

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BC CIVIL LIBERTIES ASSOCIATION

AND

CAMERON CÔTÉ

PETITIONERS

AND:

UNIVERSITY OF VICTORIA

RESPONDENT

PETITION TO THE COURT

*FORM 66 (RULES 16-1(2) AND 21-5(14))
[AM. B.C. REG. 95/2011, SCH. A, s. 20]*

ON NOTICE TO:

THE UNIVERSITY OF VICTORIA STUDENTS' SOCIETY

AND TO:

JAMES DUNSDON

AND TO:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

PURSUANT TO THE *CONSTITUTIONAL QUESTION ACT* and the

JUDICIAL REVIEW PROCEDURE ACT

This proceeding has been started by the petitioners for the relief set out in Part I below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioners

- (i) 2 copies of the filed response to petition, and
- (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:

800 Smithe Street
Vancouver, BC V6Z 2E1

(2) The petitioners' address for service is:

BRANCH MACMASTER LLP
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Telephone: 604 654-2999
Fax No: 604 684-3429
Attn: Craig E. Jones, Q.C.
and Emily Unrau

(3) The name and office address of the petitioners' lawyer is:

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Fax No: 604 684-3429
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and Emily Unrau

CLAIM OF THE PETITIONERS

PART 1: ORDERS SOUGHT

The Petitioners apply to this Court for:

1. A declaration under section 52 of the *Constitution Act, 1982* that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires*, void and of no force or effect as it violates section 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1;
2. A declaration that policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter of Rights and Freedoms*;
3. A declaration that the decisions of Jim Dunsdon, Associate Vice-President Student Affairs, University of Victoria, dated January 29, 2013, January 31, 2013 and March 7, 2013 failed to appropriately weigh the infringement of section 2(b), (c) and (d) of the *Canadian Charter of Rights and Freedoms* against the justifications for such infringement and were therefore unreasonable;
4. An order that the decisions of Jim Dunsdon dated January 29, 2013, January 31, 2013 and March 7, 2013, are quashed and set aside;
5. Such further and other relief as this Honourable Court considers just; and
6. Costs, including special or increased costs.

The Petitioners will rely on:

1. The *Canadian Charter of Rights and Freedoms*, ss. 2, 21;
2. *Constitution Act, 1982*, s. 52;
3. The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 24;
4. *University Act*, R.S.B.C. 1996, c. 468;
5. British Columbia Supreme Court Civil Rules, BC Reg 168/2009, Rule 2-1(2)(b);

6. Such further and additional legislation and authorities as the Petitioners advise; and
7. The inherent jurisdiction of this Honourable Court; and

PART 2: FACTUAL BASIS

The facts upon which this petition is based are as follows:

Youth Protecting Youth (YPY)

1. The Petitioner Cameron Coté was at material times a student at the University of Victoria (the “University”) and was a member of the University of Victoria Youth Protecting Youth Club (“YPY”), including terms as Vice President and President.
2. YPY is a club at the University, formed under the University of Victoria Student Society (“UVSS”) Bylaws and the *Clubs Policy*, and has been a club at the University of Victoria since prior to 1999. YPY engages in education, advocacy and other measures in opposition to the practice of abortion.

The BC Civil Liberties Association

3. The Petitioner BC Civil Liberties Association (BCCLA) is incorporated under the *Society Act*, and is a public interest advocacy group with a long history of advocating for free speech on behalf of students, including the Petitioner and other members of YPY at the University of Victoria.

The University of Victoria

4. The University is a statutory corporation continued under s. 3(3) of the *University Act*, R.S.B.C. 1996, c. 468 (the “*Act*”), located in Victoria, British Columbia.
5. At all material times, Mr. Jim Dunsdon was Associate Vice-President Student Affairs, a delegate of the respondent University with responsibilities that included the administration and application of section 15.00 of the *Booking of Outdoor Space by Students Policy*.

The “Choice Chain” Presentation

6. Abortion remains a topic that deeply engages and divides many members of the student body at the University of Victoria, as elsewhere. The members of YPY, who oppose abortion, recognize that their view may be a minority one on campus. Their objective, through peaceful dialogue and assembly, is to petition and persuade their fellow students, as well as other members of the university community, of the merits of their position.
7. In 2011, the UVSS, which identifies itself as staunchly supportive of abortion rights, purported to revoke the club status of YPY on the basis of its activities in opposition to abortion. YPY, with the support of the BC Civil Liberties Association, responded with a lawsuit; the UVSS retreated, and YPY was reinstated by the UVSS as a recognized club. Nevertheless, the UVSS remained hostile to YPY and its activities.
8. As part of its activities, on November 16 and 17, 2011, YPY gathered to hold a presentation known as a Choice Chain at the University campus (the “2011 Choice Chain”).
9. A Choice Chain is an interactive pro-life event wherein participants hold signs with either an image of an aborted fetus or an image of a living and naturally developing fetus. Although the images are provocative, the stated purpose of a Choice Chain is to create respectful dialogue surrounding the topic of abortion and participants are trained as to how to interact with passers-by.
10. Within weeks of this event, the UVSS had concluded that the activities of the YPY, and in particular the 2011 Choice Chain display, constituted hate speech or “harassment” and therefore violated its policies. On February 6, 2012, the UVSS passed a motion reading as follows:

Motion 2012/02/06: 03 – Bowie/Dhalla

Whereas complaints were received regarding an event called “Choice Chain” hosted by the UVSS club, Youth

Protecting Youth (“YPY”); and Whereas the Board struck a closed ad hoc Complaints Committee (the “Committee”) to investigate the complaints and provide recommendations to the BoD; and Whereas the Committee has provided a report to the Board with recommendations regarding the complaints and discipline; therefore BIRT the Board adopt the recommendations of the Committee regarding the complaints and find that:

YPY’s Choice Chain Event violated Clubs Policy (the “Policy”) Part F, Section 2 and Part F, Section 2d (the “Violations”); and

Part F, Section 2a; Part F, Section 2b; Part F, Section 2c of the Policy were not violated.

BIFRT the Board adopt the recommendations of the Committee regarding the appropriate discipline for the Violations and impose discipline on the YPY as follows:

The YPY be censured; and

The YPY be ordered not to repeat the Violations and, in particular, not to organize or conduct Choice Chain or similar events; and

The YPY have its booking privileges for the use of public spaces on the University of Victoria campus revoked until the Spring 2013 Semester, with the exception of booking privileges for space for its meetings and Clubs Days.

11. In determining that YPY’s activities constituted “harassment” or were otherwise violative of UVSS policies, the UVSS did not engage in any weighing of YPY’s members’ rights to free expression, assembly and religion, nor did they perform any constitutional analysis.

Approval of February 1, 2013 Choice Chain Presentation

12. In the following year, YPY made a written request to Mr. Dunsdon, pursuant to the *Booking of Outdoor Space by Students Policy*, to reserve outdoor space for a second Choice Chain presentation at the University, planned for February 1, 2013, from 12:30 to 2:30 p.m. Between 4 to 12 YPY members were expected to participate in the presentation.

13. On January 29, 2013, Mr. Dunsdon replied to YPY's booking request by letter to Mr. Coté, approving the request on the following conditions:

YPY members and other demonstrators agree to abide by university policies and procedures at all times and the attached Division of Student Affairs Booking of Outdoor Space by Students policy.

YPY will have a designated primary contact and an alternate contact person selected from the club's executive members. One of these individuals must be in attendance and responsible for the Choice Chain presentation at all times.

No amplification is permitted during this presentation.

The presentation may only be held in the area indicated in the attached map and cannot move to an alternate location without explicit authorization from the university. No aspect of the presentation may extend past this allocated space. At 12:00 pm on February 1, 2013, the representative from my office and a representative from Campus Security will meet with the YPY designated contacts to review the allocated space for this presentation and discuss any outstanding logistical concerns.

YPY members and other demonstrators participating in the presentation will not:

- follow any individual who does not want to be followed;
- block any pathways around the presentation;
- prevent anyone from freely walking past the presentation;
or
- prevent anyone from not engaging with the demonstrators.

YPY's request to video record this presentation for security purposes has been reviewed and denied. The university will provide security for the event at no cost to YPY. It is expected that YPY members will also not use smart phones or other devices to video record any aspect of this presentation.

The university will install signage in the surrounding entry points to the Choice Chain Presentation in order to alert members of the university community about the nature of the images presented by YPY.

In order to ensure the safety and security of the university community and university property, the university may cancel the event at any time without notice.

The presentation will be halted if there is any physical altercation or imminent threat of violence.

14. In imposing the restrictions he did on the Choice Chain presentation, Mr. Dunsdon did not engage in any weighing of YPY's members' rights to free expression, assembly and religion, nor did he perform any constitutional analysis. Mr. Dunsdon provided no reason why YPY members were prohibited from using smart phones or other video recording devices, where others who attended the presentation would remain free to do so; nor did he provide any basis for the prohibition on even modest amplification equipment.
15. Despite these restrictions, YPY agreed to honour the University's wishes and proceeded with planning for the event within the constraints imposed.

Cancellation of February 1, 2013 Choice Chain presentation

16. On January 31, 2013, the day before the planned event, Mr. Dunsdon withdrew the University's approval of the Choice Chain presentation. By letter dated January 31, 2013, he referenced the February 6, 2012 UVSS motion, stating:

When the university approved YPY's space booking request on January 29th, we were unaware of the above UVSS motion which explicitly restricts Choice Chain or similar events. Section 15.00 of the Booking of Outdoor Space by Students policy states that:

Bookings of outdoor space by Student Groups may be declined, cancelled or modified including, but not limited to, where

(a) the use or activities:

- i. are not in accordance with legislation, municipal bylaws, or the university's policies, mission, vision and values;
- ii. are not in accordance with applicable student society policies;

- iii. present a likelihood of danger to people, property, space or university equipment;
- iv. may result in abnormal deterioration or damage to university property or equipment;
- v. may be disruptive, involve large numbers of people, or involve excess noise;
- vi. are not suited to the requested space;
- vii. may violate a contract with a university strategic alliance or sponsor; or
- viii. will negatively impact the university's reputation.

(b) the Student Group:

- i. has misrepresented their intentions for the use of the space;
- ii. has previously misused university space or equipment;
- iii. has previously not complied with a university policy or an agreement with the university;
- iv. has been sanctioned for a violation of a university or student society policy;
- v. intends to provide a service or sell goods without proper license or qualification;
- vi. does not sign applicable university waivers; or
- vii. does not comply with any additional conditions or restrictions set out by the qualification.

[Emphases in original.]

- 17. In purporting to cancel the Choice Chain presentation, Mr. Dunsdon did not engage in any weighing of YPY's members' rights to free expression, assembly and religion, nor did he perform any constitutional analysis.
- 18. On February 1, 2013, notwithstanding the University's purported cancellation, YPY held its Choice Chain presentation between 12:30 p.m. and 2:30 p.m. The event proceeded without incident.

March 7, 2013 Penalty and Threat of Further Sanctions

19. On March 7, 2013, Mr. Dunsdon revoked YPY's space booking privileges for one year, until March 1, 2014. By letter dated March 7, 2013, Mr. Dunsdon stated the February 1, 2013 Choice Chain presentation was "unauthorized" and had "... unnecessarily burdened multiple university resources and violated an established policy." Mr. Dunsdon stated that "... if YPY or its individual members refuse to comply with direction from a university official or violate established policies in the future, an allegation of non-academic misconduct could be pursued in accordance with the university *Resolution of Non-Academic Misconduct Allegations* policy (AC1300)."
20. The "established policy" is apparently a reference to the policy deferring to decisions of the UVSS regarding who may be permitted to gather on campus for collective expression. It is unclear what "multiple university resources" had been "burdened" beyond those to which Mr. Dunsdon had already committed when he initially approved the Choice Chain event.
21. Section 3.00 of *The Resolution of Non-Academic Misconduct Allegations Policy* describes "non-academic misconduct" as including
 - ...any of the following types of conduct on university property or in connection with a University activity:
 - Theft, damage or destruction of property;
 - Unauthorized entry or presence on university property;
 - Fraud or impersonation;
 - Disruptive or dangerous behaviours;
 - Unlawful possession or use of alcohol;
 - Use or possession of illicit drugs; or
 - Other activities that result in a criminal conviction or court judgment.
22. The violation of policies, or the simple refusal to follow the direction of a university official, are not listed among the misdeeds that would ordinarily attract proceedings for non-academic misconduct.
23. In imposing the penalty of revocation of booking privileges, and in threatening non-academic discipline as a means of regulating YPY members' expressive and

assembly activities, Mr. Dunsdon did not engage in any weighing of YPY's members' rights to free expression, assembly and religion, nor did he perform any constitutional analysis.

24. The Petitioner Mr. Côté graduated from the University in May 2013 and was replaced as president of YPY. The club continues at the University in the 2013/14 years, and continues to be under threat of proceedings for non-academic misconduct arising from peaceful expressive activities on campus.

PART 3: LEGAL BASIS

The University

1. Pursuant to s. 47(2) (f) of the *Act*, the University is required to, *inter alia*:
 - (f) generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university".
2. Pursuant to s. 27 of the *Act*, the University's Board has authority to regulate the use of property on campus, including in respect of "activities and events." Section 27(2)(t) of the *Act* states:
 - 27 (1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.
 - (2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:
 - ...
 - (t) to regulate, prohibit and impose requirements in relation to the use of real property, buildings, structures and personal property of the university, including in respect of
 - (i) activities and events,
 - (ii) vehicle traffic and parking, including bicycles and other conveyances, and
 - (iii) pedestrian traffic;

3. The *Booking of Outdoor Space by Students Policy* is subordinate legislation purportedly enacted pursuant to the statutory authority provided by s. 27(2)(t) of the *Act*. Mr. Dunsdon is a delegate of the University and an administrative law decision maker operating pursuant to that policy, and his decisions are exercises of a statutory power.
4. The power to “impose... penalties... in relation to a contravention of a rule or other instrument made in the exercise of a power under this section” is found in subsection x.i of section 27(2). It would appear that the *Resolution of Non-Academic Misconduct Allegations* policy and the associated *Procedure for the Submission of and Response to an Allegation of Non-Academic Misconduct* are the University policies relied upon by the University in imposing or threatening discipline for violation of its directions with respect to the booking of space.

The Application of the Charter

5. Section 2 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the “*Charter*”) provides that:
 2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.
6. The *Charter* will apply to activities of an institution where it is controlled by government (in which case the *Charter* applies to all its activities), or if it is not controlled by government, or where it is exercising statutory authority or otherwise performing a governmental function (in which case the *Charter* applies to those activities): *Eldridge v British Columbia (Attorney General)*, 151 DLR (4th) 577.

7. Under the *University Act*, the government appoints 8 of the 15 members of the University's Board of Governors (s. 19(1)), and the Chair of the Board must be elected from among the government appointees (s. 19.2). The government may remove an appointed member at any time (s. 22(1)).
8. The University reports directly to government (s. 49), and the Minister may direct or otherwise interfere with the activities of the University except in a few narrow fields, where the University has statutory independence:

48 (1) The minister must not interfere in the exercise of powers conferred on a university, its board, senate and other constituent bodies by this Act respecting any of the following:

 - (a) the formulation and adoption of academic policies and standards;
 - (b) the establishment of standards for admission and graduation;
 - (c) the selection and appointment of staff.
9. In regulating or prohibiting the use of its common space for all purposes, including expressive purposes, the University is performing a function explicitly set out in s. 27 of its enabling legislation. The imposition of discipline for non-academic offences, or the threatened imposition of such discipline, also derives directly from the powers of the University set out in the *Act*, and is similarly governmental in nature: *Pridgin v University of Calgary*, 2012 ABCA 139 aff'g 2010 ABQB 644.
10. Governmental activities cannot escape *Charter* scrutiny because they are "delegated" to another body: *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31.
11. In reviewing an exercise of statutory authority that affects rights under the *Charter*, the question is whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values involved: *Doré c Québec (Tribunal des professions)*, 2012 SCC 12.

12. As a matter of deep history, convention and tradition, the freedom of students to gather for the purposes of peaceful collective expression is fundamental to “the work of a University”.
13. It is also fundamental to “the work of a university” that opportunities to gather for those purposes be provided equally to all lawfully-expressed points of view, be they religious, political or social. These principles find expression in s. 66 of the *Act*, which states that the University must be non-sectarian and non-political in principle. Pursuant to the University’s *Policy on Human Rights, Equity and Fairness (GV0200)* the University must strive to be free from discrimination and promote the “worldviews of all its members.”
14. As such, permitting and facilitating the gathering of students for purposes of such collective expression of minority or dissenting points of view is not at odds with the statutory powers and obligations of the University; in fact it is one of those powers and obligations.
15. In the present case, there was no justifiable reason to impose the strict restrictions of January 29th, 2012, including the restrictions on the students’ use of modest amplification equipment or personal recording devices.
16. The focus of the Petitioners’ complaint, however, are the two decisions of Mr. Dunsdon.
17. The January 31st decision to cancel the following day’s Choice Chain event was plainly unreasonable. As set out in Mr. Dunsdon’s letter, the University did not conclude that the proposed event would be dangerous, disruptive, excessively noisy, not suited to the requested space, or otherwise raised a concern that might be a basis for refusal under the *Booking of Outdoor Space by Students Policy*. Nor was it suggested that YPY had, through its prior Choice Chain event, “misused university space or equipment” or “previously not complied with a university policy or an agreement with the university.” In fact it does not appear that the University had any cause for complaint regarding the prior Choice Chain event.

18. Instead, the decision to cancel of the February 1 Choice Chain event was exclusively and explicitly premised on the University's conclusion that it was either "not in accordance with applicable student society policies" or because YPY had "been sanctioned for a violation of a... student society policy". The University made no attempt to consider or confirm whether the decision of the UVSS was itself justified or reasonable. This does not represent an appropriate (or indeed any) weighing of the *Charter* rights and values in the statutory and factual context.
19. Given the invalidity of his January 31st cancellation of the Choice Chain event, Mr. Dunsdon's subsequent letter threatening to subject YPY members to a disciplinary regime for disobedience of similar decisions in the future is also unreasonable.
20. The restrictions that the University purported to impose on January 29th, 2012, the decision to cancel the Choice Chain event on January 31st, 2012, and the consequential imposition of a penalty upon the YPY students and the threat of further sanctions communicated on March 7, 2012 must all be set aside as unreasonable in that they failed to proportionately balance the relevant *Charter* rights and values and are otherwise unconstitutional. In particular those decisions, in conjunction with the *Booking of Outdoor Space by Students Policy*:
 - Deny students who are not members of a group endorsed, sanctioned or permitted by the University or UVSS equal access to University property for the purposes of collective expression;
 - Impermissibly and unreasonably delegate final decisions on which students may access property for collective speech to the board and executive of the UVSS, student politicians with no experience with or expertise in university administration, property management, or the weighing and balancing of fundamental rights and the interpretation and application of laws;
 - Impose inequitable and unreasonable restrictions, such as a prohibition on personal recording devices for one group of students (YPY) that did not apply to other students who might attend the Choice Chain event;
 - By deferring to student government decisions regarding which speech violates their policies and which does not, impose restrictions unequally

and inequitably based on, *inter alia*, the popularity of the speech in question; and

- Generally fail to consider or sufficiently weigh the fundamental rights of expression, including religious expression, and peaceful assembly in the context of the University's statutory mandate to carry on the work of a university.

PART 4: MATERIAL TO BE RELIED ON

1. Affidavit of Cameron Côté, made September 26, 2013.
2. Affidavit #2 of John Dixon, made September 23, 2013.
3. Affidavit of Elizabeth Fitzmaurice, made September 17, 2013.

The Petitioners estimate that the hearing of the petition will take 3 days.

Dated: September 26, 2013

BRANCH MACMASTER LLP
(Per: Craig E. Jones, Q.C. &
Emily Unrau)
Counsel for the Petitioners

Name and address of lawyer:
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and Emily Unrau

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of

Part 1 of this petition

with the following variations and additional terms:

Dated: _____

Signature of Judge Master

