidentiary and constitutional errors apparent in this argument.

137. In connection with the evidence, the Respondent fails to recognize that it, still, does not know what the applicants' purported "expressive interests" were. While the record is replete with accusations that Widdowson was a "racist", was a "residential school denier", and had said or wished to say any number of terrible things, only professor Victor Rodych appears to have noticed that there were no specifics or proof of any of it.[186] The UofL claims that Widdowson's and Pickle's "expressive interests" were contrary to the mob, based on pure accusation and speculation.

138. In fairness, one evidenced contrary "expressive interest" was apparent: the applicants' interest in free expression and the mob's antipathy to it.

139. Also, in connection with the evidence, the assertion that the applicants are "complaining about others exerting their expressive interests" is baseless. The applicants have no

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[182] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para 118.
[183] Widdowson Affidavit, paras 12, 13 and 14.
[184] *Board of Governors of Mount Royal University v. Mount Royal Faculty Association*, 2024 CanLII 68666 (AB GAA)
[185] Respondent's Brief, para 129, see also para 43.
[186] CRP000100.

complaint, and both actively support, including through bringing this application, the right of Canadians to express dissenting viewpoints. The applicants are "complaining" about censorship.

140. The Respondent's constitutional error in this argument is a fundamental misunderstanding of the nature of the *Charter* s. 2(b) guarantee. The s. 2(b) guarantee categorically excludes suppressive "expression" like violence or (where impugned conduct is a Charter infringement in effect) expression which, "undermines the principles and values upon which freedom of expression is based."[187] The *Charter* does not guarantee the right to censor.

141. That censorship might be accomplished by the expressive means of shouting obscenities, drumming, or random noise on a pulled-too-close-amplified-electric-guitar,[188] does not transform censorship into a protected constitutional right.

142. That the UofL apparently misunderstands this nuance is perplexing, because the exact same concept is infused throughout its policies including the Statement on Free Expression itself:

> *"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 … It is for individual members of the university community … 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 … 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."*[189]

[187] *R v. Keegstra*, [1990] 3 S.C.R. 697, para 33 and 34.
[188] Pickle Affidavit, para 17.
[189] CRP000004.

E. Doré Reasonableness Review

i. Inquiring into Weight

143. The Respondent quotes both *Vavilov* and *CSFTNO* for the rule that, "…absent exceptional circumstances, a reviewing court must not reweigh the evidence before the decision-maker or conduct a *de novo* analysis of the issues."[190]

144. This rule is not applicable for two reasons.

145. First[191] as stated by the court in *CFSTNO*:

> *"On the other hand, the Doré approach requires reviewing courts to inquire into the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted by the decision maker."*[192]

146. Second, the UofL, in fact, neither weighed the evidence, nor attempted to balance the weight of that evidence against the weight of appropriate countervailing evidence and objectives.

1. The Respondent Failed to Weigh the Evidence in Favour of Censorship

147. By "weight" the court is referring, *inter alia*, to the tribunals assessment and evaluation of the evidence before it.[193]

148. As discussed above in Sections II.B.iii. (Not Cancelled for "Real Risks" from Protest) the Respondent had allegedly formed the opinion that a protest posed some "real risk of physical safety" but then entirely failed to conduct any kind of hazard assessment or evaluation. It did nothing to determine, for example:

a. Its reality - whether the risk was even "real." Anyone can imagine a protest becoming violent, but one can equally imagine a protest not becoming violent. Imagining it would become violent doesn't make the risk "real". What makes the risk "real" is substantial evidence that violence is likely. Is there a history of violence on campus? Have threats of violence been made? Is there some reason to believe that the attendees of the Event would become violent when passing a peaceful protest? The Respondent asked

[190] Respondent's Brief, para 71.
[191] As acknowledge by the Respondent in the next paragraph: Respondent's Brief, para 72.
[192] *CFSTNO*, para 72.
[193] *Vavilov*, para 125.

no such questions. The claim that the risk of violence was "real" is entirely speculative, and the Respondent was (and remains) satisfied to leave it at that.

b. Its likelihood - if the risk was "real," how likely it was. Was a history of violent protest on campus one in which a rogue few would become violent, or was there a history of organized mass violence? If there was a threat of violence, was it from one or many people? Was it from known individuals? Was it vague (for example, "we must counter this violence with violence") or specific (for example, "everyone please come, wearing masks and bring projectiles")? The Respondent did nothing to quantify the likelihood of the risk in this manner.

c. Its nature and gravity - if there was a real and likely risk to physical safety, what was the nature and gravity of that risk? Was there a bomb threat that could kill hundreds or was the only "real risk" that a single person with limited vision in the crowd might fall, or knock into someone else, or accidentally take the corner of a protest sign to the eye? A very high likelihood of a minor injury is of little "weight." Again, the Respondent did nothing to understand the nature or gravity of this purported risk.

d. Its mitigation - if there was a real, likely and substantial risk to physical safety, understanding its nature, what could be reasonably done to mitigate that risk? Could a known individual could be contacted, expelled or charged and arrested for uttering threats? Could a student or faculty group that had threatened violence be sanctioned or warned? Could the protest be moved from, as planned, inside Anderson Hall and completely surrounding the Event[194] to a more remote location, like outside, or in an adjacent building, or in the Atrium, a location "well suited to the exercise of free expression."[195] The Respondent completely failed to consider risk mitigation. Of course, how could it? The Respondent knew nothing of the risk.

149. Simply put, when UofL's Vice-Provost, Indigenous Relations claimed Widdowson's presence on campus posed a threat to "the lives of 500 plus Indigenous students,"[196] UofL did nothing to determine whether that was, as seems obvious, hyperbolic conjecture.

150. Given the Respondent's complete failure to quantify or quality purported physical risk, it had no rational basis upon which it could assign weight to that risk in the balance. The

[194] CRP000130.
[195] Respondents' Brief, para 129.
[196] CRP000066.

Respondent's assignment of weight to physical risk could, therefore, only have been arbitrary.

151. While:

a. in its argument, the Respondent claims to have conducted a "… careful balancing of the importance of free expression, and the countervailing interests including safety on campus;"[197] and

b. throughout the CRP, Mahon likewise claimed to have conducted an "assessment" to achieve a "critical balance"[198]

the assignment of weight to factors on an arbitrary basis renders the "proportionate balancing" of *Charter* rights demanded by *Doré* impossible.

152. The above paragraphs (to) relate to the purported physical risk arising from the proposed protest. However, the same observation applies to every other risk and harm which may have been weighed by the Respondent in favour of cancellation.

153. The Respondent received numerous objections to Widdowson's presence on campus on the basis it would harm students psychologically[199], including triggering inter-generational trauma.[200] And yet, it did nothing to understand whether that harm was real, likely, or widespread. It did nothing to understand its nature or gravity. It did nothing to understand how it might, therefore, have been reasonably mitigated.

154. It is useful to compare the Respondent's complete failure to identify and understand any "psychosocial" hazards, with the obligations cited by the Respondent itself at footnote 192 of the Respondent's Brief – the Government of Alberta's "Assessment and control of psychosocial hazards in the workplace" (a copy of which is attached hereto as Appendix "A" for reference). Where the employer identifies a "psychosocial hazard", the resources confirm:

> *"… employers are required to assess a work site and identify existing and potential hazards. Employers should identify any existing or potential hazards for each task at a work site … An employer must prepare a report of the results of the hazard assessment and the methods used to control or eliminate the hazards. …*

[197] Respondents' Brief, para 112.
[198] CRP000047.
[199] Respondent's Brief, para 92.
[200] For example, CRP000033 and CRP000066.

> *… the next step is to take measures to eliminate each hazard or, if elimination is not reasonably practicable, to control the hazard …*
>
> *In situations where it is not reasonably practicable to eliminate a psychosocial hazard, they need to be controlled. Controlling hazards … involves an OHS concept called the "hierarchy of controls". In this hierarchy, engineering controls … are preferred … if these are not sufficient, administrative controls (policies, procedures, or training) are implemented. If neither of these types of controls are sufficient to control the hazard, personal protective equipment (PPE) needs to be used."*
>
> *…*
>
> *… most psychosocial hazards can't be controlled using PPE … but there are some things that can protect psychological health and safety. For example … a personal alarm system or privacy barriers … individuals can find ways to manage their stress levels and increase their mental fitness, such as yoga, meditation, or talking with trusted friends. Employers can provide and promote wellness programs, coping skills seminars, and sessions to develop skills such as communication skills …"*

155. The Respondent did nothing to identify, understand, or properly mitigate alleged psychosocial hazards. Instead, it received a number of complaints vaguely and variously alleging Psychological Harms, did nothing to understand them including whether they were real or how they might be mitigated, and jumped straight to cancellation.

156. The Respondent's Brief doubles-down on the uncertainty as to the very nature of the purported psychosocial harms. At paragraph 92 it asserts an obligation under *OHSA* to ensure campus would be psychologically safe – including those in the Event's "vicinity." The Respondent seems to be suggesting, then, that people are more likely to experience a psychological injury the physically closer they come to campus or Anderson Hall. What is the mechanism of injury? Is the Respondents suggesting that simply laying eyes on Event attendees or Widdowson herself is more likely to trigger a psychological injury?

157. Understanding practically nothing about these remaining harms renders the Respondent's purported "careful analysis"[201] a logical impossibility - no proper *Doré* balancing could have been conducted because "balancing" would have been premised on vague, uncertain, and unserious speculation.

[201] Respondent's Brief, para 112.

158. Section 1 of the *Charter* permits the infringement of *Charter* rights where, *inter alia*, "demonstrably justified." To permit infringements, instead, on the basis of a decision maker's vague and unanalyzed speculation, is to permit the significant and arbitrary narrowing of *Charter* rights.

159. It does seem clear from the record, however, that between January 26, 2023, when Mahon communicated that UofL would not cancel the event, and January 27, 2023, when the UofL decided to cancel after all, something had changed. What changed?

160. What changed is this:

a. on January 26, 2023, the Respondent received an objection from its Indigenous Student Representative, Nathan Crow[202];

b. on January 26, 2023, Crow created an online petition with the text of this objection;[203]

c. on January 26, 2023, at 8:15 a.m. Mahon held a meeting with, *inter alia*, Leroy Little Bear (a professor in the Department of Indigenous Studies) and Mathurin-Moe (Vice Provost-Equity, Diversity, and Inclusion)[204]

d. on January 27, 2023, at 8:35 a.m. the Respondent received an objection from Vice-Provost, Indigenous Relations, Leroy Wolf Collar[205]

e. on January 27, 2023, at 8:39 a.m. the Respondent received an objection from the Department of Indigenous Studies;[206] and

f. on January 27, 2023, at 10:11 a.m. the Respondent received an objection from Associate Professor, Women & Gender Studies, Caroline Hodes;[207] and

g. on January 27, 2023, at 4:08 p.m. the Respondent received a petition to cancel the Event.[208]

161. The meeting in which the decision was made to cancel the event occurred 20 minutes later.[209]

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[202] CRP000110.
[203] Widdowson Affidavit, para 26 and Exhibit "F"; according to the CRP this was not communicated to the UofL until as late as January 30, 2023 (see CRP000132).
[204] Sexton Third Affidavit, Exhibit "Q".
[205] CRP000112.
[206] CRP000078.
[207] CRP000088.
[208] Widdowson Affidavit, para 25 and Exhibit "E"; Sexton Third Affidavit, Exhibit "Q".
[209] CRP000087.

162. While, as explained above, there was no assessment, and hence no rational weighing, of the various harms asserted within these objections, they represent a powerful volume of objections including from powerful stakeholders given the reasons for cancellation were Truth Harm and Reconciliation Harm (i.e. indigenous representatives). When he publicly announced the decision to cancel, Mahon specifically named only one stakeholder:

> *"Over the past few days … we have sought guidance from those with considerable cultural, scholarly, sectoral and legal expertise, including continuing guidance from the Vice-Provost, Indigenous Relations and others."*[210]

163. In other words, the record suggest UofL simply capitulated to demands (to avoid Truth Harm and Reconciliation Harm) in the face of a pressure campaign. Pressure, however, is irrelevant to a *Doré* analysis.

164. *Charter* rights are not upheld only when its easy - quite the opposite. *Charter* rights are most in need of protection when it is difficult.

2. The Respondent Failed to Weigh Appropriate Factors on the "Free Speech" Side of the Scale

165. As set-out in the Applicants' Brief, the Respondent entirely failed to engage in a *Charter* balancing exercise (either as to s. 2(b) rights or s. 2(c) rights), which is fatal.[211] The Respondent now claims, nonetheless, that its decision:

> *"… reflects a careful balancing of the importance of free expression, and the countervailing interests including safety on campus."*[212]

166. The record simply does not bear that out. Many factors were completely ignored and, in the result, received no weight whatsoever.

167. First, the Respondent did not consider whether the *Charter* even applied. In fact, the Respondent still maintains the position that the *Charter* has no application. This means, by logical necessity, that no weight could have been assigned to the applicants' *Charter* rights.

168. Second, if the Respondent placed Psychological Harm in the balance, it did not consider the other side of that coin: what if it was wrong? What if indigenous students were, in fact, more resilient to the presence of dissenting views on campus than the Respondent gave them

[210] CRP000002.
[211] Applicants' Brief, para 48.
[212] Respondent's Brief, para 112.

credit? Cancelling the Event would, then, have tended, unnecessarily, to undermine indigenous students' sense of resilience, agency and capability.

169. If it was wrong, the UofL improperly suggested to indigenous students (and everyone) that indigenous students were, in fact, less psychologically or emotionally capable of encountering "offensive or disagreeable" ideas than other students. Other students, after all, were expected to not only encounter highly offensive ideas but to critically engage with them while still upholding rights of free expression.[213]

170. Similarly, the Respondent clearly placed "Truth Harm" in its consideration but, again, failed to consider the possibility it was wrong. In fact, the UofL never even considered what it might be wrong about![214] Contrary to its unequivocal government mandate to operate a university amenable to free inquiry, the UofL operated not as the guardian of free inquiry in the search for truth – but as the guardian of "the truth" itself. It operated, in other words, to shield dogma from rational scrutiny.

171. More specifically, rather than facilitate the very important empirical search for the causes of massive socioeconomic disparity between indigenous and other Canadians – the objective of Widdowson's life work – it sought to supress that search. The possibility – the certainty – that important truths would go undiscovered where free inquiry is stifled was not even considered by the university, much less somehow weighed against cancellation.

172. In an ironic twist, the cancellation was the very subject matter of the Event.[215] However, the UofL failed (and still fails) to consider that Widdowson might be correct or that students might have benefitted from critically engaging with her opinion that:

> *"Censorship of dissenting opinions eliminates inquiry into, and therefore discovery and communication of, the causes of and solutions for indigenous socioeconomic disparities. Censorship, therefore, will tend to prolong and aggravate an already dire situation. For indigenous peoples, censorship, however well-meaning or virtuous, will be disastrous."*[216]

173. Third, the above observations relate to UofL's clear statutory objective to:

a. deliver; and

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[213] University of Lethbridge Principles of Student Citizenship at Viminitz Affidavit, Exhibit "G", and CRP000055.
[214] See above at para 138.
[215] Widdowson Affidavit, para 19.
[216] Widdowson Brief, para 21.k.

b. improve indigenous access to and success in

a program of university education.[217]

174. The Respondent acknowledges that freedom of inquiry and expression are "pre-requisite" requirements in university education. As stated by the Alberta Court of Appeal:

> *"The education of students largely by means of free expression is the core purpose of the University."*[218]

175. While students might be admitted to an institution labelled "university", may pass classes at that institution, and may receive a parchment bearing the word "university", if the students' actual educational experience lacks free inquiry and the concomitant opportunity to develop and deploy critical thinking in the face of provocative, contrary viewpoints, students do not, in fact, receive a university education.

176. Widdowson's purported "views" related squarely to issues of critical importance to the indigenous community. Her thesis is that the economic and social progress of Canada's indigenous peoples is being suppressed by policies which tend to prolong and exacerbate indigenous isolation and dependency and by a superstructure of lawyers, advisors, and consultants.[219] According to the UofL,[220] then, indigenous students were presented with an opportunity to critically engage with views which they might find particularly engaging, challenging and relevant. However, rather than facilitate this "golden opportunity" for indigenous students, it denied them the opportunity entirely.

177. The cancellation effected, therefore, a substantial degradation, if not elimination, of the university education UofL had a government mandate to deliver to all students (including to Pickle) and especially (in the context) to indigenous students. Not only were indigenous students denied the university education promised them, more perniciously they were even encouraged to the view that they were uniquely incapable of real participation.

178. That the cancellation was related to objectives anathema to its mandate as a university is also made clear from Mahon's references to the fact that Widdowson's "abhorrent" views were

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[217] Applicants' Brief, para 240.a.
[218] *UAlberta*, para 148.
[219] Widdowson Affidavit, para 7.
[220] UofL did not, in fact, consider the intended content of the Event but seemed to operate on the assuming Widdowson was coming on to campus to make "… assertions that seek to minimize the significant and detrimental impact of Canada's residential school system …": CRP000002.

> *… in conflict with a number of values held by the University – including … Truth and Reconciliation …*[221]

179. The Respondent's mandate of university education necessitates institutional neutrality.[222]

180. Fourth, the CRP contains virtually no evidence and contains absolutely no consideration as to Widdowson's, Pickle's, or any interested attendee's individual circumstances. The Respondent can not have "carefully balanced" countervailing interests against Widdowson's or Pickle's *Charter* rights without knowing some basic facts like, for example, what Widdowson intended to discuss.

181. The Respondent asserts a countervailing interest of prohibiting certain illegal or unsafe expression.[223] And yet, the Respondent had no evidence as to the content of Widdowson's desired expression, much less that it was illegal or somehow unsafe. The Respondent seemed, instead, to have either completely misapprehended what Widdowson intended to discuss or (more likely) to have considered the actual content of her talk irrelevant to the "countervailing interests."

182. The Respondent clearly sought to mitigate "Truth Harm" but did not know what Widdowson intended to say, had said in the past, or whether any of it was false.

183. The Respondent now claims there was no "substantial interference" with Widdowson's s. 2(b) rights because Widdowson was able to later conduct the Event by Zoom.[224] But the Respondent had no evidence that this was planned or possible, and no evidence as to whether all attendees were able to attend to the Zoom lecture (Pickle was not).[225]

184. *Doré* demands that a decision maker balance the "severity of the interference of the *Charter* protection with the statutory objectives."[226] Knowing nothing of Widdowson's, Pickle's, or any interested attendee's individual circumstances, the UofL could not rationally assess the severity of the interference.

185. Fifth, the Respondent also entirely failed in its decision and still in its brief to even consider the applicants' s. 2(c) *Charter* right of assembly.

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[221] CRP000055.
[222] Applicants' Brief, para 27.
[223] Respondent's Brief, para 90, 112.
[224] Respondent's Brief, para 128.
[225] Pickle Affidavit, para 20.
[226] *Doré,* para 56.

186. The Respondent's failure to consider, much less weigh, factors relevant to valid statutory objectives represents a failure to conduct the balancing necessary under *Doré*.

3. The Respondent Failed to Link "Countervailing Interests" to any Valid Statutory Objectives

187. The Respondent repeatedly claims to have weighed, "competing interests"[227] and "countervailing interests."[228]

188. As discussed above, there remains significant uncertainty as which competing interests were weighed – certainly an interest to avoid Truth Harm and Reconciliation Harm was considered, and perhaps also an interest to avoid Psychological Harm, Emotional Harm, Erasure Harm, etc.

189. However, *Doré* does not call for a balancing of "interests." It calls for the balancing of statutory objectives.[229] A delegate has no right whatsoever to infringe *Charter* rights to accommodate "competing interests." In fact, a delegate has no legal right to pursue any objective outside of its statutory mandate.[230]

190. Because the Respondent's asserted "competing interests" remain broadly undefined and uncertain[231] it is not possible to link these interests to valid statutory objectives.

191. Regardless, to some extent the Respondent does assert links to claimed statutory objectives.

192. The Respondent asserts a statutory obligation under *OHSA* to "ensure, as far as it is reasonably practicable" the "health, safety and welfare" of workers and others." Given the arguments above,[232] the Respondents have failed to establish even that OHSA was engaged and have certainly not established that the cancellation was a reasonable or practicable means of controlling that risk. In the event this asserted obligation under *OHSA* has any bearing on the *Doré* analysis, the applicants challenge the constitutionality of *OHSA* as set out in Section II.G. (Application to Strike OHSA).

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[227] Respondent's Brief, para 5, 6 and 29, 153.
[228] Respondent's Brief, para 112 and 154.
[229] *Doré*, para 55 to 56.
[230] *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), para 48.
[231] See Section II.B.iii (Not Cancelled for "Real Risks" from Protest) and II.B.iv (What Harms Actually Lead to Cancellation?).
[232] See Sections II.B.iii (Not Cancelled for "Real Risks" from Protest), II.B.iv (What Weights Were Placed on the "Cancel" Side of the Scale?), and II.E.viii. (Inquiring into Weight)

193. The Respondent also asserts a statutory objective under its Statement on Free Expression. However, it is difficult to discern from the CRP and the Respondent's Brief exactly how the cancellation was "rooted in its Statement on Free Expression."[233] In particular, was this statutory objective balanced against or in favour of expressive rights?

194. As noted in the Applicants' Brief,[234] in its January 26, 2023, communication the UofL summarized the "University's position regarding free expression" which was grossly inconsistent with its government-mandated Statement on Free Expression. The Statement on Free Expression is, in fact, not tempered with the UofL's allegiance to "the tenets of equity, diversity and inclusion and … commit[ment] to meeting the Truth and Reconciliation Commission's Calls to Action."

195. Similarly, on January 27, 2023, Mahon stated, in connection with the decision to cancel, that:

> *"Our Free Speach 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."*[235] *[emphasis added]*

196. Additionally, the Statement on Free Expression does not exempt from protection things likely to cause generalized "harm." Rather, it only excludes from protection expression which is illegal. To the extent "harm" means something other than "illegal," the Respondent weighs against free expression something which is outside of the putative statutory objective.

197. Mahon appears to have relied on the Statement on Free Expression's (purported or actual) exceptions as "countervailing" statutory objectives. The Statement on Free Expression is treated, therefore and somewhat perversely, as a statutory objective weighing against free expression.

198. In his January 30, 2023, public statement Mahon stated:

> *"Our statement [on free expression] acknowledges the University must be able to reasonably regulate the use of facilities, time, place and manner of expression." [emphasis added]*

[233] Respondent's Brief, para 36.
[234] Applicants' Brief, para 27.e.
[235] CRP000003.

199. The Respondent, therefore, perceives its "time, place and manner" rights under the Statement on Free Expression as, both, a right to cancel (rather than regulate) expression, and therefore and perversely, another "countervailing" statutory objective auguring against free expression.

200. The Respondent clearly misinterprets the purpose of its right to "regulate." The Statement on Free Expression states:

> *"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." [emphasis added]*[236]

201. The time, place and manner regulation rights are for the purpose of facilitating the university's mandate of free inquiry. However, the Respondent relied on these rights for the opposite purpose: supressing free inquiry. Further, the Respondent relied on the right to "regulate" the "time, place and manner" of expression to entirely cancel expression. As stated in the Applicants' Brief,[237] UofL misused this right to "regulate" to declare:

> *"Not ever. Not here. Not her."*

202. In the Respondent's Brief the Statement on Free Expression is treated in a similarly ambivalent fashion – as a statutory objective weighing, alternately, in favour of expression and in favour of cancellation.[238]

203. As explained above[239] the only countervailing interests the UofL unambiguously weighing against expressive rights were the interests of avoiding Truth Harms and Reconciliation Harms. Nowhere in the record, however, is there any indication these interests are statutory objectives.

204. Given the centrality of these "countervailing interests" to the cancellation Decision, the absence of any argument about them in the Respondent's Brief is conspicuous. The Respondent merely asserts:

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[236] CRP000005.
[237] Para 37.
[238] Respondent's Brief, paras 37 to 40, 89, 90, 91, 94, and 112.
[239] Section II.B.iii. (Not Cancelled for "Real Risks" from Protest) and II.B.iv. (What Harms Actually Lead to Cancellation?).

"… it was clear to the University that the "harm associated with this talk is an impediment to meaningful reconciliation".[240]

205. In connection with Truth Harm and Reconciliation Harm, the Respondent offers no applicable statutory objectives and offers no argument such statutory objectives were reasonably balanced.

206. Critically, the Respondent offers no argument as to the central question: if "truth and reconciliation" demands that a university insulate, both, settled truths and indigenous students from free inquiry, how can that be reconciled with the UofL's clear statutory mandate to deliver university education – including to indigenous students?

ii. Charter Rights Were Not Best Protected

207. Because the UofL:

a. entirely failed to consider the *Charter* (and maintains in its brief that the *Charter* has no application);

b. failed to consider all relevant statutory objectives;

c. improperly treated various "countervailing interests" as if they were valid statutory objectives; and

d. failed to assess and thereby rationally weigh evidence (and ultimately appears to have cancelled the Event in an act of capitulation to a pressure campaign).

an inquiry into whether it nonetheless reasonably determined how to "best protect" *Charter* rights is academic – an internally coherent and rational chain of analysis[241] is entirely lacking.

208. Regardless, the Respondent asserts that freedom of expression was limited in a "minimally intrusive manner" because, although it cancelled one thing (the Event), it did not cancel or interfere with something else (the in-class lectures and Widdowson's attempts to speak in the Atrium).[242]

209. The UofL's purported "non-interference" with the in-class lectures and Widdowson's attempts to speak in the Atrium are irrelevant to the *Doré* analysis.[243] The question at issue

[240] Respondent's Brief, para 96.
[241] *Vavilov*, para 85.
[242] Respondent's Brief, para 8, 112 – 114, 128, 155.
[243] See above at para 38, 39 and 130.

in this application is whether the cancellation of the Event was reasonable under *Doré*, not whether UofL passed-up on other opportunities to infringe Widdowson's *Charter* rights.

210. However, even on a *de novo* review (the only review possible without sufficient reasons), the UofL's arguments very clearly fail to meet its burden to prove the adequate protection of *Charter* rights.

211. As a starting point, because the Respondent has still not:

a. clarified what exactly the "countervailing interests" were;

b. shown they were real or likely;

c. explained their nature including how they might be mitigated;

d. shown to what valid statutory objectives they relate; or

e. acknowledged even the possibility either applicant has s. 2(c) rights or that Widdowson enjoys 2(b) rights,

it can not, by definition, meet its burden under *Doré.* Its argument is missing the essential fundamentals of a proper *Doré* analysis.

212. As to the insufficient arguments nonetheless advanced by the Respondent, they are unconvincing.

213. The Respondent cancelled the Event and, in doing so, cancelled Widdowson personally and permanently from any booked space on campus whatever she might want to talk about. It is difficult to imagine a more thorough cancellation of the Event.

214. The Respondent's assertion that it did not attempt to interfere with the in-class lectures[244] is plainly false.

215. The UofL had already (without a shred of evidence) publicly maligned Widdowson's views as "abhorrent", contradictory to truth and reconciliation, and not evidence based.[245] It also encouraged students to the view that Widdowson's views were so toxic students might require medical intervention – just from hearing about her.[246] Hence, the UofL discouraged student attendance as misleading, dangerous and immoral.

[244] Respondent's Brief, para 114.
[245] CRP000055.
[246] CRP000055.

216. The UofL promoted "a concurrent evidence-based counter-lecture"[247] which "debunks the perspective you disagree with"[248] [emphasis added] (i.e. which "confirms rather than challenges your pre-conceived notions") referencing a talk by Sean Carleton, "Truth before Reconciliation: How to Identify and Confront Residential School Denialism." Parenthetically, and contrary to the assertion it was evidence-based, the talk would:

> *"… historiciz[e] and theoriz[e] the role of denialism in colonial settings to argue that speech acts such as Beyak's can be understood as a discursive strategy used by colonizers to legitimize and defend their material power, privilege, and profit."*[249]

In other words, the talk was to be a study in *ad hominem*. This promoted counter-lecture was held at the same time as the Event.

217. This all constitutes encouragement (including social pressure), therefore, to not attend the Event.

218. The Respondent's other assertion that, in connection with Widdowson's attempts to speak in the Atrium:

> *"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"*

is outrageous. When, on January 31, 2023, municipal police contacted Nolan Meyer, UofL's Emergency and Security Services Manager, Meyer told police:

> *"Security has been advised not to engage either Viminitz or Widdowson to try and better understand their expectations related to safety or their safety concerns."*

219. The UofL was also aware Ms. Bhatt had requested permission to protest Widdowson's presence on campus with a specific request that protesters be immune from discipline.[250] UofL knew Bhatt's intention was, therefore, to engage in misconduct. Obviously, the specific misconduct Bhatt anticipated was some form of censorship – a violation of the Statement on Free Expression and Principles of Student Citizenship. Armed with this knowledge, UofL appears to have, both, granted permission for the protest and to have waived discipline. Approving and condoning a cancel mob is interference.

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[247] CRP000010, CRP000030,
[248] CRP000108.
[249] CRP000011.
[250] See above at para 27.

220. More broadly, the Respondent's "minimally intrusive" argument reflects an improper understanding of the balancing exercise required by *Doré*. The test is not: was the infringement less than maximum?

221. The test is, rather, whether there were options reasonably open to the decision-maker that would reduce the impact on the protected rights while sufficiently furthering relevant objectives.[251] Balancing is a nuanced exercise.

222. It required the Respondent to consider, in connection only with relevant statutory objectives, how exactly such objectives might be furthered. For example, to the extent the Respondent sought to advance the statutory objective of physical safety, it had to identify options available to advance that objective. It could only do so if it understood the risk's likelihood, nature, gravity, and potential means of mitigation. But the Respondent did not know or consider these details and, hence, had no way of knowing what options were open to it, much less whether they "sufficiently" advanced physical safety.

223. To the extent the Respondent sought to avoid Truth Harm, it had to determine whether that was consistent with a valid statutory objective and, if so, whether the objective of advancing "truth" was furthered by stifling or facilitating free inquiry. It also had to determine what purportedly false statements were made and whether they were false. The UofL did none of this.

224. The balancing exercise likewise required consideration of whether the *Charter* applied, the specific *Charter* right which applied, and how, in the context, they might be protected. The Respondent entirely failed even to consider the *Charter* (and still claims it is entirely irrelevant). In its brief it continues to claim the cancellation did not "substantially interfere" with Widdowson's expression rights because, *inter alia*, she gave a Zoom lecture, while failing anywhere in the record or in its brief to consider whether a Zoom lecture satisfies the applicants' democratic right of physical assembly.[252]

225. While it is difficult to discern which "harms" UofL thought it was mitigating with its cancellation[253] it likewise failed to consider any of the details of those harms; the means to

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[251] *CFSTNO*, para 72.
[252] See *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, 1994 CanLII 3453 (FCA), para. 50.
[253] See above at Section (or any other valid statutory objective that may have been related to whatever "harms" the UofL sought to avoid). II.B.iii. (Not Cancelled for "Real Risks" from Protest) and II.B.iv. (What Harms Actually Lead to Cancellation?).

mitigate such harms; whether mitigation was consistent with valid statutory objectives; whether the *Charter* applied; the nature and severity of *Charter* infringement; and etc.

226. In no meaningful sense has the UofL proven a minimal interference with *Charter* rights.

F. Application to Admit Evidence

227. Pursuant to *Rule* 3.22(b.1), affidavit evidence is permissible in a judicial reviews where relief is claimed other than an order in the nature of *certiorari* or an order to set aside a decision or act. The *Rule* 3.22(b.1) exception was created to eliminate the need to request permission to file an affidavit in judicial reviews which were not limited to a review of the record.[254] In *Oleynik*, the court noted that *Rule* 3.22 "…as originally drafted, contemplated applications for orders in the nature of *certiorari* quashing decisions of tribunals."

228. As the within application does not seek the remedy of *certiorari*, and is not a judicial review which is or can be limited to a review of "the record", *Rule* 3.22(b.1) permits the admission of affidavit evidence.

229. In the alternative, and in an abundance of caution, the applicants apply (by way of amended notice of application for judicial review) to have the following affidavits admitted pursuant to *Rule* 3.22(d):

a. the Viminitz Affidavit;

b. the Pickle Affidavit;

c. the Widdowson Affidavit;

d. the First Sexton Affidavit;

e. the Second Sexton Affidavit;

f. the Third Sexton Affidavit; and

g. a second affidavit from the applicant, Viminitz, should it be necessary.[255]

(the "**Affidavits**")

230. The Affidavits contain 4 broad categories of evidence and records:

a. evidence and records relevant to a Charter s. 32 analysis ("**Legislative Fact Evidence**");

[254] *Oleynik v University of Calgary*, 2023 ABCA 265, para 8.
[255] See below at para 274.d

b. evidence and records otherwise relevant to the applicants' Charter claims ("**Charter Breach Evidence**");

c. records improperly excluded from the CRP ("**Missing Records**") [FN: See above at para]; and

d. records which are reproduced in the CRP.

231. *Rule* 3.22(d) provides that the Court may permit any other evidence in a judicial review. The Applicants submit, essentially, that the CRP is incomplete, and that the Affidavits are required to provide this Court with a full evidentiary record necessary to determine the issues in dispute.

232. That admission of the evidence is necessary to a proper determination of the issues in this application is made obvious by the fact that:

a. the applicants make approximately 207 references to the Affidavits in the Applicants' Brief;

b. the Respondent makes approximately 22 references to the Affidavits in the Respondent's Brief (not including references for the purpose of arguing the Affidavits are not admissible, but that number (22) does not include the scores of references to the Affidavits that would have been necessary had the Respondent properly conducted a s. 32 analysis in its brief); and

c. the applicants make approximately 29 references to the Affidavits in this brief (not including the references in this section).

i. Rule 3.22(d) in Non-Typical Judicial Review

233. The evidentiary *Rules* in Part 3, Division 2, Subdivision 2 contemplate "typical judicial reviews" where the procedural record is a complete set of records submitted by participating parties to the decision maker.

234. This is obvious from the *Rules* themselves. Pursuant to *Rule* 3.18(2)(d), for example, the Respondent is required to include in the CRP, *inter alia*, all "evidence and exhibits filed with the person or body." In the case at bar, there was no hearing prior to or during which the parties (i.e. the applicants) might "file" evidence and exhibits.

235. The *Rules* also require that the Respondent include in its CRP, "anything else relevant to the decision or act in the possession of the person or body."[256] This places an onus on the Respondent where, for example, it determined the Charter has no application to it as a University (except as confirmed in *UAlberta*). The Respondent had the onus to include in the CRP records relevant to its *Charter* s. 32 analysis. Such records (the Legislative Fact Evidence) compose the vast majority of the Affidavits. The records in the Affidavits relevant to the s. 32 analysis are:

a. records authored by the Respondent and obtained from its website (for example, policies, plans, budgets, reports, calendars, and websites);

b. correspondence authored by or received by the Respondent obtained from the Minister (including letters, emails and proposals);

c. records to which the Respondent is a counterparty and obtained from the Minister or from the Respondent's website (for example, investment management agreements, grant agreements, collective agreements, other agreements and mandate and roles documents);

d. other publicly available records which evidence the regulatory scheme governing the Respondent's assets and operations and which would be well known to the UofL (i.e. legislative fact evidence).

236. Improperly, no such records are included in the CRP.

237. Caselaw recognizes that "judicial review" relates to an array of administrative decision necessitating a responsive application of the *Rules*.

238. Judicial review proceedings often do not conform to prototype: an impartial tribunal gives notice of a hearing, receives evidentiary and legal submissions from the parties, renders a decision and gives reasons, and, where a judicial review is commenced, is the subject (not respondent) of that originating application.

239. For example, *C.M. v Alberta*[257] dealt with a COVID-19 order of a Public Health Officer. The Crown respondent argued that the Public Health Officer's ("**PHO**") materials should constitute the entire record, and that affidavits submitted by the applicants were inadmissible. The Court disagreed, holding that the PHO's orders were not the product of a

[256] *Rule* 3.18(2)(e)
[257] *C.M. v Alberta*, 2022 ABKB 716 ("***CM***").

typical hearing in which evidence and arguments were made by two or more parties. Instead, the Public Health Act allowed the PHO to make orders without formal hearings and without parties. The Court held "…there is not a discrete and well-defined body of material available to the Court to assess the reasonableness of the Order. In such circumstances, it may be necessary to reconstruct the record … "[258]

240. Similarly, in *Alberta's Free Roaming Horses Society v Alberta*, 2019 ABQB 714 ("***AFRHS***"), the Court held that in cases which are not "typical judicial reviews" where there is a record of proceedings which shows materials submitted to a tribunal by affected parties, along with reasons for decision, the court can admit additional evidence. In *AFRHS*, the decision dealt with a minister's discretion, and the record of proceedings only contained an order, a briefing note and memorandum. No reasons were provided (nor were they required). In such circumstances, the Court held that the record was inadequate and the exception (no or inadequate record – see below) was satisfied.

ii. Affidavits are Admissible Under R. 3.22(d)

241. The Court of King's Bench of Alberta, in *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*[259] held that there are four instances where supplementary evidence may be admissible on judicial review:

a. to demonstrate bias or a reasonable apprehension of bias, where the facts in support of the allegation does not appear on the record;

b. to show a breach of natural justice that is not apparent on the record;

c. to deal with exceptional issues, such as standing; and

d. where a tribunal makes no, or an inadequate record of its proceedings, affidavits are allowed to show what was actually placed before the tribunal.

242. As shown above, this last exception also includes an inadequate record by virtue of the nature of the proceeding.

243. In *Syncrude v Alberta (Minister of Energy)*, 2023 ABKB 317, at paragraph 57, the court provided other circumstances where supplementary evidence is admissible, including:

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[258] *CM*, para 28.
[259] *Alberta Liquor Store Association v Alberta(Gaming and Liquor Commission)*, 2006 ABQB 904, para 41.

a. where the evidence provides necessary background and context to the judicial review application, such as explaining the operation of a complex licensing system; [260]

b. to show a complete absence of evidence before the decision maker on an essential point;[261]

c. where the evidence provides necessary background and context to a related constitutional argument under the Charter;[262]

d. in Aboriginal matters, to address useful contextual information about the termination of consultation.[263]

244. The evidence and records in the Affidavits is admissible in this framework. The Legislative Fact Evidence is admissible because:

a. the CRP is inadequate – the Respondent should have considered and included this evidence in its CRP pursuant to its obligations at Rule 3.18(2)(e));

b. it explains a highly complex regulatory scheme in which the Respondent operates and understanding the scheme is necessary to the applicants' arguments that the Respondent is controlled by government, pursues government objectives, is inherently governmental, and delivers government programs; and

c. it provides necessary background and context to the constitutional arguments.

245. The Charter Breach Evidence is admissible because it provides the necessary background and context to the constitutional arguments including evidence unique to each affiant as to the breach of their *Charter* rights.

246. The Missing Records are admissible because the CRP is inadequate and because they demonstrate bias.

G. Application to Strike OHSA

247. The Respondent states that its:

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[260] Citing *AFRHS*, paras 25 – 26.
[261] Citing *Yuill v Alberta (Workers' Compensation Appeals Commission)*, 2016 ABQB 369, paras 60 – 62.
[262] Citing *Schulte v Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2015 ABQB 17, paras 32 – 33.
[263] Citing *Cold Lake First Nation v Alberta (Tourism, Parks and Recreation)*, 2012 ABQB 579, paras 27 – 29.

"… obligations under the OH&S Act also mitigated in favour of cancelling the Event."[264]

248. However, this argument is internally inconsistent. The Respondent asserts a sort of Schrödinger's obligation: both mandatory and discretionary.

249. In reality, to "mitigate" in favour of cancelling the Event, *OHSA* must have mandated the cancellation of the Event. If *OHSA* did not mandate the cancellation of the Event, it did not "mitigate" in favour of its cancellation.

250. If the Respondent's reliance on *OHSA* is valid, therefore, the *OHSA* obligation must have been mandatory and, consequently, there is no discretionary decision to which *Doré* even applies.

251. To the extent *OHSA* is determined to have any bearing on the Decision, *OHSA* effects an infringement of the applicants' *Charter* ss. 2(b) and 2(c) rights and the applicants, therefore, request an order under s. 52 of the *Constitution Act, 1982*[265] striking down the Impugned *OHSA* Provisions (defined below).

252. In the Respondent's Brief, it cites *OHSA* s. 2(a)[266], which states:

> *"2 The purposes of this Act are*
>
> *(a) the promotion and maintenance of the highest degree of physical, psychological and social well being of workers …" [Emphasis added]*

253. The Respondent cites also s. 3(1)[267], which states, in part:

> *"3(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,*
>
> *(a) the health, safety and welfare of*
>
> *(i) workers engaged in the work of that employer,*
>
> *(ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and*

[264] Respondent's Brief, para 92.
[265] *The Constitution Act,* 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
[266] Respondent's Brief, footnote 97.
[267] Respondent's Brief, footnote 98.

(iii) other persons at or in the vicinity of the work site whose health and safety may be materially affected by identifiable and controllable hazards originating from the work site,

(b) that the workers engaged in the work of that employer are aware of their rights and duties under this Act, the regulations and the OHS Code,

(c) that none of the employer's workers are subjected to or participate in harassment or violence at the work site …"

254. The Respondent also relies[268] on the concept of "psychosocial hazards" defined by the Government of Alberta's 2022 publication: "Assessment and control of psychosocial hazards in the workplace – OHS information for worksite parties". It asserts that "harassment or traumatic events" can be "psychosocial hazards".[269]

255. The Respondent refers to the concepts of harassment and violence to support its argument that *OHSA* obligated its cancelation of the Event.[270] "Harassment" and "violence" are defined in *OHSA* as follows:

1 In this Act,

…

(n) "harassment" means any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker's health and safety, and includes

(i) conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression and sexual orientation, and

(ii) a sexual solicitation or advance,

but excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site;

…

[268] Respondent's Brief at footnote 192, citing Government of Alberta, "Assessment and control of psychosocial hazards in the workplace", (BP024) (September 2022).
[269] Respondent's Brief at para 92.
[270] Respondent's Brief, para 92 and footnote 202.

(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;

256. The Respondent's argument appears to be that the Event was a "psychosocial hazard" that *OHSA* obligated it to "identify and eliminate".

257. The applicants expressly deny that the Event constituted a psychosocial hazard, that the Decision was based on any perception by the Respondent that it constituted a psychosocial hazard, or that *OHSA* obligated the Respondent to eliminate or control the Event in any fashion.

258. In the alternative, the *OHSA* provisions cited above and relied on by the Respondent, specifically:

a. the words "psychological and social" in section 2(1);

b. the word "harassment" in section 3(1)(c);

c. the definition of "harassment" in section 1; and,

d. the word "psychological" in the definition of "violence" in section 1;

(the "**Impugned OHSA Provisions**") effect a breach of both ss. 2(b) and 2(c) of the *Charter*.

259. If the Respondent's reliance on *OHSA*, including the Impugned OHSA Provisions, is valid, *OHSA* obligated it to cancel the Event, an expressive and peaceful gathering in Anderson Hall, to ensure that University employees and those in the vicinity were "psychologically safe".

260. The Impugned OHSA Provisions thus violate the freedom of expression because

a. the Event had expressive content;

b. neither the Event's location nor method of expression removed *Charter* protection;

c. the Impugned OHSA Provisions'

i. a) purpose is to require employers to censor expression, as can be seen from the definition of harassment which includes, for example "comment"; and

ii. b) effect is to censor expression, by expanding OHSA obligations to psychological and social well-being which, according to the Respondent claims an obligation to cancel the Event.

261. The Impugned OHSA Provisions further violate the freedom of peaceful assembly by, according to the Respondent, obligating it to cancel the Event:

a. which was a physical gathering of two or more people for a common purpose;

b. which was peaceful in nature; and

c. the interference caused by the Impugned OHSA Provisions was neither trivial nor insubstantial.[271]

262. In connection with the *Charter* arguments regarding the Impugned OHSA Provisions, the applicants repeat and adopt the arguments in Sections III.B. (Freedom of Expression), III.C. (Freedom of Assembly), IV.E (Freedom of Expression) and IV.F. (Freedom of Assembly) of the Applicants' Brief, *mutatis mutandis*.

H. Remitting the Cancellation Is Not an Appropriate or Just Remedy

263. The Respondent encourages this Court, should the applicants succeed in any respect, to grant *certiorari* and remit the matter back to UofL for reconsideration.

264. As explained above[272] the applicants do not seek *certiorari* and that prerogative remedy is not available in the circumstances.

265. Further, the general rule, that a court should remit a matter for which *certiorari* is granted, is an extension of the reasonableness standard of review. Where a reasonableness standard applies, remitting a matter back to a decision maker preserves its authority to determine the matter within a range of possible, acceptable outcomes.[273]

266. The general rule, therefore, does not apply to the issues in this application subject to the correctness standard: whether the *Charter* applies; whether *Charter* rights were engaged;

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[271] This test for limits of freedom of peaceful assembly was proposed at page 22 of Kristopher EG Kinsinger, Restricting Freedom of Peaceful Assembly During Public Health Emergencies, 2021 30-1 Constitutional Forum 19, 2021 CanLIIDocs 815, https://canlii.ca/t/t30m

[272] See Section II.A. (Scope of the Application).

[273] *Quele v. Canada (Citizenship and Immigration)*, 2022 FC 108, para 34; *Taylor Processing Inc v. Alberta (Minister of Energy)*, 2023 ABKB 64 ("***Taylor***"), para 118; *Vavilov*, para 141.

the scope of such *Charter* rights; the appropriate framework for analyzing those *Charter* rights; and the constitutionality of *OHSA*.[274]

267. While the Respondent anticipates some kind of "guidance" or "instruction"[275] from this Court should it remit the Decision back, as would normally be appropriate[276], here the key guidance that would be required by the UofL includes this Court's decision on these *Charter* issues.

268. To the extent remitting the matter to the Respondent for reconsideration was pleaded and available, reconsideration should not be ordered. A matter should not be remitted where to do so would waste time or party or public resources, such as when the outcome is inevitable or an "endless merry-go-round" of judicial review is likely.[277]

269. On matters subject to the review standard of correctness, there is only one possible outcome: the correct one.

270. On matters subject to the review standard of reasonableness, for reasons described below, remitting this matter to the UofL in any respect will lead inevitably to an "endless merry-go-round" of judicial review likely to waste the parties' and the Court's time and resources. Significant resources, including judicial resources[278], have already been invested in this application, which would be entirely wasted to the extent any issue is remitted to the Respondent.

271. The Respondent claims it did not have "… the opportunity to issue a decision in accordance with a proper understanding of the legal constraints bearing upon it,"[279] and that:

> *… 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.*[280]

272. However, the question is not whether the Respondent chose to "grapple with a question," the question is whether, "the administrative decision maker had a genuine opportunity to

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[274] *Vavilov*, para 57.
[275] Respondent's Brief, para 6, 99 and 152.
[276] *Vavilov*, para `141
[277] *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, paras 228 - 230; *Dugarte de Lopez v. Canada (Minister of Citizenship and Immigration)*, 2020 FC 707, para 32; *Vavilov*, para 142.
[278] *Pickle v. University of Lethbridge*, 2024 ABKB 378
[279] Respondent's Brief, para 56.
[280] Respondent's Brief, para 152.

weigh in on the issue in question."[281] The UofL most definitely had the opportunity to consider the *Charter*. It had, in fact, an obligation to consider *Charter* values whether or not it thought the *Charter* applied.[282] That it chose not to consider the *Charter* in any manner is not a reason to remit; it is a reason not to remit.

273. A key consideration in these circumstances is that a matter should not be remitted to an original decision maker where doing so would be unfair.[283] For example, it would be unfair to remit to a decision maker which has failed to establish a proper evidentiary basis for its decision or had originally demonstrated an outcome-based, rather than evidence-based, decision making approach.[284]

274. In this case it would manifestly unfair to remit any issue to the Respondent and will lead, inevitably, to further litigation. For example:

a. The Respondent grossly failed to establish a proper evidentiary basis for its Decision. It failed to determine, *inter alia*, what the Event was about, what "views" Widdowson actually held, whether her "views" were false, or any information whatsoever about any of the "harms" which supposedly put the lives of 500 students at risk.[285]

b. The Respondent clearly applied an outcome-based and non-evidence-based decision making approach. In the end the Respondent even appears to have simply capitulated to a pressure campaign[286] The UofL nowhere in its brief shows a renewed commitment to its government mandate or reason to believe the significant pressure brought to bear on the UofL have abated.

c. The Respondent is obviously and hopelessly biased against Widdowson. Without even knowing what she said, and without a shred of evidence, the Respondent publicly stated Widdowson's views were misleading, dangerous and immoral.[287] Mahon privately characterized Widdowson's attempt to speak on campus as "despicable behavior" somehow "targeting" the "BIPOC community."[288] The Respondent even

[281] *Vavilov*, para 142.
[282] *CFSTNO*, para 56.
[283] *Vavilov*, para 142.
[284] *Taylor*, paras 119 and 120.
[285] See above at Sections II.B.iii. (Not Cancelled for "Real Risks" from Protest), II.B.iv. (What Harms Actually Lead to Cancellation?) and II.E.. (Inquiring into Weight).
[286] See above at para 162 and 163.
[287] See above at para 215.
[288] CRP000046.

instructed its security staff not to engage Widdowson to understand her safety concerns.[289]

d. Any reconsideration of its Decision will almost certainly be rejected, first, on a narrow technical basis: the original booking party, Viminitz, has been terminated by the UofL.[290]

e. The Respondent has demonstrated an intractable unwillingness to render its decision in a legal or *Charter* compliant manner. For example:

    i. Capitulation to a pressure campaign is neither legal nor constitutional.

    ii. The UofL has no statutory mandate to supress the search for truth – its mandate is the opposite.

    iii. The UofL has no statutory mandate to deny indigenous students a university education – its mandate is the opposite.

    iv. The Respondent not only cancelled the Event, but vilified Widdowson in the process, without knowing even the most basic facts about Widdowson's "views" or the Event.

    v. The Respondent claimed to have cancelled the Event in concern for "safety" and "harms" without knowing even the most basic facts about them (and still provides no useful detail in its brief).

    vi. UofL's stated "position regarding free expression" did not align with its Statement on Free Expression. The Respondent's "position" contains a carve-out for the "tenets of equity, diversity and inclusion and … commit[ment] to meeting the Truth and Reconciliation Commission's Calls to Action" which carve-out is not, in fact, contained in its government mandated Statement on Free Expression. The Respondent university seems to think, therefore, that its Statement on Free Expression is a reason to cancel, rather than not cancel, free inquiry on its campus.

f. The UofL is the Respondent, a party to this application, which in this Court: asserts that the *Charter* has no application based on a mistaken application of *Stare Decisis*;

[289] CRP000177.
[290] An affidavit to this effect will be filed if the Respondent disputes this fact – which is known to the Respondent.

asserts that the *Charter* has no application without any s. 32 analysis on the evidence; completely ignores the applicants' s. 2(c) rights; suggests this Court leave Widdowson's *Charter* rights unremedied; demonstrates an anemic conception of s. 2(b) rights; fails entirely to "grapple" with the actual reasons for cancellation (truth and reconciliation); fails to meaningfully engage with the applicants' s. 2(b) claims; and, rather than concede any of the obvious and serious errors in its Decision, instead fully defends it and even characterizes its reasons as offering "… very clear and articulate rationale…"[291]

g. Critically, there is the issue of security costs. When Bhatt proposed the protest, which the Respondent claims created "real risks in relation to physical safety", the Respondent elected to cancel the Event, rather than the protest. It is, therefore, predictable that in like manner, the UofL may impose security costs on the applicants (as anticipated in its brief at para 45 and 99) rather than absorbing those costs itself or imposing those costs on protesters (as originally requested by Bhatt[292]). Not only did the Respondent aggravate, facilitate and condone the censorious mob in the Atrium, President Mahon went on to publicly praise it.[293] Whatever security arrangements might now be required to host Widdowson on campus, it would be manifestly unfair to impose any responsibility their cost on the applicants. The UofL very much made its bed, it can now lie in it.

275. Remitting any part of this matter to the UofL will lead inevitably, instead, to an "endless merry-go-round" of judicial review. S. 24 of the *Charter*, however, requires that breaches be remedied with a full, effective, and meaningful remedy.[294]

III. CONCLUSION

276. The Respondent has failed to meet its burden under s. 1 of the *Charter* to reasonably and demonstrably justify proven *Charter* infringements in a free and democratic society.

277. Remitting this matter to the Respondent is not possible and not an effective remedy.

278. The applicants respectfully submit, therefore, that this Honourable Court should grant the applicants the remedies requested in the amended application and Applicant's Brief.

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[291] Respondent's Brief, para 115.
[292] CRP000142.
[293] Widdowson Affidavit, Exhibit "S".
[294] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, para 25; *R. v. Conway*, 2010 SCC 22, para 103.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of October 2024.

Glenn Blackett
Counsel for the Applicants

IV. LIST OF AUTHORITIES

TAB	CASELAW
1.	*Alberta (Attorney General) v. Westcoast Energy Inc.* (1997), 1997 CarswellNat 112, 208 N.R. 154 (FCA)
2.	*Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission),* 2006 ABQB 904
3.	*Baier v. Alberta,* 2007 SCC 31
4.	*BC Civil Liberties Association v. University of Victoria,* 2016 BCCA 162
5.	*Board of Governors of Mount Royal University v. Mount Royal Faculty Association,* 2024 CanLII 68666 (AB GAA)
6.	*C.M. v. Alberta,* 2022 ABKB 716
7.	*Canada (Minister of Citizenship and Immigration) v. Vavilov,* [2019] 4 S.C.R. 65
8.	*Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City),* 2018 ABCA 154
9.	*Canadian Federation of Students v. Greater Vancouver Transportation Authority,* 2009 SCC 31
10.	*Canadian Private Copying Collective v Canadian Storage Media Alliance,* 2004 FCA 424
11.	*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment),* 2023 SCC 31
12.	*C.U.P.E., Re,* 1971 CarswellNB 33, 3 N.B.R. (2d) 613
13.	*D.W.H. v D.J.R.,* 2013 ABCA 240
14.	*DGS v. HAS,* 2019 ABQB 887
15.	*Doré v. Barreau du Québec,* 2012 SCC 12
16.	*Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62
17.	*Douglas/Kwantlen Faculty Assn. v. Douglas College,* [1990] 3 S.C.R. 570
18.	*Dugarte de Lopez v. Canada (Minister of Citizenship and Immigration),* 2020 FC 707
19.	*Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624
20.	*Harrison v. University of British Columbia,* [1990] 3 S.C.R. 451
21.	*Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927
22.	*Lobo v. Carleton University,* 2012 ONCA 498
23.	*Local 873 v. British Columbia (Attorney General)* (2010), 2010 BCSC 593

24.	*Mazepa v. Embree,* 2014 ABCA 438
25.	*McKinney v. University of Guelph,* [1990] 3 S.C.R. 229
26.	*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202
27.	*PetroBakken Energy v. Northridge Energy,* 2020 ABCA 470
28.	*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy),* [1995] 2 SCR 97
29.	*Pickle v. University of Lethbridge,* 2024 ABKB 378
30.	*Pridgen v. University of Calgary,* 2012 ABCA 139
31.	*Quele v. Canada (Citizenship and Immigration),* 2022 FC 108
32.	*R v. Keegstra,* [1990] 3 S.C.R. 697
33.	*R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295
34.	*R. v. Conway,* 2010 SCC 22
35.	*R. v. Ontario (Labour Relations Board)* (1969), 7 D.L.R. (3d) 696
36.	*R. v. Ontario (Labour Relations Board)*
37.	*Roach v. Canada (Minister of State for Multiculturalism and Citizenship),* [1994] 2 F.C. 406
38.	*Roncarelli c. Duplessis,* [1959] S.C.R. 121 (S.C.C.)
39.	*Sihota v. Chohan,* 2019 ABCA 390
40.	*Stoffman v. Vancouver General Hospital,* [1990] 3 S.C.R. 483
41.	*Syncrude v Alberta (Minister of Energy),* 2023 ABKB 317
42.	*Taylor Processing Inc v. Alberta (Minister of Energy),* 2023 ABKB 64
43.	*The Redeemed Christian Church of God v. New Westminster (City)*, 2021 BCSC 1401
44.	*Thibaudeau v. R,* [1995] 2 SCR 627
45.	*Toronto (City) v. Ontario (Attorney General),* 2021 SCC 34
46.	*UAlberta Pro-Life v. Governors of the University of Alberta,* 2020 ABCA 1
47.	*Wagner v. Wagner,* 2014 ABCA 428
48.	*Warren v. Cowling,* 2019 ABQB 403
49.	*Woodbridge Homes Inc. v. Palmer,* 2023 ABKB 649
	LEGISLATION

50.	*Constitution Act 1982,* Part VII, Section 52
51.	*Occupational Health and Safety Act, SA 2020, c O-2.2*
52.	*Occupational Health and Safety Code, Alberta Regulation 191/2021*