COURT OF APPEAL OF ALBERTA

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REGISTRY OFFICE:	EDMONTON
APPELLANTS	UALBERTA PRO-LIFE, AMBERLEE NICOL and CAMERON WILSON
RESPONDENT	THE GOVERNORS OF THE UNIVERSITY OF ALBERTA
INTERVENOR	THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
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Part 1 – Facts, Part 2 – Grounds of Appeal, and Part 3 – Standard of Review

1. This Factum is submitted on behalf of the Intervenor, the British Columbia Civil Liberties Association ("BCCLA"). The BCCLA's application to intervene in this appeal was granted on conditions by the Hon. Madam Justice Schutz on October 29, 2018. In that decision, the BCCLA was granted leave to file a Factum of up to 15 pages respecting these matters:

> a. Universities provide the core public function of providing education;
> b. The recent Supreme Court decisions in *Loyola, TWU 1*, and *TWU 2*, have altered the *Doré* analysis; and
> c. The scope of the s. 2(b) *Charter* right at issue must be identified, considered, and afforded substantial weight in light of the new *Doré/Loyola* test.[1]

2. The above matters relate only to the second decision now under review. The BCCLA has not been granted leave to present submissions respecting points of fact, the grounds of appeal, or the standard of review, and defers to the factual submissions of the parties on those subjects.

3. The following basic facts are of significance to the submissions presented in this Factum. The Appellants comprise a "pro-life" student organization at the University of Alberta. On occasion, their activities include the expression of certain challenging ideas for the purpose of stimulating discussion and debate regarding the abortion issue. In the second decision now under review, the university granted permission to the Appellants to set up displays in the university quad, but only on condition that they pay an estimated $17,500 in security costs. That costs condition was imposed since, on a prior occasion, a crowd of counter demonstrators had obstructed a similar event in an effort to suppress the expression of the Appellants' ideas.

Part 4 - Argument

Issue 1: Universities provide the core public function of providing education

4. In this appeal, the BCCLA does not submit that universities are government entities amendable to the *Charter* in everything they do. For example, as held in *McKinney*, universities are not subject to the *Charter* in the context of their employment relations.[2] However, insofar as the actions of universities in Alberta amount to the delivery of education, they are performing a core government function, and are subject to the *Charter*. As Deschamps J. held in *Greater Vancouver Transportation Authority*, the *Charter* may be found to apply to an entity in either or both of two ways:

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[1] *UAlberta Pro-Life v. Governors of the University of Alberta*, 2018 ABCA 350 at para. 32 **[Tab 1]**.
[2] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 **[Respondents' Tab 20]**.

> [T]here are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.[3]

(a) This Court ought to squarely address and determine the constitutional issue

5. As an initial matter, the BCCLA submits that the issue of the *Charter*'s applicability to the decision now at issue properly arises for determination in this case and ought not to be avoided. This issue is of substantial importance to the residents of Alberta, and the other provinces of Canada. No rule or judicial policy warrants a side-stepping of this issue. On the contrary, as Justice Côté has opined: "An important role of Courts of Appeal is to settle the law, so it is unfortunate when they avoid reasonable chances to do so."[4]

6. As pointed out by the Respondents at paragraph 79, there exists a general rule that a Court ought not to decide legal issues that are unnecessary to the resolution of a case, which rule applies *a fortiori* to constitutional issues.[5] But this rule does not require a Court to take active steps, such as the adoption of questionable assumptions, in order to avoid constitutional issues that properly arise for determination.

7. The application of the *Charter* to the University of Alberta is not an extraneous or unnecessary issue in this case. This issue will determine whether the university's decisions are to be reviewed on the basis of *Doré/Loyola* or on the basis of *Dunsmuir*.

8. Both Bokenfohr J. and O'Ferrall J.A. in *Pridgen* side-stepped the issue of the *Charter*'s applicability on the basis that, even under ordinary administrative law principles, the decision-makers were required to consider the civil liberties affected by their decisions. That approach is, in substance, the approach that prevailed from 1999 to 2012, after *Baker* but before *Doré*.[6]

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[3] *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31 at para. 16 **[Respondents' Tab 1]**.

[4] JE Côté, *The Appellate Craft,* (Ottawa: Canadian Judicial Council, 2009) at p. 7 **[Tab 2]**. See also: Colin Feasby, "Failing Students by Taking a Pass on the Charter in *Pridgen v University of Calgary*", Constitutional Forum constitutionnel, Volume 22, Number 1, 2013 **[Tab 4]**.

[5] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 6-11 **[Tab 2]**.

[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 53-56 **[Tab 5]**; examined in *Doré v Barreau du Québec*, 2012 SCC 12 at para. 28ff **[Appellants' Tab 6]**.

9. But the whole point of Abella J.'s landmark decision in *Doré* was to establish a new, more rigorous framework for the review of administrative decisions which engage *Charter* rights and values, and to bring that framework into alignment with the Court's s. 1 jurisprudence. Contrary to Bokenfohr J.'s analysis at paragraphs 45 and 55 of her reasons, it is insufficient for a decision maker to merely advert to the *Charter*. This Court ought not to adopt the wrong test just to avoid an issue properly arising from the facts of this case.

(b) The delivery of education is a core public function

10. By way of overview, the BCCLA submits that the analyses of Paperny J.A.,[7] and Strekaf J. (as she then was)[8] in *Pridgen* ought to be adopted by this Court. Both of those judgments find that the delivery of post-secondary education is a specific objective of the Alberta Legislature, and that "universities are acting as government agents in regard to the delivery of post-secondary education".[9] Indeed, as Paperny J.A. wrote: "That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed".[10] Since the BCCLA was denied leave to present submissions regarding *Pridgen*, these submissions will focus on points not addressed in that case.

11. In *McKinney*, the Court did not hold that universities are a *Charter*-free zone, and in fact acknowledged that some activities may be subject to *Charter* review.[11] The factors to be considered in determining whether the activities of a private entity will be subject to the *Charter* are less than clear. In *Eldridge*, LaForest J. noted that "[t]he 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."[12] However, those factors at least include the terms of the legislation which governs the activity at issue. Such legislation must include the Constitution.

12. It is impossible to imagine a Canada or an Alberta without a public education system. The constitutional provisions which confer responsibilities respecting education on Parliament and the provincial legislatures are of fundamental importance to our system of government.

13. By s. 93 of the *Constitution Act, 1867*, the power to legislate with respect to education is entrusted to the provincial legislatures. As Iacobucci J. noted in *Adler v. Ontario*, s. 93's

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[7] *Pridgeon v. University of Calgary*, 2012 ABCA 139 **[Appellants' Tab 10]**.
[8] *Pridgeon v. University of Calgary*, 2010 ABQB 644 **[Tab 31]**.
[9] *Pridgeon v. University of Calgary*, 2012 ABCA 139 at paras. 101-103 **[Appellants' Tab 10]**.
[10] *Pridgeon v. University of Calgary*, 2012 ABCA 139 at para. 104 **[Appellants' Tab 10]**.
[11] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at para. 42 **[Respondents' Tab 20]**.
[12] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 42 **[Respondents' Tab 27]**.

protections for denominational schools and religious minorities embody one of the most important compromises in the history of Canada:

> Section 93 is the product of an historical compromise which was a crucial step along the road leading to Confederation. As Gonthier J. said in *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511, at p. 529:
>
> > Section 93 is unanimously recognized as the expression of a desire for political compromise. It served to moderate religious conflicts which threatened the birth of the Union.
>
> Without this "solemn pact", this "cardinal term" of Union, there would have been no Confederation.[13]

14. Similarly, in the federal context, the Queen's promises respecting the provision of education were of crucial importance to the negotiations which culminated in each of the numbered treaties with Canada's First Nations, including Alberta's Treaties 7, 8 and 9.[14] As James (Sa'ke'j) Youngblood Henderson writes in *Treaty Rights in the Constitution of Canada*:

> Enriched education of the First Nations was the shared intent and the most fundamental purpose of the treaties. It was considered the foundation and engine of the Treaty economy. Education was associated with the future and prosperity… Recognizing the right of education and instruction in the treaties is what gives coherence to the Treaty economy.[15]

15. Today, education in Alberta is governed primarily by the *School Act* and the *Post-Secondary Education Act*. By s. 45.1 of the former Act (which of course does not apply to universities), all school boards are expressly required to establish formal policies which affirm the applicability of the *Alberta Bill of Rights* and the *Charter* to each staff member and student:

> 45.1 (3) A policy established under subsection (2) and a code of conduct established under subsection (2) must
>
> > (a) affirm the rights, as provided for in the *Alberta Human Rights Act* and the *Canadian Charter of Rights and Freedoms*, of each staff member employed by the board and each student enrolled in a school operated by the board, and
> >
> > (b) contain one or more statements that staff members employed by the board and students enrolled in a school operated by the board will not be discriminated against as

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[13] *Adler v. Ontario*, [1996] 3 S.C.R. 609 at paras. 29-31 **[Tab 6]**.

[14] "Each of the numbered treaties, for example, provides specifically for rights to education. These are sometimes expressed in the form of a simple requirement to provide a school or a teacher, but when taken together with the oral record and understanding of the treaty nation, they entitle treaty nations people to be educated so that they can earn a living in today's world." Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples (Ottawa: The Commission, 1996), Vol. 2, *Restructuring the Relationship*, Part One, ch. 2, pp. 78-80 **[Tab 8]**.

[15] James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) at p. 634 **[Tab 7]**.

> provided for in the *Alberta Human Rights Act* or the *Canadian Charter of Rights and Freedoms*.[16]

16. In both *Lobo* and *BCCLA*, *Pridgen* was distinguished on the basis of the applicable legislation.[17] *Lobo* turned upon the particular legislative history of Carleton University,[18] whereas the Court in *BCCLA* placed particular reliance upon the *University Act* of British Columbia.[19] The provisions of the *Post-Secondary Education Act* of particular importance to this case were reviewed by Paperny J.A. and Stekaf J. in *Pridgen*, and so will not be repeated here.

17. In the American context, the First Amendment applies to the activities of state funded universities. The Supreme Court of the United States has repeatedly emphasized the vital importance of free speech in this context. In fact, the Court has held that the free exchange of ideas is nowhere more important than on campus. In *Healy v. James*, Justice Powell wrote:

> At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case. *Ibid*. And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' *Id*., at 507, 89 S.Ct. at 737. Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom…[20]

(c) The decision under review is one respecting the delivery of education

18. A review of the Canadian cases on point confirms that the Court's characterization of the conduct at issue may be critical in determining the applicability of the *Charter*. In *Pridgen*,

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[16] *School Act*, R.S.A. 2000, c. S-3, s. 45.1 **[Tab 9]**.
[17] *BC Civil Liberties Assn. v. University of Victoria*, 2016 BCCA 162 at para. 37 **[Respondents' Tab 30]**.
[18] *Lobo v. Carleton University*, 2012 ONSC 254 at para. 14 **[Respondents Tab 29]**, aff'd 2012 ONCA 498 at para. 4 **[Respondents Tab 28]**.
[19] *BC Civil Liberties Assn. v. University of Victoria*, 2016 BCCA 162 at paras. 21-25 and 32-33 **[Respondents' Tab 30]**.
[20] *Healy v. James*, 408 U.S. 169 (1972) at p. 180 **[Tab 10]**.

Paperny J.A. and Strekaf J. characterized the governmental activity in question as the delivery of education. In contrast, both *Lobo* and *BCCLA* characterized the decisions then under review as ones merely allocating physical space for extra-curricular activities. In the former case, the Ontario Court of Appeal concluded that a university is not carrying out a government program for the purposes of *Eldridge* when it "books space for non-academic extra-curricular use".[21] In the latter case, Willcock J.A. held that: "There is no basis upon which it can be said on the evidence that when the University regulated the use of space on the campus it was implementing a government policy or program."[22]

19. The BCCLA submits that the decision now under review does not merely allocate physical space for non-educational activity. Rather, it regulates an integral component of the educational experience – the marketplace of ideas. Hence, this Court ought not to adopt *Lobo*'s and *BCCLA*'s rigid distinction between a university's formal curriculum and its extra-curricular activities and programs. In the article *Application of the* Charter *to Universities' Limitation of Expression*, Prof. Dwight Newman questions the validity of the "fiercely drawn" distinction in *Lobo*, given that both curricular and extra-curricular aspects of university life are an important part of the student's education:

> One question that arises [from *Lobo*] is whether the informal curriculum of an educational institution can be so easily distinguished from the formal curriculum, so as to say that student extracurricular activities have no place within their educational experience and academic activity.[53] If this distinction cannot be so fiercely drawn, then it may be that this category is no different than others in which student expression of views is limited.
> […]
> [53] Drawing on other literature, Paul Clarke suggests that the informal curriculum—what an educational institution teaches about behaviours and values through aspects of the institution outside the formal curriculum—may be just as important to the educational experience. See Paul T. CLARKE, *Understanding Curricular Control: Rights Conflicts, Public Education, and the Charter*, London, Althouse Press, 2013, p. 161.[23]

20. Prof. Newman goes on to opine that with respect to university limitations on expression, "*Charter* application actually furthers the values of academia" and that given the *Charter*'s

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[21] *Lobo v. Carleton University*, 2012 ONCA 498 at para. 4 **[Respondents Tab 28]**
[22] *BC Civil Liberties Assn. v. University of Victoria*, 2016 BCCA 162 at para. 33 **[Respondents Tab 31]**.
[23] Dwight Newman, *Application of the* Charter *to Universities' Limitation of Expression*, (2015) 45 R.D.U.S. 133 at p. 147 **[Tab 11]**.

proportionality analysis, "there is very little prospect that *Charter* application in respect of campus freedom of expression will harm universities' pursuit of their mission."[24]

21. In contrast with the analyses in *Lobo* and *BCCLA*, the applicable decisions of the Supreme Court of the United States recognize such university decisions for what they really are: limits upon students' freedom of expression. In particular, the Court has recognized that a decision to exclude a student group from an open forum based upon the content of their speech engages the First Amendment. In *Widmar v. Vincent*, Justice Powell wrote:

> With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities… Here the UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment… In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that is regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[25]

22. In conclusion, the BCCLA submits that, as held by Paperny J.A. and Strekaf J. in *Pridgen*, universities are entrusted with responsibility for carrying out a government program – the delivery of education. Education includes not only the formal curriculum, but extra-curricular activities as well. Where a university curtails free expression in the extra-curricular context by closing an otherwise open forum on the basis of expressive content, it is not merely allocating physical space. It is regulating the "marketplace of ideas" lying at the heart of the educational experience. Such decisions are properly reviewable under the *Doré/Loyola* framework.

Issue 2: The recent Supreme Court decisions in *Loyola, TWU 1,* and *TWU 2,* have altered the *Doré* analysis

23. Although the *BCCLA* was granted permission to present submissions on the basis that *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 ("*TWU 1*"), and *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 ("*TWU 2*") "have altered" the *Doré* analysis, the BCCLA does not submit that any dramatic alteration has resulted from these cases. However, these more recent authorities do provide additional guidance that may be of assistance

[24] Dwight Newman, *Application of the* Charter *to Universities' Limitation of Expression*, (2015) 45 R.D.U.S. 133 at p. 150 and 153-154 **[Tab 11]**.
[25] *Widmar v. Vincent*, 454 U.S. 263 (1981) at p. 274 **[Tab 12]**.

to this Court in applying what is now called the "*Doré/Loyola*" test. Another case of interest is *Groia*, where *Doré/Loyola* was applied in the particular context of freedom of expression.[26]

24. As Abella J. explained in *Loyola*, the preliminary issue is whether the decision engages the *Charter* by limiting its protections.[27] If such a limitation has occurred, "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play".[28]

25. When applying the proportionality test, the analysis begins with an identification of the state interests, or statutory objectives at stake.[29]

26. Next, the *Charter* protections at issue – both values and rights – are identified.[30] Further in regards to these protections, *TWU 1* and *TWU 2* require an assessment of the severity of the infringement.[31]

27. Finally, the Court must determine whether the decision as a whole reflects a proportionate and reasonable balancing of the *Charter* protections and statutory objectives at issue.[32] There may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable objectives and mandate.[33]

28. Regarding the final balancing stage, the majority in *TWU 1* emphasized that the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate". Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives. When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.[34] Further assistance is derived from the following passage of *TWU 1*:

> 81 The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not

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[26] *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at paras. 111-122 **[Tab 32]**.
[27] *Loyola*, para. 39 **[Tab 13]**.
[28] *Loyola*, para. 39 **[Tab 13]**.
[29] *Loyola*, paras. 50-57 **[Tab 13]**.
[30] *Loyola*, paras. 35-36, 58-67 **[Tab 13]**.
[31] *TWU 1* at para. 85 **[Tab 14]**; *TWU 2* at para. 38 **[Tab 15]**.
[32] *Loyola*, paras. 32, 79 **[Tab 13]**.
[33] *Loyola*, para. 41 **[Tab 13]**; *TWU 1*, at para. 79 **[Tab 14]**.
[34] *TWU 1*, at para. 80 **[Tab 14]**.

> mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.[35]

29. A second helpful summary of *Doré/Loyola*'s proportionality balancing was also provided in *TWU 2*:

> 36 The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). If there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Doré*, at para. 56; *Loyola*, at para. 68). In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not in issue, the question is whether the administrative decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.[36]

30. It may be noted at this stage that the *Doré/Loyola* framework is broadly similar to the approach adopted by the Supreme Court of the United States respecting regulatory limitations on free speech as protected by the First Amendment. Consequently, American jurisprudence addressing similar situations may be of some persuasive value in the Canadian context. The applicable approach was summarized by Justice Kennedy, for the Court, in *U.S. v. Playboy Entertainment Group, Inc.*:

> …If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. *Ibid.* If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Reno,* 521 U.S., at 874, 117 S.Ct. 2329 ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *Sable Communications, supra,* at 126, 109 S.Ct. 2829 ("The Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). To do otherwise would be to restrict speech

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[35] *TWU 1* at para. 81 **[Tab 14]**; *TWU 2* at para. 35-36 **[Tab 15]**.
[36] *TWU 2* at para. 36 **[Tab 15]**.

without an adequate justification, a course the First Amendment does not permit.[37]

31. Returning to Canada, deference is to be accorded to the statutory decision-maker who is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case.[38]

32. A point not expressly determined by the majority judgments of the Court is the nature of the onus for demonstrating that a decision reflects a proportionate balance. In her concurring judgments in both *TWU 1* and *TWU 2*, McLachlin C.J. would have held that the onus in satisfying the requirements of *Doré/Loyola* rests with the government.[39] This issue is important in the present case given Bokenfohr J.'s reliance at paragraph 65 upon a lack of evidence regarding the imposition of costs upon other student groups. The Appellants cannot be expected to access and present such evidence as is within the university's exclusive control.

Issue 3: The scope of the s. 2(b) *Charter* right at issue must be identified, considered, and afforded substantial weight in light of the new *Doré/Loyola* test

(a) The values and rights underlying s. 2(*b*)'s freedom of expression

33. As noted above, the *Doré/Loyola* framework requires the Court to identify the *Charter* protections – both the values and rights – impacted by the decision at issue, and to assess the severity of the decision's impact upon those values and rights. In *Loyola*, the Court explained that under the *Doré* framework, *Charter* values are "those values that underpin each right and give it meaning" and which "help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives".[40] In *TWU 1*, the Court returned to this point in the following passage:

> 82 The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has

[37] *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) at p. 813 **[Tab 16]**.
[38] *TWU 1*, at para. 79 **[Tab 14]**.
[39] *TWU 1* at para. 117 **[Tab 14]**; *TWU 2* at para. 46 **[Tab 15]**.
[40] *Doré* at paras. 35-36 **[Appellants Tab 6]**. This passage was reiterated in *TWU 1* **[Tab 14]** at para. 57 **[Tab 15]**.

> furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.[41]

34. In addition to its resemblance to s. 1's proportionality analysis, *Doré/Loyola*'s requirement of going below the surface to identify the values underlying the *Charter* protections at issue corresponds to s. 24(2)'s second-stage requirement that the Court evaluate "the extent to which the breach actually undermined the interests protected by the right infringed".[42]

35. Regarding the particular values engage by s. 2(*b*)'s freedom of expression, they were identified in *Irwin Toy*, where Laforest J. wrote:

> **53** We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in *Ford* (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.[43]

(b) The type of expression at issue

36. In the particular context of s. 2(*b*) and freedom of expression, the Supreme Court of Canada has repeatedly held that the Court must identify the particular form of expression being regulated since some forms of expression are more important than others. For example, "commercial speech" has been found to enjoy lower protection than "political speech". This approach was adopted by Moldaver J. in applying the *Doré/Loyola* framework in *Groia*, where he noted that: "The protection afforded to expressive freedom diminishes the further the speech lies from the core values of s. 2(*b*)".[44]

37. Regarding the particular form of expression at issue in the case at bar, it was held in *R. v Watson and Spratt* that expression respecting the debate on abortion lies at the very heart of freedom of expression, and as such is deserving of s. 2(*b*)'s highest protections:

> **26** Beliefs about the meaning and value of human life are fundamental to political thought and religious belief. Those beliefs find expression in the debate on abortion. Professor Dworkin has said this about the importance of those convictions to most people:

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[41] *TWU 1* at para. 82 **[Tab 14]**.
[42] *R. v. Grant*, 2009 SCC 32 at paras. 76-78 **[Tab 17]**.
[43] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 976, para. 53 **[Tab 18]**.
[44] *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 117 **[Tab 32]**. See also: *R. v. Guignard*, [2002] 1 S.C.R. 472 at para. 20 **[Tab 19]**.

> [To people who are religious in the traditional way] [t]he connection between their faith and their opinions about abortion is not contingent but constitutive: their convictions about abortion are shadows of more general foundational convictions about why human life itself is important, convictions at work in all aspects of their lives. ... People who are not religious in the conventional way also have general, instinctive convictions about whether, why and how any human life -- their own, for example -- has intrinsic value. No one can lead even a mildly reflective life without expressing such convictions. These convictions surface, for almost everyone, at exactly the same critical moments in life -- in decisions about reproduction and death and war.

27 It follows that the importance of communicating those ideas and beliefs lies at the "very heart of freedom of expression".[45]

(c) The severity of the infringement

38. As noted above, *Doré/Loyola* requires the Court to assess the severity of the interference with *Charter* protected rights and values.[46]

39. In *Irwin Toy*, LaForest J. emphasized that the severity of an infringement of freedom of expression will depend in part upon whether or not the limitation is "content neutral", which consideration was borrowed from American jurisprudence respecting the First Amendment. Following his adoption of certain statements by former U.S. Solicitor General Archibald Cox regarding the importance of content-neutrality, he concluded: "With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee".[47]

40. The BCCLA submits that the Respondents' decision to shift its own financial responsibilities onto the Appellants on the basis of anticipated hostile reactions by observers is especially difficult to justify under the *Doré/Loyola* test since the decision is not content-neutral for the purposes of *Irwin Toy*. As the Courts of the United States have held on many occasions, governmental decision-makers may not impose burdens and obstacles on free speech based upon the anticipated hostile reactions of observers. Such decisions necessarily depend upon the content of the expression at issue, and empower unruly mobs to suppress free speech.

41. One of the leading American cases on this subject is *Forsyth Cnty. v. Nationalist Movement*. In that case, the Supreme Court of the United States considered an assembly and

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[45] *R. v Watson and Spratt*, 2008 BCCA 340 at paras. 26-27 **[Tab 20]**. Footnote omitted, citing Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should be Overruled" (1992), 59 U. Chi. L. Rev. 381 at 412-13 Not reproduced].

[46] *TWU 2* at paras. 36, 38 **[tab 15]**.

[47] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 976, paras. 49-51 **[Tab 18]**.

parade ordinance which permitted the county to charge demonstrators a fee reflecting its security and administrative costs, including costs for police. In finding the ordinance to be contrary to the First Amendment, Justice Blackmun, for the Court, held that the ordinance was not "narrowly tailored to serve a significant governmental interest" because it did not operate in a "content-neutral" manner. In his words: "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[48] Further:

> In order to assess accurately the cost of security for parade participants, the administrator " 'must necessarily examine the content of the message that is conveyed,' […], estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.[49]

42. Justice Blackmun went on to reject the county's argument that the ordinance was justified on the basis of the county's wish to stay within budget and to raise revenue since the same objective could be achieved by a content-neutral rule:

> The county offers only one justification for this ordinance: raising revenue for police services. While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee.[50]

43. The content-neutrality requirement in *Forsyth Cnty* has been followed in many subsequent cases, including *Rock for Life-UMBC v. Hrabowski*, where the U.S. Court of Appeals for the 4th Circuit assessed the constitutionality of a state university's decision to prohibit a student group from displaying pro-life posters on campus on the basis of security concerns. Those concerns had been based upon the unruly reactions of counter demonstrators at prior events. The Court held that the decision violated the First Amendment since it was based upon the anticipated reaction of the listeners, and as such was not content neutral. Consequently, it was not "narrowly tailored" for the purposes of the American version of the *Doré/Loyola* test:

> While an interest in public safety is a content-neutral basis to regulate speech,... safety concerns arising from a prediction of how listeners might react to speech cannot be effectively de-coupled from speech content. Although, as the district court noted, the defendants "should not be faulted for taking seriously the concerns raised by [the plaintiffs]"… those concerns arose from the content of the plaintiffs' message.

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[48] *Forsyth Cnty. v. Nationalist Movement,* 112 S. Ct. 2395 (1992) at p. 2404 **[Tab 21]**.
[49] *Forsyth Cnty. v. Nationalist Movement,* 112 S. Ct. 2395 (1992) at p. 2403 **[Tab 21]**.
[50] *Forsyth Cnty. v. Nationalist Movement,* 112 S. Ct. 2395 (1992) at p. 2404 **[Tab 21]**. See also: *Gay and Lesbian Services Network, Inc. v. Bishop*, 832 F.Supp. 270 (1993): "It is thus inconsistent for the Police Department to cite its poverty as a justification for the Current Policy." **[Tab 22]**

> …A content-based restriction of speech withstands constitutional scrutiny only when narrowly tailored and necessary to serve a compelling state interest… Even were we to find UMBC's interest in protecting the safety of its students compelling, acquiescence to a heckler's veto would still fail under strict scrutiny, for the defendants must employ the least restrictive means available to further that interest. [51]

44. Similarly, in *Central Florida Nuclear Freeze Campaign v. Walsh*, the U.S. Court of Appeal for the 11th Circuit held that "[t]he right of free speech, exercised in a public forum, on issues of public concern, cannot be abridged by a governmental regulation which requires the speakers to prepay the costs of police protection, based on the content of the speaker's views."[52]

45. The requirement of content neutrality does not prevent government agencies from imposing a fee or charge as part of a permitting system to help defray the security costs associated with an event. But such regulations must operate without regard to the content of the regulated speech.[53]

46. *Forsyth Cnty* is often identified as one of the leading cases respecting the "heckler's veto" doctrine.[54] That doctrine recognizes that the suppression of free speech cannot be justified on the basis of an anticipated forceful reaction by listeners. Free speech is supposed to be provocative and challenging.[55] Just as the state cannot itself stifle free expression on the basis of its content, the state cannot empower private persons to do so by throwing a sufficient number of rocks and bottles.[56]

47. The importance of the constitutional issues implicated by the present case is illustrated by *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*. In that case, the City of Chicago had prohibited the plaintiffs from conducting a march on Martin Luther King Jr. Day since their previous marches "had precipitated a highly emotional condition in the area and would require the Police Department to supply a large amount of personnel to properly protect participants in

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[51] *Rock for Life-UMBC v. Hrabowski*, 411 Fed.Appx. 541 (2010) at pp. 551-553. **[Tab 33].**

[52] *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (1985). See also *Gay and Lesbian Services Network, Inc. v. Bishop*, 832 F.Supp. 270 (1993).

[53] *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (1991).

[54] *Rock for Life-UMBC v. Hrabowski*, 411 Fed.Appx. 541 (2010) at pp. 552 **[Tab 33].**

[55] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949): at pp. 4-6 **[Tab 26]**: "[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute,… is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest… There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

[56] Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse,* 35 Hofstra L.Rev. 1305 (2007) **[Tab 27]**.

the activity" and because the police "do not have the available manpower for this purpose".[57] On application, the district court judge granted an historic injunction not only requiring the city to permit the march, but also requiring the city to "provide police in such numbers as in their professional judgment are required to afford adequate protection to plaintiffs."[58] After the march occurred, but with significant violence, the district court permitted the plaintiff marchers to sue the police officers for failing to provide adequate protection.[59]

48. In conclusion, the BCCLA submits that the University of Alberta has empowered an unruly mob to abrogate the Appellants' right to engage in expressive activity – activity that attracts s. 2(*b*)'s highest protection. Such a decision cannot withstand a *Doré/Loyola* analysis since the same objective of raising revenue can be accomplished in a content-neutral manner. The affirmation of such a decision by this Court would inevitably lead to the standardization of ideas to those held by dominant community groups, and the stifling of minority views.

Part 5 – Relief Sought

49. The BCCLA takes no position respecting the appropriate relief to be granted in this appeal.

50. The BCCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2018.

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Nathan J. Whitling
Counsel for the Intervenor
The British Columbia Civil Liberties Association

Estimated time for argument: 25 minutes.

[57] *Dr. Martin Luther King Jr. Movement Inc. v. City of Chicago*, 435 F.Supp. 1295 (1977) at p. 1297 **[Tab 28]**.
[58] *Dr. Martin Luther King Jr. Movement Inc. v. City of Chicago*, 435 F.Supp. 1289 (1977) at p. 1292 **[Tab 29]**.
[59] *Dr. Martin Luther King Jr. Movement Inc. v. City of Chicago*, 435 F. Supp. 1295 (N.D. Ill. 1977) **[Tab 28]**.

Table of Authorities

20.	*R. v Watson and Spratt*, 2008 BCCA 340.
21.	*Forsyth Cnty. v. Nationalist Movement*, 112 S. Ct. 2395 (1992).
22.	*Gay and Lesbian Services Network, Inc. v. Bishop*, 832 F.Supp. 270 (1993).
23.	*Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (1985).
24.	*Cox v. New Hampshire*, 312 U.S. 569 (1941).
25.	*Stonewall Union v. City of Columbus*, 931 F.2d 1130 (1991).
26.	*Terminiello v. City of Chicago*, 337 U.S. 1 (1949).
27.	Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 Hofstra L.Rev. 1305 (2007).
28.	*Dr. Martin Luther King Jr. Movement Inc. v. City of Chicago*, 435 F.Supp. 1295 (1977).
29.	*Dr. Martin Luther King Jr. Movement Inc. v. City of Chicago*, 435 F.Supp. 1289 (1977).
30.	*Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31.
31.	*Pridgeon v. University of Calgary*, 2010 ABQB 644.
32.	*Groia v. Law Society of Upper Canada*, 2018 SCC 27.
33.	*Rock for Life-UMBC v. Hrabowski*, 411 Fed.Appx. 541 (2010).