# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *BC Civil Liberties Association v. University of Victoria,* 2015 BCSC 39

Date: 20150114
Docket: S137184
Registry: Vancouver

Between:

**The BC Civil Liberties Association and Cameron Côté**

Petitioners

And

**University of Victoria and University of Victoria Students' Society**

Respondents

Before: The Honourable Chief Justice Hinkson

## Reasons for Judgment

| | |
|---|---|
| Counsel for Petitioners | C.E. Jones, Q.C., E.J. Unrau |
| Counsel for Respondent, University of Victoria | P. Gilligan-Hackett, K.R. Hart |
| Counsel for Respondent, University of Victoria Students' Society | D.B. Borins, N. Iyer, M. Margets |
| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>October 14–17, 2014 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 14, 2015 |

*"Universities are places where difficult ideas and issues are often discussed and debated. Freedom of speech is a core component of intellectual inquiry and is a fundamental value of the University of Victoria. The university respects the expression of opposing viewpoints on campus related to sensitive and contentious social issues. In exercising free speech, all university community members must work together to foster an environment characterized by tolerance, civility and mutual respect while recognizing that opposing views may be offensive to some."*

*Jim Dunsdon, Associate Vice-President of Student Affairs, University of Victoria*

## Introduction

[1] The petitioner Cameron Côté ("Mr. Côté") is a former student at the respondent University of Victoria ("the University"). Whilst he was a student at the University, Mr. Côté was on the executive of a student club named Youth Protecting Youth ("YPY").

[2] On January 29, 2013, Jim Dunsdon ("Mr. Dunsdon"), the Associate Vice-President of Student Affairs at the University, purported to approve an allotment of space on the University campus for an activity to be undertaken by YPY members on February 1, 2013. Shortly thereafter, Mr. Dunsdon was advised by members of the executive of the University of Victoria Students' Society ("UVSS") that the UVSS had prohibited YPY from the use of campus space due to YPY's prior activities. In the result, on January 31, 2013, Mr. Dunsdon withdrew his approval of the use of campus space by YPY for February 1, 2013, and instructed Mr. Côté, as the president of YPY, not to proceed with the activity.

[3] The activity proceeded despite Mr. Dunsdon's instruction, and Mr. Côté took part in the activity. On March 7, 2013, Mr. Dunsdon wrote to Mr. Côté admonishing YPY for conducting their activity in defiance of his direction.

[4] Mr. Côté and the BC Civil Liberties Association (the "BCCLA"), petitioned 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.

## Legislation, Policies, and Bylaws

[5] The University is a statutory corporation continued under s. 3(3) of the *University Act*, R.S.B.C. 1996, c. 468 [*University Act*], and located in Victoria, British Columbia. Its real property is vested in, privately held, and controlled by the University.

[6] The powers of the University's Board of Governors are addressed in s. 27 of the *University Act*. The pertinent parts of s. 27 provide that:

> **Powers of board**
>
> 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:
>
> …
>
> (d) in consultation with the senate, to maintain and keep in proper order and condition the real property of the university, to erect and maintain the buildings and structures on it that in the opinion of the board are necessary and advisable, and to make rules respecting the management, government and control of the real property, buildings and structures;

> (e) in consultation with the senate, to provide for conservation of the heritage sites of the university, including any heritage buildings, structures and land of the university;
>
> …
>
> (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,
>
> …
>
> (t.1) to regulate, prohibit and impose requirements in relation to noise on or in real property, buildings and structures of the university;
>
> …
>
> (t.4) to regulate, prohibit and impose requirements in relation to nuisance on or in real property, buildings and structures of the university, including providing for remediation of a nuisance and recovery of the costs of remediation;
>
> …
>
> (x) to make rules consistent with the powers conferred on the board by this Act;
>
> …
>
> (x.2) to provide for the hearing and determination of disputes arising in relation to
>
> (i) the contravention of a rule or other instrument made in the exercise of a power under this section, and
>
> (ii) the imposition of a penalty under paragraph (x.1);
>
> (y) to do and perform all other matters and things that may be necessary or advisable for carrying out and advancing, directly or indirectly, the purposes of the university and the performance of any duty by the board or its officers prescribed by this Act.

[7] Section 48 of the *University Act* provides that:

> **Minister not to interfere**
>
> 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.
>
> (2) Despite subsection (1), a university must not establish a new degree program without the approval of the minister.

[8] Section 61 of the *University Act* provides that:

> **Suspension of student**
>
> 61 (1) The president has power to suspend a student and to deal summarily with any matter of student discipline.
>
> (2) On the exercise of the power, the president must promptly report the action to the standing committee established under section 37 (1) (v) with a statement of his or her reasons.
>
> (3) The action of the president is final and subject in all cases to an appeal to the senate.

[9] Mr. Dunsdon is responsible for the administration of the University's policies; including policies developed by his office. Included within those policies are the "Resolution of Non-Academic Misconduct Allegations" Policy (the "Non-Academic Misconduct Policy") and the "Booking of Outdoor Space by Students" Policy (the "Outdoor Space Booking Policy").

[10] At para. 1.00 of the Non-Academic Misconduct Policy under the heading "Purpose" it provides:

> The university's goal is to be a diverse, dynamic and welcoming learning community. The purpose of this policy is to:
>
> - support the development and maintenance of a collegial environment that is characterized by fairness, safety, civility and respect;
> - identify what constitutes Non-Academic Student Misconduct;
> - set out consistent processes for submitting, investigating and responding to allegations of Non-Academic Misconduct; and
> - articulate the rights and responsibilities of Students involved in Non-Academic Misconduct proceedings.

[11] The Outdoor Space Booking Policy provides, in part, that:

> 1.00 The purpose of this policy is to:

(a) establish consistent practices for the booking of outdoor space by Student Groups at the university;
(b) maintain the safety of the university community and protect university property;
(c) help ensure that university activities are not interrupted by outdoor events; and
(d) help ensure that approved outdoor events are conducted in a responsible manner in accordance with university policies and procedures.

…

3.00 **Student Group** means a student-led group, club, course union, or organization that includes:

(a) Sports and Recreation Clubs registered with the Athletics and Recreation department;
(b) clubs, course unions, advocacy groups, associations or Professional Development Unions that are recognized by the University of Victoria Students' Society or Graduate Students' Society; and
(c) university paraprofessional student/staff and or [sic] university-sanctioned volunteer programs or service groups.

…

5.00 This policy applies to the booking of outdoor space on the university's campus by Student Groups.

…

7.01 Student Group requests to book other outdoor spaces on campus will be considered on a case-by-case basis in accordance with this and other applicable policies.

8.00 The booking and use of outdoor space on campus shall be in accordance with applicable legislation, municipal bylaws and university policies and procedures.

9.00 Outdoor space bookings by Student Groups must be prearranged and approved in advance to help ensure:

(a) the general safety and well-being of the university community;
(b) that university activities are not interrupted;
(c) the protection of property and equipment;
(d) that appropriate consultation occurs with other Units and community members; and
(e) effective management of multiple booking requests from diverse Student Groups in order to minimize scheduling conflicts.

10.00 The following general conditions are related to the booking and use of outdoor space on campus by Student Groups:

(a) Outdoor space bookings by Student Groups should be related to the Student Groups' purpose and/or constitution.
(b) Outdoor space will not be available for bookings on certain dates due to university-sanctioned events, during exam periods or during convocations.
(c) The university may limit the frequency and length of bookings available to each Student Group.

…

(f) Signage, advertising or promotional materials related to the outdoor space booking shall be in accordance with applicable university policies including but not limited to the university:
- Liquor policy (AD2400)
- Discrimination and Harassment policy (GV0205);
- Building Usage Policy - including Poster Regulations (BP3105); and
- Strategic Alliances policy (FM5110).

…

(j) In the event of unforeseen circumstances, the university may cancel the booking without notice.

…

11.00 Outdoor space booking requests from Student Groups must be submitted on the Application Form to the Office of the Associate Vice-President Student Affairs for evaluation and approval a minimum of ten (10) university business days before the event.

…

13.00 The Office of the Associate Vice-President Student Affairs will consult other pertinent university offices prior to approving the booking of an outdoor space that may:

(a) require a risk assessment;
(b) require additional insurance;
(c) require the attendance of Campus Security;
(d) require additional university resources; or
(e) substantially impact the operations of another university unit, facility or space.

13.01 Depending on the nature of a booking, outdoor space bookings by a Student Group may be subject to written endorsement from other university offices prior to approval.

13.02 An assessment of required endorsements will be conducted by the Office of the Associate Vice-President Student Affairs as part of the initial review of the Student Group outdoor space booking request.

14.00 Depending on the nature of the booking and any risks or safety concerns involved the university may:

(a) apply additional conditions or restrictions related to the booking outside of those set out in this policy;

…

15.00 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;

…

v. may be disruptive, involve large numbers of people, or involve excess noise;

… 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;

… or

vii. does not comply with any additional conditions or restrictions set out by the university.

(c) the university does not have the required resources or cannot appropriately accommodate the booking request; or

(d) unforeseen circumstances occur where the space must be repaired or used for an alternate purpose.

[12] Thus, Student Groups, as defined above, are required to apply to the Office of the Associate Vice-President, Student Affairs, to request to book space. In deciding whether or not to grant a booking request, the Associate Vice-President, Student Affairs, may consult with others.

[13] In his affidavit of November 14, 2013, Mr. Dunsdon swore that:

> 6. The Outdoor Space Policy was developed by my Office and came into effect in 2012. The Outdoor Space Policy was not developed or approved by the Board of Governors. It does not apply generally to requests to book space on Campus. It applies only to such requests when they come from student groups.
>
> 7. No government or government agency played any role in the development of the Outdoor Space Policy. It is designed and intended to be an interim policy that will apply to requests from student groups while the President's Office develops a campus-wide policy of general application.
>
> …
>
> 13. No one in my Office consults with any government agency about a student group's proposed use of outdoor space on the Campus. In particular, no one in my Office consults with or would expect to consult with any representative of a government—whether municipal, provincial, or federal—before making a decision about whether to approve a student group's request to use outdoor space on the Campus.
>
> 14. In the specific case of YPY, I did not consult with any government agency or employee about my decisions about YPY's space booking requests.

[14] The UVSS is a corporation established under the *Society Act*, R.S.B.C. 1996, c. 433 [*Society Act*], and is the exclusive official representative of the University's students. It has a role in the governance of the University, in that two members of the UVSS sit on the University's Board of Governors.

[15] The UVSS has a Board of Directors that is comprised of 21 directors elected democratically from among the membership of the UVSS. Directors are elected for one year terms and must be members of the UVSS.

[16] The University does not play a role in the governance, management, direction, or workings of the UVSS. There are no representatives of the University on the UVSS's Board of Directors. The University does not make, approve, or enforce UVSS policies.

[17] The UVSS's Board of Directors manages the daily operations of the UVSS including establishing and maintaining UVSS policies. Under the UVSS's bylaws, the Board of Directors may establish policies by two-thirds majority vote of the Board of Directors.

[18] UVSS's Constitution and Bylaws permit the establishment of UVSS clubs and the creation of policies to govern their operation. There are approximately 200 UVSS clubs at the University. UVSS clubs are not independent legal entities; they are internal to the UVSS, and all aspects of UVSS club activities are regulated by the UVSS's Clubs Policy. Sections 1 and 2 of the UVSS Constitution provide that:

> 1. The name of the Society is the University of Victoria Students' Society.
> 2. The purposes of the Students' Society are:
>
> a) to organize students on a democratic, cooperative basis in advancing students' interests, and advancing the interests of the students' community;
>
> b) to provide a common framework within which students can communicate, exchange information, and share experience, skills and ideas;
>
> c) to bring students together to discuss and cooperatively achieve necessary educational, administrative, and legislative change wherever decision-making affects students;
>
> d) to facilitate cooperation among students in organizing services which supplement the learning experience, provide for human needs, and which develop a sense of community with our peers and with other member of society;
>
> e) to articulate the desire of students to fulfill the duties and be accorded the rights of citizens in British Columbia, in Canada, and in the international community;
>
> f) to achieve the goal of a system of post-secondary education which is accessible to all, which is of high quality, and which is rationally planned; which recognizes the legitimacy of student representation and the validity of students' rights; and whose role in society is clearly recognized and appreciated;
>
> g) to provide leadership in environmental responsible practices in all aspects of the Society's functions.

[19] The UVSS Bylaws define a club as a group of members gathered in accordance with UVSS policies. The bylaws establish the UVSS's Director of

Student Affairs as the chair the UVSS's Clubs' Council and require the Director of Student Affairs to facilitate new and established clubs.

[20] Bylaw 1.8 provides that a "'Club' shall be a group of members gathered in accordance with Board of Director policy and overseen by the Director of Student Affairs."

[21] Bylaws 12.1 and 12.2 provide that:

> 12.1 Policy for the Students' Society may be established from time to time by:
>
> a. A two-thirds [2/3] vote of the Board of Directors,
> b. A two-thirds [2/3] majority vote of those voting in a quorate general meeting, or
> c. A majority vote of a referendum of the Students' Society.
>
> 12.2 All policy remains the policy of the Students' Society until changed, or retracted by a vote of the same or higher authority as that which established the policy.

[22] The UVSS's Clubs Policy allows members of the UVSS to establish student clubs for the purpose of enhancing "the university experience by offering students the opportunity to pursue their interests beyond strictly academic endeavours" and fostering "a positive environment for students to express themselves and to join in activities within the diverse community of the University of Victoria."

[23] The UVSS's Clubs Policy allocates funding and other privileges to UVSS clubs. The Clubs Policy establishes a non-statutory complaints process for reviewing and adjudicating complaints against clubs, including an internal appeal process, and provides for discipline of clubs found to have violated the Clubs Policy. The UVSS can discipline its clubs, but has no power to discipline club members.

[24] Under the Clubs Policy, recognition as a UVSS club provides the club with, among other things:

> a. The opportunity to book available tables and rooms in the student union building free of cost;
>
> b. The opportunity to book available rooms, tables, and outdoor space on the University campus free of cost;

c. Access to audio-visual equipment;

d. The opportunity to raise funds for its activities;

e. Basic funding and the opportunity to apply for additional funding; and

f. The opportunity to put up posters in UVSS controlled facilities or venues.

[25] The UVSS's Clubs Policy provides mechanisms for dealing with funding, discipline, and harassment:

> **4. STATUS**
>
> …
>
> f. A club shall not be granted status until such time that the club's signing officers have read Clubs Policy Part F: Harassment and have signed a form verifying that this section has been read, understood and communicated to the club's entire membership.
>
> …
>
> **PART C: FUNDING**
>
> **1. ELIGIBILITY**
>
> a. To be eligible to receive funding grants from the UVSS a club must make it known on their Club Verification form that they wish to receive funding.
>
> b. No club shall receive funding if:
>
> i. It has not met the requirements of Recognition under Part B, section 2
>
> ii. It has not met the requirements of Membership under Part B, section 4
>
> iii. It has not met the requirements of Governance under Part B, section 5
>
> …
>
> **PART E: DISCIPLINE**
>
> **1. ACTIONS**
>
> Clubs having been found to violate Clubs policy may be disciplined in the following manner:
>
> a. An order to cease the violation and to refrain from committing the same or similar violation again;
>
> b. Public censure;

c. Freezing of accounts, denial of funding or withdrawal of unspent funds for no more than one year;
d. Withdrawal of room or AV booking privileges for no more than one year;
e. Withdrawal of postering and bannering privileges for no more than one year;
f. Withdrawal of Clubs Status for no more than one year.

**2. REINSTATEMENT**

Where status has been withdrawn, after the expiry of the period of withdrawal the disciplined club may re-apply for status.

**PART F: HARASSMENT**

**1. PURPOSE**

The purpose of Part F: HARASSMENT is as follows:

a. To prevent behaviour by clubs that has the effect or purpose of creating a hostile, intimidating, threatening, or humiliating environment;
b. To support ideological diversity;
c. To promote an environment within which all members of the University Community can fully participate in respectful debate and the sharing of ideas;
d. To create a campus environment that is free of discrimination and harassment.

Further to Club's harassment policy as stated in PART F, as members of the University Community and as agreed to under the terms of the UVSS' lease agreement with UVic for the Student Union Building, UVic's Discrimination and Harassment Policy will apply.

**2. DEFINITIONS**

Clubs shall not engage in harassment. Harassment is defined as the abusive, unfair, or demeaning treatment of a person or group of persons that has the effect or purpose of unreasonably creating a hostile, intimidating, threatening, or humiliating environment. It is not necessary for the club or club representative to intend for the conduct to produce feelings of fear or intimidation, only that the club or club representative reasonably ought to have known that the conduct would cause such feelings. Further to these definitions, the following is also identified as constituting harassment:

a. Abuses of the power that one holds over another or the misuse of authority;
b. Behaviour that discriminates against a person or group of persons on the basis of race, colour, ancestry, place of origin, nationality, religion, family or marital status, physical or mental disability, age, sex, sexuality, gender, gender identity, or conviction for a criminal charge;
c. Attempting to proselytise members of other religious clubs through membership lists, or during club meetings or other organized functions;
d. Communicating with another person or group of persons by verbal, electronic, telephonic, written or visual means in a manner that harasses.

**Background**

[26] YPY was formed pursuant to the UVSS Bylaws and Clubs Policy, and has been a UVSS club since the 1990s. Its members are opposed to the practice of abortion. YPY is neither a corporate entity nor a society, and is thus not a legal entity and has no legal capacities.

[27] The petitioners contend that the University's response to the UVSS's treatment of Mr. Côté and the other members of YPY began as wilful blindness and had progressed, by January of 2013, to active participation.

[28] Although neither Mr. Côté nor the BCCLA challenge any decisions of the UVSS prior to January 29, 2013, it is necessary to place the challenged decision in perspective by reviewing a number of events that took place prior to that date.

[29] Since 2008, and perhaps earlier, the views of members of YPY have conflicted with those of at least some of the executive of the UVSS. The root of the conflict has been with respect to abortions. The UVSS's policy on abortion is:

> 3. The Society supports:
>
> a. The fundamental right of all women to control their BoDies [sic]
>
> …
>
> c. Freedom of choice in the matter of abortion

This policy has been in place since 1989.

[30] In February 2008, YPY conducted a poster campaign that included at least three posters from a group called “Feminists for Life”. The posters had been approved for display by the UVSS Information Booth, but in March 2008, some students complained about them to the UVSS Board. As a result of the complaints, the posters were removed from the University’s Student Union Building.

[31] At a UVSS Clubs Council Committee meeting on September 23, 2008, YPY’s status as a club was challenged. The Clubs Council decided to approve club status for YPY, but to deny it the funding that would customarily accompany such approval. The UVSS Board then considered the matter and sent it back to Clubs Council for reconsideration. On October 21, 2008, Clubs Council reaffirmed its decision to deny funding.

[32] On February 10, 2009, Clubs Council approved both ratification and funding for YPY. This decision was reversed on February 23, 2009, by the UVSS Board which decided to deny YPY funding for a period of one semester.

[33] YPY unsuccessfully appealed that decision at the UVSS Board meeting on April 6, 2009.

[34] On September 29, 2009, Clubs Council voted to ratify YPY and grant it ordinary funding. This decision was reversed by the UVSS Board on October 5, 2009, when funding was again denied.

[35] On October 19, 2009, Dr. Dixon of the BCCLA wrote to the UVSS, UVic President Turpin, and others, objecting to the UVSS’s decision to deny YPY’s club funding.

[36] The University’s response was essentially that the UVSS’s actions were beyond the purview of the University and was signed by the University’s Secretary, Dr. Julia Eastman.

[37] In October 2009, YPY made a formal complaint to the University with respect to what it asserted to be attempts by the UVSS to restrict YPY's funding. YPY argued that these attempts violated the University's discrimination and harassment policy, by discriminating against YPY's members on the basis of their religion and conscientiously held political beliefs. YPY further alleged that the attempts were based upon numerous fabricated complaints of harassment and discrimination.

[38] The University concluded that it lacked jurisdiction over the UVSS, a separately incorporated association, which had not agreed to submit to the University's discrimination and harassment policy. The University found that where YPY's complaints were focused on an individual member of the UVSS, that individual's actions were undertaken not in a personal capacity, but as a representative of the UVSS, and were therefore also outside the University's jurisdiction.

[39] In January 2010, YPY again displayed posters from "Feminists for Life". The UVSS received a complaint, signed by 33 students, that the posters constituted harassment. The students wrote:

> We are writing a formal complaint today because on our way to class this morning some of us came across some of the same posters that YPY used in the past from Feminists for Life. This material has no space [sic] on a campus that promotes diversity, inclusion, and the human rights of all of its members.

[40] The petitioners contend that on the basis of the complaint, Clubs Council passed a motion in January 2010, recommending that YPY be denied club status for a year.

[41] On the basis of the Clubs Council's finding of harassment, the UVSS Board voted on February 8, 2010, to discipline YPY by denying clubs funding and stripping YPY of its club status until YPY members agreed in writing to a "Conditions of Clubs Status" ("CCS") document to be developed by the Organizational Development Committee.

[42] YPY wrote to the UVSS Board seeking to appeal the decision by having the matter taken to a Special General Meeting. The UVSS Board considered YPY's request at a meeting on February 22, 2010, and, by vote, denied it.

[43] The decision of February 8, 2010, was partially reversed by the UVSS Board on April 21, 2010, when it decided that YPY's club status would be restored for the remaining four days in the semester, upon YPY being informed of the new Clubs Policy. YPY's funding was not restored.

[44] On May 3, 2010, Anastasia Pearse, then president of YPY, launched a petition in BC Supreme Court (the "2010 Petition") alleging harassment and discriminatory treatment by the UVSS and seeking, *inter alia*, restoration of YPY's club status and funding. The 2010 Petition explicitly referred to the disciplinary sanction imposed by the UVSS against YPY for its violation of the UVSS harassment policy.

[45] In July 2010, Ms. Pearse's petition was held in abeyance by agreement when UVSS reinstated YPY's club status and funding and made other concessions to YPY.

[46] In the fall of 2010, YPY invited a representative of the Canadian Centre for Bio-Ethical Reform, a Calgary-based anti-abortion group, to present a movie on October 26, 2010, called "Echoes of the Holocaust". The movie graphically compares the practice of abortion with the genocide of the Nazi Holocaust. Mr. Dunsdon, on behalf of the University, approved the use of indoor space on campus for the presentation.

[47] Prior to and after the film was shown in October of 2010, complaints were made to the UVSS alleging that showing the film constituted harassment.

[48] Sometime prior to October 25, 2010, Rachael Reaugh, the Human Rights Advisor, Complaints, in the University's Equity and Human Rights Office, drafted what Cindy Player, the Director of that office described as a "discussion paper" and sent it to Ms. Player. In the paper, Ms. Reaugh expressed the view that the activities

of YPY constituted hate speech and harassment, and were inconsistent with the values of the University. She reported that she had "met in person with outraged students" and received "approximately 60 email complaints". Ms. Reaugh encouraged the University to seize "an opportunity for our university to show conviction in the resolve of our fundamental values."

[49] On October 25, 2010, the UVSS struck a Complaints Committee to address those complaints. The committee found that the harassment policy was violated by YPY when it publicly compared abortion to the Holocaust.

[50] On February 7, 2011, the UVSS accepted the Complaints Committee's recommendations and passed a motion censuring YPY for violating the UVSS Clubs Policy on harassment.

**The 2011 Choice Chain**

[51] On October 28, 2011, YPY applied to the Student Affairs Assistant for permission to host a "Choice Chain" event on the University's property. The request was forwarded by the Student Affairs Assistant to Mr. Dunsdon's assistant, Chardelle Lalonde.

[52] A Choice Chain is described by the petitioners as "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." They assert that although the images are provocative, the purpose of the event is to create a respectful dialogue surrounding the topic of abortion and that the participants are trained as to how to interact with passers-by.

[53] On October 31, 2011, UVSS Chair Tara Paterson met with Joel Lynn, the University's Director of Student Services, and asked the University not to allow the Choice Chain to proceed. At that meeting, Ms. Paterson and Mr. Lynn discussed concerns around the "Echoes of the Holocaust" event from 2010, and Ms. Reaugh's discussion paper describing YPY's activities as hate speech and a violation of the

UVSS and University harassment policies. Later that day, Ms. Paterson followed up with an email to Mr. Lynn attaching Ms. Reaugh's discussion paper.

[54] On November 2, 2011, Ms. Paterson sent a letter to Mr. Dunsdon in which she set out the UVSS's position on the Choice Chain event. The UVSS took the position that "[s]tudents should have the right to choose to be exposed to the content of the presentation", and that the high traffic location proposed by YPY for the Choice Chain would take away that choice. The UVSS stated that the Choice Chain violated the University's discrimination and harassment Policy. They recommended a change in venue from an outdoor, high-traffic area on campus, to an auditorium.

[55] After receiving the UVSS's letter and prior to the Choice Chain event, Mr. Dunsdon consulted with the University's General Counsel and reviewed the University's existing policies. He concluded that he "could not pre-determine whether the 2011 Choice Chain would constitute discrimination or harassment under the University's Policy".

[56] Ms. Paterson and Jenn Bowie, the UVSS Director of Student Affairs, directed further communications to Mr. Lynn while Mr. Dunsdon was absent from the University. Notwithstanding the UVSS's protest, Mr. Lynn approved the 2011 Choice Chain event by letter dated November 8, 2011.

[57] After his return to the University, Mr. Dunsdon directed Mr. Lynn to draft a letter approving a "counter-demonstration" by the Students for Reproductive Justice, to be conducted on the same days as the Choice Chain. Mr. Lynn sent this letter on November 15, 2011.

[58] The 2011 Choice Chain event went ahead on November 16 and 17 as scheduled. During the event, YPY members were allegedly the targets of verbal attacks and their opponents reportedly employed "stink bombs ... thrown among the backpacks belonging to YPY members" and "a small smoke bomb ... set off near their displays".

[59] After the 2011 Choice Chain event, the UVSS received approximately 24 complaints and Mr. Dunsdon's office received approximately 40 complaints about the conduct of YPY members during the event. Mr. Dunsdon responded to one such complaint by saying:

> … the university will conduct a thorough review of YPY's activities during their Choice Chain presentation and will use the results of this review to inform decisions surrounding future space bookings by the club. The University will work closely with the UVSS on reviewing this event within the context of the concerns raised, university policies and the university's expectations for club activities.

[60] The UVSS struck a Complaints Committee to investigate the complaints made and provide recommendations to the UVSS Board.

[61] Ms. Bowie was selected by UVSS as the Chair of the Complaints Committee. On February 6, 2012, the UVSS accepted the recommendations of the Complaints Committee and passed a second motion censuring YPY for violating the Clubs Policy on harassment by holding the 2011 Choice Chain event. In that motion the UVSS also purported to rescind YPY's space booking privileges on campus until the 2013 spring semester. The UVSS motion continued to allow YPY booking privileges for its meetings and Clubs Day.

[62] In February 2012, Ms. Bowie wrote to Mr. Dunsdon, asking that YPY's bookings be restricted to meeting space only as a result of the February 6, 2012 UVSS motion. She attached a copy of the UVSS meeting minutes from that date and made a further request that YPY's postering privileges also be suspended, advising that it "is something that the UVSS will also be implementing."

**The Outdoor Space Booking Policy**

[63] Work on a new Outdoor Space Booking Policy began in 2011, when early drafts were prepared by Jonathan Derry, the University's Manager, Policy Development and Judicial Affairs, in consultation with the UVSS, among others. The first meeting with the UVSS discussing the policy appears to have taken place in late October 2011.

[64] During this consultation process UVSS raised concerns about YPY with Mr. Derry. The policy incorporated feedback from the UVSS president.

[65] None of the versions of the new Outdoor Space Booking Policy drafted by Mr. Derry between September 2011 and September 11, 2012, included language providing that a booking could be denied where an applicant group "has been sanctioned for a violation of a university or student society policy".

[66] On September 11, 2012, Mr. Derry wrote to Mr. Dunsdon with what he presented as the "final draft" of the Outdoor Space Booking Policy stating:

> I have... recently met with staff in our office and we collective [sic] feel like we are ready to implement this policy.

[67] On September 27, 2012, Mr. Derry wrote to Mr. Dunsdon attaching the new policy "with your recent comments incorporated".

[68] The final draft of the policy was the same as that sent to Mr. Dunsdon on September 11, 2012, with the exception of one addition to 15.00(b)(iv) which thus read:

> (b) the Student Group:
>
> ...
>
> iv. has been sanctioned for a violation of a university or student society policy;

[69] The policy was finalized on September 28, 2012, and came into effect thereafter. By the time it did, YPY had been sanctioned by the UVSS on three separate occasions for violations of a student society policy: once after the "Feminists for Life" posters, once after "Echoes of the Holocaust", and once again after the 2011 Choice Chain.

[70] There is no evidence that any other student group had ever been sanctioned by the UVSS prior to September 2012.

**The 2013 Choice Chain**

[71] On November 6, 2012, Mr. Côté and Bronwyn Lawrie wrote to Mr. Dunsdon on behalf of YPY requesting permission to hold a second Choice Chain event on November 22, 2012. Their letter said, in part, "[a]s you are likely aware, after last year's event the University of Victoria Students' Society's board of directors voted to censor YPY's free speech by removing the club's public space booking privileges."

[72] Mr. Dunsdon's office received YPY's request on November 13, 2012. The Outdoor Space Booking Policy required that requests be received a minimum of 10 business days prior to the event. On November 16, 2012, Mr. Dunsdon denied YPY's booking request. While Mr. Dunsdon deposed that YPY's failure to comply with the 10 business day rule was not a significant factor in his denial of YPY's request, he was concerned that there was insufficient time to give notice to other student groups about the Choice Chain event. On November 27, 2012, Mr. Dunsdon met with Mr. Côté and another member of YPY to discuss concerns about the 2011 Choice Chain. Mr. Dunsdon recommended that YPY submit a space booking request for 2013.

[73] On January 17, 2013, YPY made a space booking request for a second Choice Chain event, this time to be held on February 1, 2013. Mr. Dunsdon added the booking request to the agenda of a meeting on January 28, 2013, with the UVSS-UVic Operational Committee.

[74] In his affidavit of August 12, 2014, Mr. Côté confirmed that:

> 11. I was President of YPY during the month of January 2013.
>
> 12. On January 17, 2013, I applied under BOSSP for UVic's approval to hold the February 1, 2013 Choice Chain (the "January 17, 2013 Request").
>
> 13. I was YPY's primary representative in connection with the January 17, 2013 Request.
>
> 14. I was the author of the January 17, 2103 Request…

[75] The request was approved by Mr. Dunsdon and communicated by letter dated January 29, 2013, to YPY and copied to the UVSS. That approval was subject to conditions, which were agreed to by Mr. Côté on behalf of the YPY. Those conditions were that:

1. 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.
2. 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.
3. No amplification is permitted during this presentation.
4. 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, a 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.
5. 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.
6. 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.
7. 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.
8. 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.
9. The presentation will be halted if there is any physical altercation or imminent threat of violence.

[76] On January 31, 2013, Mr. Dunsdon received a number of messages from the UVSS executive complaining of the University's decision to permit the Choice Chain event. Mr. Dunsdon met with UVSS executives that morning. In an email from the UVSS General Manager, Mr. Dunsdon was reminded that the UVSS had "ordered" YPY "not to organize or conduct Choice Chain or similar events".

[77] On January 31, 2013, Mr. Dunsdon spoke to Mr. Côté and informed Mr. Côté of his decision to withdraw his approval of the use of outdoor space for the Choice Chain. Mr. Dunsdon also asked Mr. Côté whether YPY had appealed the UVSS resolution. Mr. Côté told Mr. Dunsdon that YPY had not started such an appeal. Mr. Dunsdon encouraged Mr. Côté to consider doing so and took steps to ensure that he was informed about the UVSS appeal process. Mr. Côté did not mention to Mr. Dunsdon at any time during this conversation that YPY intended to go ahead with the Choice Chain event on February 1, 2013.

[78] Mr. Dunsdon also wrote to Mr. Côté by letter dated January 31, 2013, to confirm his decision. The letter stated:

> 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 university.

[Emphasis in original.]

[79] On February 1, 2013, Mr. Dunsdon and Mr. Derry met with Mr. Côté and Laura Gerein to discuss the reasons that the outdoor space booking approval was being revoked, YPY's concerns with the decision, and potential ways to move forward with further Choice Chain events on campus. During that meeting Mr. Côté said nothing about his intention, or the intention of other YPY members, to go ahead with the unauthorized Choice Chain later that day.

[80] It is clear that Mr. Dunsdon had been advised of the UVSS resolution on at least three occasions prior to January 31, 2013. I accept Mr. Dunsdon's explanation that he did not believe he had been advised of the UVSS's resolution. I find that this was a genuine belief which was due to the volume of paperwork that routinely went through his office and which he sometimes did not fully read or retain the details of. I find that as a result of the February 1, 2013, Choice Chain event:

a. Mr. Dunsdon had to cancel afternoon meetings to meet with the executive of the UVSS, who were concerned about student safety and angry that the Choice Chain had gone ahead. The executive of the UVSS wanted the University to shut down the Choice Chain and to have the members of YPY who were involved removed for trespassing. Mr. Dunsdon told the

executive of the UVSS that the University was not going to do either of the things they wanted. Mr. Dunsdon then had to spend time responding to the reaction from the executive of the UVSS;

b. Two members of Mr. Dunsdon's staff left a meeting to take signs to the site of the Choice Chain, warning people approaching the site that graphic images would be on display. They later had to return to the site to remove the signs;

c. An emergency meeting took place involving Tom Downie, the University's Director of Campus Security; Mr. Derry, the University's Manager, Policy Development and Judicial Affairs; a staff member of Mr. Dunsdon's office; and one of the University's in-house counsel at which they reviewed options for responding to the unauthorized Choice Chain;

d. Notice had to be given to occupants of University buildings adjacent to the site of the Choice Chain that the Choice Chain was going ahead and they had to be given contact information for health and counselling services to address any problems arising from the nature or content of the Choice Chain;

e. Notice had to be given to both the Dean of Education and the Dean of Human and Social Development about the potential impact of the Choice Chain on classroom attendance levels and the possibility of behavioural issues among students due to the nature and content of the Choice Chain;

f. Urgent deployment of a Campus Security Officer had to occur to address potential security issues, particularly given the fact that the Choice Chain was unauthorized; and

g. Accredited counselling services had to be arranged to assist any students who experienced emotional distress as a result of the Choice Chain.

[81] On March 7, 2013, Mr. Dunsdon wrote to Mr. Côté as the President of YPY. The letter stated:

> Dear Cameron:
>
> The purpose of this letter is to provide Youth Protecting Youth's (YPY) executive with follow-up information related to the club's unauthorized Choice Chain event that was held in the central quad on February 1, 2013.
>
> In accordance with section 15.00 of the Booking of Outdoor Space by Students policy, the university may decline, cancel or modify a space booking. On January 31, 2013, I sent you a letter that clearly cancelled YPY's space booking and also alerted you of this cancellation by telephone. On February 1, 2013, we met to discuss the reason the booking was being cancelled and the process for YPY to appeal the University of Victoria Student Society's motion which prevents YPY from conducting Choice Chain or similar events on campus. It was clearly communicated to you in writing and in our meeting that the event was not approved to be held.
>
> Over the last several years, the university has dedicated considerable planning and staffing resources related to the Choice Chain event. Despite the university's cancellation of the February 1 event, YPY proceeded to hold the unauthorized Choice Chain event which unnecessarily burdened multiple university resources and violated an established policy. I want to remind you that YPY also violated an agreement with the university during its November 16 and 17, 2011 Choice Chain events (as outlined in my letter to YPY's executive dated November 29, 2011).
>
> As YPY held an unauthorized event despite direction from the university, in accordance with section 19.00 of the Booking of Outdoor Space by Students policy, I am revoking YPY's outdoor space booking privileges on campus for a one year period until March 1, 2014.
>
> I want to also be clear 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).
>
> Please contact me if you require clarification on this restriction.

[82] The petition in these proceedings was filed on September 26, 2013, and the responses of the University and the UVSS were filed on November 15, 2013. On March 10, 2014, Mr. Dunsdon wrote to the executive of YPY to advise that he was withdrawing his letter of March 7, 2013, in which he had suspended YPY's booking privileges for the preceding year.

[83] In September 2014, Mr. Dunsdon wrote to the executive of YPY to advise that he was withdrawing his January 31, 2013, letter to Mr. Côté because the indefinite

restriction that it imposed on the booking of space by YPY was no longer relevant due to changes in the Outdoor Space Booking Policy made in July 2014.

[84] Mr. Dunsdon's January 29, 2013, letter has not been withdrawn.

**The Positions of the Parties**

[85] The petitioners contend that the restrictions that Mr. Dunsdon imposed on January 29, 2013, his decision to cancel the Choice Chain event on January 31, 2013, and his consequential imposition of a penalty on YPY students and the threat of further sanctions communicated on March 7, 2013, ("the impugned decisions") must all be set aside as unreasonable because they failed to proportionately balance the relevant *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] rights and values and are otherwise unconstitutional.

[86] The petitioners further contend that these decisions and actions 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 and impermissibly and unreasonably delegate final decisions on which students may access property for collective speech, to the board and executive of the UVSS. The petitioners argue that the UVSS is comprised of student politicians with no experience or expertise in university administration, property management, or the weighing and balancing of fundamental rights and the interpretation and application of laws.

[87] The petitioners also contend that these decisions and actions impose inequitable and unreasonable restrictions, such as a prohibition on personal recording devices for YPY that did not apply to other students who might attend the Choice Chain event. They argue that the University deferred to the student government as to which speech violates the University's policies and which does not, and imposed restrictions unequally and inequitably based on, *inter alia,* the popularity of the speech in question. The petitioners say that the University generally

failed to consider or sufficiently weigh the fundamental rights of expression and peaceful assembly in the context of what the petitioners assert to be the University's statutory mandate to carry on the work of a university.

[88] In its pleadings, the University raised the issue of unclean hands on the part of Mr. Côté due to his refusal to abide by Mr. Dunsdon's cancellation of the 2013 Choice Chain event, but did not press the issue before me. Therefore I will not address that issue in these reasons for judgment.

[89] The University contends that the *Charter* has no application to it, and asserts that the petitioners' claims are moot as the 2013 Choice Chain event took place as planned by YPY and was participated in by Mr. Côté.

[90] The University contends, in the alternative, if the *Charter* does apply to it, that the decision to cancel the space booking for February 1, 2013, and the decision to suspend YPY's space booking privileges for one year struck a reasonable balance between the relevant *Charter* values and the legitimate objectives of the Outdoor Space Booking Policy as is required when the *Charter* is found to apply to the exercise of administrative discretion.

[91] The UVSS takes the position that neither of the petitioners has standing to pursue the relief sought in their petition, but that if they do, the *Charter* cannot be applied to the impugned decisions, the University, or the UVSS.

**Issues**

[92] I would describe the issues that arise from the petition before me as follows:

a) Do either of the petitioners have standing to pursue a claim for a breach of *Charter* rights?

b) Are the issues raised by the petition moot?

c) Is Mr. Côté estopped from pursuing his alleged rights because he did not exhaust his other available remedies?

d) Does the *Charter* apply to:

i. the Outdoor Space Booking Policy;

ii. the policies and decisions of the University in regulating the use of its common areas for expressive purposes; and/or

iii. the impugned decisions?

e) Do the Outdoor Space Booking Policy and/or the impugned decisions violate the *Charter*? and

f) What remedies should flow to the petitioners?

**Discussion**

**a) Standing**

[93] The petitioners bear the burden of establishing standing to raise the *Charter* issues they seek to pursue: *Christian Labour Association of Canada and General Workers Union v. B.C. Transportation Financing Authority*, 2000 BCSC 727.

[94] There are, of course, two bases upon which such standing can be established: first, a direct or private interest, or second, a public interest: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside Sex Workers*].

[95] Private interest standing arises when an individual's legal interests are directly affected. UVSS contends that as Mr. Côté sought to book space for the Choice Chain event scheduled for February 1, 2013, in his capacity as president of YPY, and YPY has no *Charter* rights, Mr. Côté has no standing to petition the court with respect to the policies and decisions of the University.

[96] In my view the UVSS's position is an oversimplification of the matter. Mr. Côté asserts a private interest in his right to free speech. While his rights are personal, he

sought to enjoy them in his capacity as a member of a club, as only clubs could book University space.

[97] When Mr. Côté exercised what he contends was his right to free speech on February 1, 2013, he was threatened in his individual capacity with academic sanctions by Mr. Dunsdon. In my opinion, Mr. Côté's *Charter* rights are properly in issue, and he has private interest standing to assert the infringement of those rights.

[98] The BCCLA cannot assert private interest standing, and thus relies upon an assertion of public interest standing. Public interest standing is permitted at the discretion of the Court when a case raises a serious justiciable issue, when the party bringing the action has a real stake or a genuine interest in its outcome, and when, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 253.

[99] In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, the Supreme Court extended the discretion to grant public interest standing to include cases involving a challenge to the exercise of administrative authority. Speaking for the Court, Mr. Justice Le Dain, at 631, reaffirmed the three criteria for granting public interest standing and explained the judicial concerns underlying them:

> The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson, McNeil* and *Borowski*.

[100] In *Fédération des parents francophones de Colombie-Britannique v. British Columbia (Attorney General)*, 2012 BCCA 422 [*Fédération des parents francophones*], Mr. Justice Groberman, for the Court, found that a not-for-profit organization of some 43 member associations, each of which was associated with a

single French-language school, preschool, or daycare program (the "Fédération") should be granted party status, and be added as a party to the litigation commenced by some 33 parents of francophone students. He reasoned that if the Fédération was not granted standing as a plaintiff, the efficiency of the process might well suffer. Far from conserving judicial resources, Groberman J.A. concluded that intervenor standing alone in such a situation would result in inefficiencies. He found that the inclusion of the Fédération as one of the jointly-represented plaintiffs in the case could be expected to conserve judicial resources and be conducive to a full airing of the issues.

[101] At paras. 34 – 37, he wrote:

> [34] While, as the chambers judge found, it would be possible for the other plaintiffs to proceed with this case in the absence of the Fédération, the Fédération has a genuine contribution to make. It will be able to assist the other plaintiffs in ensuring that the perspectives presented to the court are complete. Some of the issues in this litigation, such as the provision of space in certain schools for pre-school classes, can only be effectively addressed by the Fédération.
>
> [35] Concerns of judicial efficiency in this case also favour the granting of public interest standing. As the plaintiffs will be jointly represented in the litigation, and are not seeking enhanced procedural rights as a result of the multiplicity of claimants, it is unlikely that the inclusion of the Fédération as a plaintiff will increase either the length or complexity of the trial.
>
> [36] In fact, if the Fédération is not granted standing as a plaintiff, the efficiency of the process may well suffer. If not granted standing as a plaintiff, the Fédération would almost certainly apply for and be granted the right to intervene in this case. As an intervenor, it would, for practical purposes, have to be represented separately from the plaintiffs. Far from conserving judicial resources, such a situation would result in inefficiencies. The inclusion of the Fédération as one of the jointly-represented plaintiffs in this case can be expected to conserve judicial resources and be conducive to a full airing of the issues.
>
> [37] Unfortunately, the decision in *Downtown Eastside Sex Workers* post-dates the chambers judge's decision. Following some of the language of older cases, he applied a strict test in considering the third criterion for public interest standing. If he had, instead, applied the flexible and purposive test that is now mandated, he would have found that the Fédération ought to be granted public interest standing.

[102] Dr. Dixon, a director of the BCCLA, deposed at para. 17 of his affidavit of September 23, 2013, that:

> Mr. Côté has suggested to me on several occasions, and I believe, that without the support of the BCCLA neither he nor other members of YPY would be able to initiate or sustain litigation against UVic.

[103] While this hearsay evidence is contradicted by the 2010 Petition, it is apparent from the material filed before me that Mr. Côté has relied to a considerable extent on the support of the BCCLA during the time in issue.

[104] In *Carter v. Canada (Attorney General)*, 2012 BCSC 886 (overturned, but not on this point at 2013 BCCA 435) at para. 98, in granting public interest standing to the BCCLA, Madam Justice Smith relied upon the fact that the BCCLA was a co-plaintiff:

> Finally, and most importantly, the BCCLA is involved as a co-plaintiff, in support of plaintiffs who have private standing. The issue is very different than it would be if the BCCLA were attempting to bring a separate action; in that case, the existence of an action by Ms. Carter, Mr. Johnson and Ms. Taylor might provide a strong argument that the BCCLA lacked standing to advance its own separate claim.

[105] As I have concluded that Mr. Côté has a private interest standing to pursue the alleged breaches of his *Charter* rights, I find that the BCCLA has a genuine contribution to make in the proceedings and that they will be able to assist Mr. Côté in ensuring that the perspectives presented to the court are complete.

[106] Applying the flexible and purposive test described in *Downtown Eastside Sex Workers*, I find that the BCCLA ought to be granted public interest standing in this matter.

**b) Mootness**

[107] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, Mr. Justice Sopinka described the analysis to be applied when the issue of mootness is raised:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always

> make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[108] The University contends that Mr. Côté's claim is moot because he is no longer a student at the University and the impugned decisions have been rescinded.

[109] While Mr. Dunsdon's letter of January 29, 2013, has not been withdrawn, it granted permission to YPY and its members to engage in the Choice Chain on February 1, 2013, albeit on terms. Those terms were agreed to and accepted by Mr. Côté. In the result, I am not persuaded that the decision referred to in that letter entitles the petitioners to any relief, and I would not entertain the relief they seek with respect to the decision reflected in that letter.

[110] On the other hand, as a result of the second and third impugned decisions, Mr. Côté was the subject of a disciplinary sanction by the University, and even though that sanction is no longer operative, I am prepared to infer that it forms a part of his academic record with the University.

[111] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para. 55, Iacobucci and Arbour JJ., writing for the majority held that:

> … an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, *per* Lamer J. (as he then was)).

[112] In *Vancouver (City) v. Ward*, 2010 SCC 27, the Court held that declarations of a *Charter* breach alone may provide an adequate remedy for the *Charter* breach.

[113] If Mr. Côté was deprived of any of his *Charter* rights by the second and third impugned decisions, he may, in my opinion, be entitled to seek relief as a result of such deprivations, notwithstanding that the deprivations are no longer operative.

### c) Exhaustion of Other Remedies

[114] The University contends that neither Mr. Côté nor any other representative of YPY sought a review of the February 2012 sanctions imposed upon YPY by the UVSS, and in the result, the petitioners should not be permitted to pursue their petition.

[115] As I have already indicated, the petitioners do not challenge any of the decisions predating Mr. Dunsdon's decision of January 29, 2013. In the circumstances, they must live with the February 2012 sanctions imposed upon YPY by the UVSS, and the choice not to seek a review of those sanctions does not, in my view preclude the hearing of their petition on other grounds.

### d) Does the *Charter* apply?

[116] Section 32 of the *Charter* provides:

> 32. (1) This Charter applies
>
> > (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> >
> > (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[117] In *Eldridge* v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624 [*Eldridge*], the Supreme Court of Canada confirmed that there are two ways in which the *Charter* may apply to an organization: if the organization is part of the apparatus of government or if it is implementing a government program or policy.

[118] At para. 35 of *Eldridge*, Mr. Justice La Forest, writing for the Court, explained that:

> Private corporations are entirely creatures of statute; they have no power or authority that does not derive from the legislation that created them. The *Charter* does not apply to them, however, because legislatures have not entrusted them to implement specific governmental policies. Of course, governments may desire corporations to serve certain social and economic purposes, and may adjust the terms of their existence to accord with those goals. Once brought into being, however, they are completely autonomous from government; they are empowered to exercise only the same contractual and proprietary powers as are possessed by natural persons. As a result, while the legislation creating corporations is subject to the *Charter*, corporations themselves are not part of "government" for the purposes of s. 32 of the *Charter*.

[119] Where the activities of an institution are controlled by government, the *Charter* applies to all its activities. If it is not controlled by government but is exercising statutory authority or otherwise performing a governmental function, the *Charter* will apply to those activities even if they are delegated to subordinates.

[120] The petitioners point out that under the *University Act,* the provincial government appoints eight of the 15 members of the University's Board of Governors: s. 19(1). The Chair of the Board must be elected from among the government appointees: s. 19.2(1). The government may remove an appointed member at any time: s. 22(1). While the University reports directly to the Minister on certain matters (s. 49), the Minister may not direct or otherwise interfere with the activities of the University set out in s.48(1).

[121] In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [*McKinney*]*,* five of the seven members of the Court held that universities were not part of "government" for the purposes of section 32 of the *Charter.* The majority held as follows at 268 – 270 and 274:

> It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. Essentially, the prerogative writs were designed to ensure that administrative decision-making was legally and procedurally correct. They did not deal with substantive rights like those enshrined in the *Charter* and their scope extends beyond what one would normally characterize as government. In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. As

Beetz J. observed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 594, it is only "in a sense" that a university may be regarded as a public body. It is clear from that case that judicial review may be available in certain circumstances even though a university may be an autonomous body. The following passage from Beetz J.'s reasons, at pp. 594-95, is instructive:

> The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens, as was held in *Polten* [(1975), 59 D.L.R. (3d) 197], its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy of the university by making provision for the solution of conflicts within the university.

The *Charter* apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a *Charter* attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the *Charter*. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse, as Beetz J.'s statement from *Harelkin v. University of Regina* indicates; see also *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), *per* Rehnquist J., for the court, at pp. 350-51. I would refer, in this respect, to McIntyre J.'s statement in *Dolphin Delivery*, *supra*, at p. 598, that s. 32(1) does not refer "to government in its generic sense — meaning the whole of the governmental apparatus of the state". A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty. It is simply not the test mandated by s. 32. As Wellington, "The Constitution, the Labor Union and 'Governmental Action'" (1961), 70 *Yale L.J.* 345, has stated, at p. 374, in relation to the United States Constitution:

> The easy conclusion, shared by too many "bold thinkers", that "whenever any organization or group performs a function of a sufficiently important public nature, it can be said to be

> performing a governmental function and thus should have its actions considered against the broad provisions of the Constitution" is wrong. Like most easy conclusions about most hard governmental problems it lacks the institutional feel. Perhaps there are private groups in society to which the Constitution should be applied. But one thing is clear: that conclusion should depend on more than an awareness that the group commands great power or performs a function of an important public nature.
>
> …
>
> There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.

[122] In *Harrison v. University of British Columbia,* [1990] 3 S.C.R. 451 [*Harrison*], the Supreme Court of Canada specifically considered whether the result in *McKinney* would change as a result of differences between the legislation at issue in *McKinney* and the *University Act*. In *Harrison,* five of the seven members of the Court held that the *Charter* did not apply to the University of British Columbia ("UBC"). The majority held as follows at 463:

> ... The relatively minor factual differences in the two cases [*McKinney* and *Harrison*] do not affect the matter. The fact that in the present case the Lieutenant Governor appoints a majority of the members of the university's Board of Governors or that the Minister of Education may require the university to submit reports or other forms of information does not lead to the conclusion that the impugned policies of mandatory retirement constitute government action. While I would acknowledge that these facts suggest a higher degree of governmental control than was present in *McKinney*, I do not think they suggest the quality of control that would justify the application of the *Charter*. I would in this respect refer to the distinction that I have drawn in the companion appeal of *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, between ultimate or extraordinary control and routine or regular control; see pp. 513-14. The respondents also sought to establish government control of the university by means of the *Financial Administration Act*, S.B.C. 1981, c. 15, the *Auditor General Act*, R.S.B.C. 1979, c. 24, and the *Compensation Stabilization Act*, S.B.C. 1982, c. 32 (repealed by s. 69 of the *Industrial Relations Reform Act*, S.B.C. 1987, c. 24). These Acts, no doubt, apply to the university in that they monitor and regulate the expenditure of public funds it receives. However, I agree with the Court of Appeal, at p. 152, that "the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core

> functions of the university and, in particular, upon the policy and contracts in issue in this case".

[123] In *Eldridge* the Supreme Court of Canada summarized *McKinney* and *Harrison* as follows at para. 37:

> ... a majority of the Court in *McKinney, Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not themselves part of the apparatus of government in the sense required by s. 32(1), nor were they putting into place a government program or acting in a governmental capacity in adopting those policies.
>
> [Emphasis added.]

[124] At paras. 42 – 43, the Court continued:

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. In *McKinney*, I pointed to *Slaight*, supra, as an example of a situation where action taken in furtherance of a government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that the arbitrator in that case was "part of the governmental administrative machinery for effecting the specific purpose of the statute". "It would be strange", I wrote, "if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute"; see *idem*. Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor; see A. Anne McLellan and Bruce P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 371.
>
> Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the

> susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:
>
> > It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. ... In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers.
> >
> > (Emphasis added.)
>
> In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. As I stated further on in *McKinney,* at p. 269, "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32".
>
> [Emphasis added.]

[125] In *Blaber v. University of Victoria* (1995), 123 D.L.R. (4th) 255 (B.C.S.C.) [*Blaber*]*,* the petitioner alleged that the University had infringed his right to free expression insofar as it had curtailed, or threatened to curtail, his access to and use of a University computer account that, in turn, provided him with access to the Internet. The petitioner further contended that the University's harassment policy was contrary to s. 2(b) of the *Charter* and the infringement was not justified under s. 1.

[126] Mr. Justice Owen-Flood held that the *Charter* did not apply to the University, either as a result of the nature of the relationship between the University and government or because of the particular actions of the University at issue in that case.

[127] At paras. 31 – 32, Owen-Flood J. found that the *Charter* did not apply to the University in the discipline of a student. He found support for his conclusion that the *Charter* did not apply in the circumstances, in the wording of s. 46.1 of the *University Act*, now s. 48, and in particular the provision that prevented the Minister from interfering with the exercise of the University's powers in connection with the formulation of academic policies and standards. He appeared to be of the view that the enforcement of the University's harassment policy was a matter concerned with

the formulation of academic policies and standards, although observing that there was an absence of evidence on which to decide this point.

[128] Our Court of Appeal considered the application of the *Charter* to universities in *Maughan v. University of British Columbia,* 2009 BCCA 447 [*Maughan*], application for leave to appeal dismissed [2009] S.C.C.A. No. 526. The Court held that the *Charter* did not apply to UBC. It agreed with UBC's submission that the *Charter* had no application in the litigation, which was taking place between private litigants: paras. 52 and 54.

[129] In *Barbour v. University of British Columbia,* 2009 BCSC 425, rev'd on other grounds, 2010 BCCA 63, at para. 49 [*Barbour*], the trial judge accepted, in general, UBC's submission that it had the common law rights of a landowner in relation to persons who had parked their cars at UBC without UBC's permission. This was so because such persons were trespassers. In the case at bar, the University says it had and exercised the same common law rights as a landowner, as UBC did in *Barbour.*

[130] The petitioners contend that despite these authorities, the University, in regulating or prohibiting the use of its common space for all purposes, including expressive purposes, was performing a government function explicitly set out in s. 27 of its enabling legislation. The petitioners argue further that 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 *University Act*, and is similarly governmental in nature.

[131] The petitioners contend that all administrative decisions are now subject to *Charter* scrutiny as a result of the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*]. They argue that due to this authority, every decision maker whose decision may impact constitutional rights must appropriately weigh and consider the various rights in issue. They contend that like the provision of health care, the provision of post-secondary education is a government program.

[132] I am not persuaded that the decision in *Doré* stands for such a proposition. *Doré* involved a judicial review of the imposition of discipline on a lawyer by the Barreau du Québec (the "Barreau"). The question of whether the *Charter* applied to such proceedings was never raised in that case, the Barreau in effect conceding the point.

[133] One can understand the concession by the Barreau as it was acting upon its express grant of statutory authority in the discipline of its professional member.

[134] The discussion of the application of the *Charter* in *Doré* was the type of *Charter* analysis to be undertaken in an administrative forum in proceedings where the *Charter* applied. The Supreme Court of Canada held that the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 was inapplicable to an administrative decision because no *law* was being challenged.

[135] As I have set out above, the question to be addressed in this section of my reasons is whether the *Charter* applies to the Outdoor Space Booking Policy, the policies and decisions of the University in regulating the use of its common areas for expressive purposes, and/or the impugned decisions.

[136] The petitioners also rely on the decision of the Alberta Court of Appeal in *Pridgen v. University of Calgary*, 2012 ABCA 139 aff'g 2010 ABQB 644 [*Pridgen*] in support of their position on this issue. *Pridgen* was a judicial review of the University of Calgary's decision to place two students on probation for non-academic misconduct after they posted criticism of a professor on social media. The chambers judge found that the University's non-academic discipline policy formed part of the University's specific statutory mandate under the *Post-secondary Learning Act*, S.A. 2003, c. P-19.5, to provide accessible post-secondary public education.

[137] The petitioners contend that *Pridgin* stands for the proposition that any regulation of speech on its property by a university is subject to *Charter* scrutiny. Certainly that is the thrust of the reasoning of Madam Justice Paperny who wrote at paras. 90 – 91 and 104 that:

> [90] There are many other examples of bodies exercising powers of statutory compulsion. A similar analysis has led to the application of the *Charter* to a university in the creation and enforcement of parking bylaws prohibiting the distribution of pamphlets (*R v Whatcott*, 2002 SKQB 399), and to a first nation purporting to prevent band members from protesting at the band council office (*Horse Lake First Nation v Horseman*, 2003 ABQB 152). In both cases, it was noted that the body's authority to govern and regulate the activity in question, where it was greater in scope than the authority of a private citizen or corporation, was derived from statute.
>
> [91] Where a statutory authority is being exercised, the *Charter* will apply not only to rules and regulations enacted pursuant to that authority, but also to the application and interpretation of those rules in making decisions: *Slaight Communications*. At 1077-78 of that case, Lamer J. articulated the principle as follows (quoted with approval recently by Bastarache J. in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada*, 2008 SCC 15, [2008] 1 SCR 383 at para 20):
>
> > *The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question.* The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, *it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter*, unless, of course, that power is expressly conferred or necessarily implied .... *Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter, and he exceeds his jurisdiction if he does so.*
> >
> > (emphasis of Bastarache J.)
>
> …
>
> [104] That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed. The rather more fine distinction the University seeks to draw here is that it is not a "specific governmental objective", which it says *Eldridge* requires. I find this distinction to be without merit. *Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSL Act*, while couched in broad terms, are tangible and clear.

[138] However, the other two members of the Court did not agree with Madam Justice Paperny. Mr. Justice O'Ferrall found that a ruling on either the *Charter's* applicability to university student discipline or a ruling on whether the students'

rights, as guaranteed by the *Charter*, had been infringed, was unnecessary to the chambers judge's disposition of the students' complaint or to the Court's disposition of the University's appeal. He further found that a decision on the applicability of the *Charter* was perhaps even undesirable because the issue of *Charter* infringement was not explored at first instance.

[139] Mr. Justice McDonald held that it was neither appropriate nor necessary for the chambers judge to have embarked on a *Charter* analysis, and declined to exercise the Court's jurisdiction to refer the matter back to the board. Recognizing that *Doré* had been decided following the argument in *Pridgen,* McDonald J.A. commented that in his view, the decision of the Supreme Court of Canada in *Doré* did not alter his analysis.

[140] Despite the comments of McDonald J.A., the petitioners say that this court should apply the interpretation of *Pridgen* in light of *Doré* as found in Madam Justice Horner's decision in *Wilson v. University of Calgary*, 2014 ABQB 190. In that case, at paras. 147 – 148, Madam Justice Horner wrote:

> [147] Counsel for the University argued that the issue of whether the *Charter* applies to instances of disciplinary proceedings under the *PSLA* has not been settled in this province. It is clear that Justices Paperny and McDonald took differing approaches to the application of the *Charter* to the facts in *Pridgen CA*. Paperny JA found that the *Charter* applies to a disciplinary proceeding undertaken by a university, and that the university had failed to take into account the students' right to freedom of expression in that instance: *Pridgen CA* at para 128. McDonald JA found that because the matter could have been decided solely on administrative law grounds, there was no need to resort to a *Charter* analysis: *Pridgen CA* at para 176.
>
> [148] O'Ferrall J.A. found that while the issue in *Pridgen CA* was not whether the university was a "*Charter*-free zone" the disciplinary decision was unreasonable because no consideration was given to the students' right to freedom of expression and association. He went on, at paras 179 and 183 to find that a ruling on the application of the *Charter* was unnecessary and perhaps undesirable because the issue of the *Charter* infringement was not explored by the general faculties council at first instance (in the case at bar it was raised at all three hearings). This is not the same as finding that the *Charter* is not applicable. In fact, O'Ferrall JA went on to state that the failure of the general faculties council to engage in an analysis weighing the students' right to freedom of speech and association against considerations such as academic freedom and fostering a respectful learning environment was, in itself, enough to justify setting aside the general faculty council's

> decision: *Pridgen CA* at para 183. I do not read these three sets of reasons as together casting doubt upon the requirement to undertake a consideration as to the effect that disciplinary action has on a student's *Charter*-protected rights in the present case.

[141] Unlike the Alberta legislation considered in *Pridgen*, s. 48 of the *University Act* specifically prohibits the Minister from interfering with certain powers granted to the University and s. 61 of the *University Act* gives the president and senate of the University authority over student discipline. In any event, unlike the student in *Pridgen*, Mr. Côté was not the subject of any actual discipline by the University.

[142] The UVSS contends that the government control test from *Eldridge* requires consideration of the extent to which the government controls the University, and the petitioners must establish more than the fact that the University performs some public functions. It says that the petitioners must establish that there is governmental control built into the university's governance framework and that they have failed to do so. For this contention the UVSS relies upon *Blaber, Pridgen, McKinney, Harrison, Maughan*, *Telfer v. University of Western Ontario*, 2012 ONSC 1287, *AlGhaithy v. University of Ottawa*, 2012 ONSC 142, and *Lobo v. Carleton University*, 2012 ONCA 498 [*Lobo*].

[143] In *Lobo*, a group of students alleged that the defendants breached their *Charter* rights by failing to allocate space in the students' chosen venue to advance their extra-curricular objectives, such as the mounting of pro-life exhibits, the Genocide Awareness Project, and Choice Chain, as a means to express their social, moral, religious, or political views. The chambers judge struck out the students' *Charter* claims on the basis that they disclosed no reasonable cause of action.

[144] At para. 4 of its endorsement the Ontario Court of Appeal held that:

> … As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.

[145] The UVSS argues that the petition fails as well under the government activity test. I accept the submission of the UVSS that the purpose of the government activity test is to prevent a government from avoiding *Charter* scrutiny by creating a body that is distinct from government to do what would attract *Charter* scrutiny if done by government directly. This rationale was established by the Supreme Court of Canada in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 48.

[146] As Mr. Justice La Forest explained in *Eldridge*, at para. 35:

> … it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so; *Slaight, supra*. It is possible, however, for a legislature to give authority to a body that is not subject to the *Charter*. Perhaps the clearest example of this is the power of incorporation. Private corporations are entirely creatures of statute; they have no power or authority that does not derive from the legislation that created them. The *Charter* does not apply to them, however, because legislatures have not entrusted them to implement specific governmental policies. Of course, governments may desire corporations to serve certain social and economic purposes, and may adjust the terms of their existence to accord with those goals. Once brought into being, however, they are completely autonomous from government; they are empowered to exercise only the same contractual and proprietary powers as are possessed by natural persons. As a result, while the legislation creating corporations is subject to the *Charter*, corporations themselves are not part of "government" for the purposes of s. 32 of the *Charter*.

[147] The University and the UVSS contend that the *Charter* does not apply to the impugned decisions as they were decisions taken by the University respecting the management of its privately owned land, and not to the exercise of governmental policy or the implementation of a specific government program regulating the use of University land.

[148] I agree with the University and the UVSS that if the impugned activity or decision falls within the University's sphere of autonomous operational decision-making, the *Charter* will not apply to such a decision. Thus, the test to determine whether the *Charter* applies to the act of a non-governmental entity under the government activity test identified in *Eldridge*, requires the identification of a specific act or decision that can be identified as infringing a *Charter* right: *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter*

*Games*, 2009 BCCA 522 at para. 49 and *Canadian Blood Services v. Freeman*, 2010 ONSC 4885 at para. 367.

[149] The three impugned decisions in this case relate to the University's allocation of its outdoor space for use by UVSS student clubs. The University is given the authority 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 activities and events, by s. 27(2)(t)(i) of the *University Act*, set out above. In my opinion, this is therefore a sphere of autonomous operational decision-making reserved for the University.

[150] Given the reasoning in *McKinney* and *Harrison,* the fact that the University is engaged in the provision of post-secondary education cannot result in every endeavour that is undertaken by the University falling under *Charter* scrutiny.

[151] In my opinion, the reasoning in *Lobo* applies equally to the petition before me, and I find that in booking space for student club activities, the University is neither controlled by government nor performing a specific government policy or program as contemplated in *Eldridge*.

[152] I conclude that the *Charter* does not apply to the activities relating to the booking of space by students.

[153] As I have concluded that the *Charter* does not apply to the activities relating to the booking of space by students it follows that I decline to make the declarations sought in paras. 1 and 3 of the Petition. Therefore, I also decline to grant the relief requested in para. 4 of the Petition.

[154] The declaration sought at para. 2 of the Petition is, in my view, overly broad and cannot be supported on the factual matrix of the evidence before me. It follows that I similarly decline to make the declaration sought in para. 2.

### e) Do the impugned decisions violate the *Charter*?

[155] Given my conclusion that the *Charter* does not apply to the impugned decisions, there is no basis for any determination of this issue.

### f) Remedies

[156] Given my conclusion that the *Charter* does not apply to the impugned decisions, there is similarly no basis for any determination of this issue.

## Conclusion

[157] The petition is dismissed.

"The Honourable Chief Justice Hinkson"