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**LEGAL OPINION
PRIVILEGED AND CONFIDENTIAL**

TO: Lon Knox (Secretary of and Corporate Counsel to Queen's University)

FROM: Michel Bastarache, Jennifer Klinck (of Power Law)

RE: Responsibility for Student Non-Academic Discipline and Welfare at Queen's University

You have asked us to provide a legal opinion on the legal framework controlling authority over and responsibility for non-academic discipline and student welfare at Queen's University at Kingston (hereinafter "Queen's University"). In particular, you have asked that we provide:

1. An opinion on the respective roles and responsibilities of the Board of Trustees (hereinafter "Board"), the Senate, the administration and the student governments (the Alma Mater Society (hereinafter "AMS") and the Society of Graduate and Professional Students (hereinafter "SGPS")) for non-academic discipline of the students in light of Section 23 of the Consolidated Royal Charter assigning responsibility to the Senate for exercising "[a]cademical superintendence and discipline over the students, and all other persons resident within the same [the University], and with such powers for maintaining order and enforcing obedience to the Statutes, Rules and Ordinances of the said [University], as to the said Board may seem meet and necessary," subject to the described role for the Board within Section 23 and in light of the provisions of Sections 20 and 29 of the Charter. Notwithstanding the provisions of the Royal Charter that may assign some scope of responsibility over student non-academic discipline to the Senate, this opinion should, in addition to providing an interpretation of the aforementioned Sections of the Royal Charter, also reflect on the legal responsibilities, and any attendant authority, of the Board in respect of the students and their welfare.
2. (a) An opinion on the extent to which either the Board or the Senate may delegate their respective roles or responsibilities, specifically for student discipline and welfare, to

bodies falling outside of the corporate structure of the University (i.e. student governments, which are separately incorporated legal entities).

(b) If delegation is permissible with respect to student discipline and welfare, an opinion on: (i) the scope of what may be delegated; (ii) any limits on what may be delegated; and, (iii) any conditions and/or restrictions that would have to flow with such delegation for it to be permissible.

(c) Assuming a permissible delegation is made, an opinion on what, if any, residual duties, responsibilities, accountabilities, authorities and/or liabilities will remain with either of the governing bodies of the University notwithstanding the delegation?

(d) An opinion on the University's (Board's or Senate's) right to take back responsibility for non-academic discipline in its entirety.

I. SUMMARY OF CONCLUSIONS

Our conclusions may be summarized as follows:

On a proper interpretation of ss. 20, 23 and 29 of the Consolidated Charter of Queen's University, the Senate derives its authority over student non-academic discipline and welfare from the Board. Pursuant to *Purpose and Functions of Senate*, the Board has validly conferred primary jurisdiction over student non-academic discipline to the Senate and shared jurisdiction over student welfare to the Senate, the Board and the Administration of Queen's. The Board retains the authority to alter or withdraw the Senate's powers over student non-academic discipline and welfare by way of an enactment, adopted after consultation with the Senate.

A number of Senate instruments and policies outline how the Senate exercises its powers over student non-academic discipline, and the extent to which those powers are delegated. The operation of these instruments is discussed in detail below. In short, they provide for the Senate to exercise general supervision and control over student non-academic discipline through a specialized Senate committee, the Senate Committee on Non-Academic Discipline, and an appellate adjudicative tribunal, the University Student Appeal Board (hereinafter "USAB"). Both of these bodies report to the Senate. Senate instruments and policies further purport that initial responsibility for student non-academic discipline has been delegated by the Senate to the AMS and SGPS. They also provide for distinct non-academic disciplinary processes for non-academic discipline in an academic context, in the athletics and recreation context, and in residence. Additionally, they recognize that the administration has certain emergency powers in the area of non-academic discipline, and provide the Provost with the authority to refer cases of non-academic discipline directly to USAB.

Our analysis concludes that the Senate does have legal authority to delegate its powers over non-academic discipline, as long as it exercises adequate supervision and control over the exercise of those powers. Moreover, there is no absolute bar on the Senate delegating some of those powers to third party corporations, such as the AMS of the SGPS. However, in our opinion, no proper

delegation of powers over student non-academic discipline has been made to the AMS or the SGPS. In order to exercise the necessary supervision and control over those separate corporations, the University would have to enter into contracts with them that could bind their conduct. As this has not been done, we do not consider that a valid delegation exists.

The University is a single corporate entity, which would be responsible for the actions of its governing bodies and officers. In our opinion, as there has been no valid delegation, the University cannot rely upon the *de facto* exercise of non-academic disciplinary powers by student organizations to avoid any potential liability the University might have for the failure of its disciplinary process.

Finally, in our opinion, even if responsibility for student non-academic discipline had been validly delegated to student organizations, the Senate would be free to withdraw such authority completely. Furthermore, in consultation with the Senate, the Board could also legislate to change the scope of the Senate's powers over non-academic discipline so as to prohibit any delegation to student organizations.

II. DOCUMENTS REVIEWED

Enabling Legislation

- Consolidated Royal Charter, Queen's University (dated October 2011) (as found at: <http://www.queensu.ca/secretariat/index/RoyalCharter2011.pdf>);

Enactment of the Board

- Purpose and Functions of Senate (ratified by Board September 23, 2011) (approved by Senate April 28, 2011) (as found at: <http://www.queensu.ca/secretariat/senate/functions.html>);

Senate Instruments and Policies

- Non-Academic Discipline at Queen's (approved by Senate May 21, 2003) (as found at: <http://www.queensu.ca/secretariat/policies/senateandtrustees/nonacademic.html>);
- Senate Policy on the Jurisdiction of Non-Academic Discipline (not yet adopted or in force);
- Queen's University Student Code of Conduct (approved by Senate April 24, 2008; effective July 1, 2008; amended January 21, 2014) (as found at: http://www.queensu.ca/secretariat/policies/senateandtrustees/Code_of_Conduct_final_2008.pdf);
- Terms of Reference of the Senate Committee on Non-Academic Discipline (as found at: <http://www.queensu.ca/secretariat/senate/committees/sonad.html>);

- Queen’s University Senate Policy on Student Appeals, Rights & Discipline (February 26, 2004; amended by Senate April 28, 2015) (as found at: <http://www.queensu.ca/secretariat/policies/senateandtrustees/SARDPolicy.pdf>);
- Guidelines for the Handling of Non-Academic Discipline by Faculty Boards (endorsed by Senate March 1, 1984) (as found at: <http://www.queensu.ca/secretariat/policies/senateandtrustees/nonacademicfaculty.html>);
- Queen’s University Residences Residence Student Conduct Process (approved by Senate March 3, 2005; revised April 29, 2014) (as found at: <http://www.queensu.ca/secretariat/policies/senateandtrustees/residencediscipline.html>);
- Athletics & Recreation Non-Academic Discipline Judicial Process (Discipline Policy) (approved by Senate April 22, 2010) (as found at: http://www.gogaelsgo.com/documents/2010/9/11/A_R_Disciplinary_Process_-_FULL_-_APPROVED_-_April_22-10.pdf?id=373);

Student Organization Documents

- AMS Policy Manual 4: Non-Academic Discipline Rules and Regulations (as amended April 2, 2015) (as found at: <http://www.myams.org/media/197371/amspol4.pdf>);
- Bylaws and Policies of the Society of Graduate and Professional Students (May 2013) (as found at: <http://www.sgps.ca/info/downloads/bylaws-policies.pdf>);

Other Document

- Memorandum of Understanding between President and Chief Executive Officer of the Alma Mater Society and Principal and Vice-Chancellor of Queen’s University (dated September 11, 2012).

III. POWERS OF THE BOARD AND THE SENATE UNDER THE CHARTER

(A) Principles of Statutory Interpretation

Queen’s University was created by Royal Charter in 1841. As such, the University and its constituent parts derive their legal status and powers from the Royal Charter, taken together with the subsequent acts of the Parliament of Canada which have amended the Royal Charter from time to time. For the purposes of the present legal opinion, we have relied upon the Consolidated Royal Charter, which has been prepared by the University. We have proceeded on the basis that this document accurately reflects those parts of the original Charter and subsequent amendments by Parliament which have continuing force and validity. For ease of reference, except where otherwise indicated, we shall refer to the section numbers as identified in the Consolidated Royal Charter (hereinafter “Charter”).

The starting point of the analysis of the allocation of powers and responsibilities over student non-academic discipline and welfare is therefore the Charter. A proper interpretation of the Charter, and any subordinate enactments, must be guided by the following general rule of statutory interpretation, which has been endorsed by the Supreme Court of Canada:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹

Our analysis will therefore take into account the text of the Charter, its structure, and its overall context.

(B) Interpretation with a View to Furthering Objects

An overarching interpretive consideration when analyzing the Charter is the Charter's s. 34 interpretive clause. Section 34 requires that the Charter "shall be taken, construed and adjudged in the most favorable and beneficial sense for the best advantage of" Queen's University, notwithstanding any formal defects in it. The full s. 34 provides:

34. And We Will and by these presents for Us our Heirs and Successors do Grant and declare that these our Letters Patent, or the enrolment or exemplification thereof shall and may be good, firm and valid, sufficient and effectual in the Law, according to the true intent and meaning of the same and shall be taken, construed and adjudged in the most favorable and beneficial sense for the best advantage of our said College, as well in our Courts of Record as elsewhere; and by all and singular Judges, Justices, Officers, Ministers and others, subject whatsoever of Us our Heirs and Successors, any unrecital, non-recital, omission, imperfection, defect, matter, cause, or anything whatsoever, to the contrary thereof in any wise notwithstanding. Royal Charter of 1841, s. 32. (emphasis added)

This internal interpretive clause is consistent with the requirements of the *Interpretation Act*,² which applies to every act of Parliament, unless a contrary intention appears.³ In particular, s. 12 of the *Interpretation Act* provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

In addition to giving the Charter a fair, large, liberal, and purposive interpretation, when considering the allocation of powers over student non-academic discipline and welfare among constituents and stakeholders at Queen's University, it is also necessary to have regard to the doctrine of ancillary powers codified by s. 31(2) of the *Interpretation Act*. That paragraph provides that "[w]here power is given to a person, officer or functionary to do or enforce the

¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21 (QL), citing Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87.

² RSC 1985, c I-21.

³ *Interpretation Act*, RSC 1985, c I-21, s 3(1).

doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.”

(C) Queen’s University as One Body Politic and Corporate

As s. 1 (the Preamble) and s. 4 make clear, the Charter establishes Queen’s University as “one Body Politic and Corporate in Deed and in name” (s. 4). Indeed, ss. 1-13 of the Charter concern the object (s. 2, 11), name (ss. 12, 13), original corporators (s. 3) attributes and powers (ss. 4-10) of Queen’s University as a single corporate entity. Section 4, in particular, is a general enabling provision, which operates to confer upon Queen’s University the attributes of legal personality (e.g., to have standing before the courts, to own and dispose of real, personal and other property, etc.). Section 4 specifies that these various actions, which are attributes of legal personality, may be undertaken “by the name of aforesaid” (i.e., the one Body Politic and Corporate of Queen’s University). Significantly, s. 4 specifies that this one body politic and corporate “shall and may forever hereafter be able, in Law and in Equity, to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in all Courts and places whatsoever.”

The sections that follow set out the broad governance structure of that single corporate entity, identifying three distinct bodies: the Board (ss. 14-22), the Senate (ss. 23-29), and the University Council (ss. 30-33). In addition to these governing bodies, the Charter specifically provides for a number of offices within the University: the Chancellor, the Rector, the Principal, the Vice-Chancellor, and the Secretary. The Charter also permits the Board to appoint a Vice-Principal (s. 17) and to appoint “such other Officer or Officers as to the said Trustees shall seem meet” (s. 16).

When considering the allocation of powers and responsibilities over student non-academic discipline and welfare, it will be important to bear in mind that Queen’s University is a single corporate entity with an internal governance structure composed of the Board, the Senate, and the University Council. As will be emphasized throughout this opinion, universities across Canada are structured in a variety of ways, making it essential to exercise caution when relying upon precedents from other jurisdictions and universities. For example, unlike Queen’s University, *Alberta’s Post-secondary Learning Act*, SA 2003, c P-19.5, expressly constitutes each of the Senate (s. 11(2)) and the Board of Governors (s. 16(2)) of a university as corporations.

(D) A Tricameral Governance Structure

As indicated, the Charter establishes three governing bodies for Queen’s University: the Board, the Senate, and the University Council. As there is no reason to believe that the Charter confers authority over student non-academic discipline or welfare to the University Council, except indirectly in exercising its broad advisory role (ss. 30(1), (2)), the present analysis will focus on the respective roles of the Board and the Senate.

(1) The Board

a. Composition

The composition of the Board indicates that it is meant to represent a wide range of constituencies from within and outside Queen's University. Section 14 provides:

14. The Board of Trustees of the University consists of
- (a) the Chancellor, the Rector and the Principal who are ex officio members;
 - (b) two faculty members elected by the faculty in accordance with the by-laws of the Board of Trustees ;
 - (c) two staff members elected by the staff, in accordance with the by-laws of the Board of Trustees;
 - (d) two student members elected by students registered in academic programs of the University, in accordance with the by-laws of the Board of Trustees;
 - (e) six individuals elected or appointed by the University Council from time to time, in accordance with the by-laws of the University Council; and
 - (f) not more than ten individuals elected or appointed by the Board of Trustees from time to time, in accordance with the by-laws of the Board of Trustees.
- S.C., 2011, c. s. 2.

Thus, the Trustees include nine (9) current members of the University, consisting of high level University officials, faculty, staff, and students. As further specified by By-Law No. 1 of the Board, "Composition, election and term of the Board of Trustees," neither the six (6) Trustees elected by the University Council, nor the up to ten (10) Trustees appointed by the Board may be current faculty, staff or students of Queen's University (ss. 8.2, 9.2). Pursuant to the University Council's By-Laws, the Trustees elected by the University Council are Queen's University alumni.⁴

It is therefore notable that, unless only very few Trustees are appointed by the Board, the majority of the Board's members will not be current members of the University. The relatively limited representation of faculty members on the Board is also significant.

b. Powers

The Charter confers upon the Board various powers of appointment to positions within the University, including the Principal, professors, Vice-Chancellor, and Vice Principal (ss. 16-18), but not the Chancellor.⁵ Section 19 also expressly authorizes the Board "to erect an Edifice or Edifices for the use of" the University.

⁴ By-Law D of the University Council, "Election of Trustees by the Council," provides that the Trustees selected by University Council are elected from among its elected members. By-Law C of the University Council, "Elections and Appointments to the Council," provides that the elected members of the Council are elected by and from among the alumni of the University (s. C1).

⁵ Pursuant to s. 32(1) of the Charter, the Chancellor is appointed by the University Council.

The Board's most significant power, however, is contained in s. 20. Due to its importance, we reproduce that section in full here:

20. And We further Will that the said Trustees and their Successors shall have power and authority to frame and make Statutes, Rules and Ordinances touching and concerning the good government of the said College, the performance of Divine Service therein, the Studies, Lectures, Exercises, and all matters regarding the same; the number, residence and duties of the Professors thereof, the management of the revenues and property of the said College, the Salaries, Stipends, provision and emoluments of, and for the Professors, Officers and Servants thereof, the number and duties of such Officers and Servants, and also touching and concerning any other matter or thing which to them shall seem necessary for the well being and advancement of the said College, and also from time by any new Statutes, rules or ordinances to revoke, renew, augment or alter, all, every, or any of the said Statutes, rules and ordinances as to them shall seem meet and expedient. Royal Charter of 1841, s. 19.

Section 20 grants the Board a very broad legislative power “to frame and make Statutes, Rules and Ordinances touching and concerning” a number of enumerated matters. These matters include the general administration and governance of the University (“the good government of the said College”), as well as the management of the University’s finances, property, and human resources (“the number, residence and duties of the Professors thereof, the management of the revenues and property of the said College, the Salaries, Stipends, provision and emoluments of, and for the Professors, Officers and Servants thereof, the number and duties of such Officers and Servants”). Section 20 also confers upon the Board some measure of legislative authority with respect to academic matters, i.e., “the Studies, Lectures, Exercises, and all matters regarding the same.”

In addition to the legislative powers specifically enumerated, s. 20 provides the Board with a wide residual discretion to legislate “touching and concerning any other matter or thing which to them shall seem necessary for the well being and advancement of the said College.” Moreover, the provision expressly provides that the Board has full powers “to revoke, renew, augment or alter, all, every, or any of the said Statutes, rules and ordinances as to them shall seem meet and expedient.” As such, s. 20 authorizes in quite expansive terms the Board to legislate in the manner that, in the Board’s judgement, will advance the best interests of the University.

The Charter specifies that the Board’s wide legislative powers are subject to the following proviso at s. 21: “Provided always that the said Statutes, rules and ordinances, or any of them, shall not be repugnant to these presents or to the Laws and Statutes of the said Province.” The implication of this proviso is that the Board may not legislate in a manner that would contradict the terms of the Charter or that would conflict with the essential university governance structure it establishes.

c. Specific Legislative Power over the Senate & the Duty to Consult

The specific legislative power conferred on the Board by s. 29 is also particularly important for the purposes of the present legal opinion. Pursuant to s. 29, “acting after consultation with the

Senate,” the Board “may pass any enactments in regard to the Senate which the Board thinks proper.” In considering the implications and scope of the Board’s duty to consult with the Senate prior to passing enactments with respect to the Senate, it is informative to consider the duty to consult in the context of the Crown’s relationship with First Nations, where the nature and scope of the duty has received considerable judicial treatment. That context is certainly unique, as the principles that govern the duty to consult with First Nations seek to “maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples.”⁶ Nevertheless, there are some similarities as the duty to consult the Senate acts as a control on the formal ability of the Board to substantially affect the Senate’s interests, in the context of an ongoing relationship between the two bodies requiring cooperation. The Supreme Court of Canada has outlined the following general principles as governing the Crown’s duty to consult with First Nations:

- Consultations must be undertaken in good faith by both sides.⁷ Thus, “[t]he common thread on the Crown’s part must be ‘the intention of substantially addressing [Aboriginal] concerns’ as they are raised [...], through a meaningful process of consultation.” Similarly, Aboriginal claimants “must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.”⁸
- While commitment to a meaningful process of consultation is required, there is no duty to reach an agreement.⁹
- Good faith consultation can give rise to a duty lying on the Crown to accommodate.¹⁰ Thus, “[m]eaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations.”¹¹ The duty to accommodate that may flow from the duty to consult “does not give Aboriginal groups a veto over what can be done [...]. Rather, what is required is a process of balancing interests, of give and take.”¹² Significantly, “the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.”¹³ In this context, First Nations may not be fully satisfied with the ultimate accommodation achieved because “[t]he Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.”¹⁴ Accordingly, the duty to accommodate involves “seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to

⁶ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 45 [*Haida*].

⁷ *Ibid* at paras 10, 42.

⁸ *Ibid* at para 42 (citation omitted).

⁹ *Ibid* at paras 10, 42.

¹⁰ *Ibid* at para 47

¹¹ *Ibid* at para 46

¹² *Ibid* at para 48.

¹³ *Ibid* at para 45.

¹⁴ *Ibid* at para 45; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 42.

agree. But it does require good faith efforts to understand each other's concerns and move to address them."¹⁵

- The scope of the duty to consult and accommodate varies with the circumstances, notably with the seriousness of the adverse impact on the First Nation's rights.¹⁶ At the low end of the spectrum, "where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor, [...] the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."¹⁷ At the high end of the spectrum, "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, [...] deep consultation, aimed at finding a satisfactory interim solution, may be required."¹⁸
- Although the extent of the duty to consult and accommodate is a matter of degree, "consultation cannot exclude accommodation at the outset."¹⁹

In our opinion, the general tenor of these principles would likely apply to the Board's duty to consult with the Senate prior to passing an enactment with respect to the Senate. First, the scope of the consultation and accommodation required can be expected to vary with the extent to which the legislation affects the Senate, with incidental effects requiring less consultation than significant changes to the Senate's composition, functions, or powers. Second, consultations and attempts to reach suitable accommodations would have to be undertaken in good faith by both sides: both the Board and the Senate should be open to responding to one another's concerns. Finally, the duty to consult should not be interpreted as requiring agreement or granting the Senate a veto over any legislation concerning it. Rather, the ultimate responsibility lies with the Board to balance the interests within the University. In doing so, the Board may be required to pass legislation with respect to the Senate, which while taking into account Senate concerns, might not be wholly satisfactory to the Senate.

(2) The Senate

Sections 23 to 29 of the Charter address various aspects of the nature, role and powers of the Senate. The key provision of the Charter defining the role of the Senate is s. 23, which provides:

23. And we further will, that so soon as there shall be a Principal and one Professor in the said College, the Board of Trustees shall have authority to constitute under their seal the said Principal and Professor, together with three members of the Board of Trustees, a Court to be called "The College Senate," for the exercise of Academical superintendence and discipline over the Students, and all other persons resident within the same, and with such powers for maintaining order and enforcing obedience to the Statutes, Rules and

¹⁵ *Haida*, supra note 6 at paras 49.

¹⁶ *Ibid* at paras 39, 47.

¹⁷ *Ibid* at para 43.

¹⁸ *Ibid* at para 44.

¹⁹ *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447, at para 52.

Ordinances of the said College, as to the said Board may seem meet and necessary. Royal Charter of 1841, s. 22.

Although s. 23 permits the Board to constitute the Senate, pursuant to s. 24, the Senate cannot be abolished once constituted, but “shall for ever constitute the College Senate, with the powers just mentioned.” Thus, the Senate’s s. 23 powers are also entrenched by the Charter. Moreover, s. 24 affirms the institutional independence of the Senate from the Board, by providing that no Trustee (with the exception of the Principal) shall be a member of the Senate.

There is no question that the Senate’s predominant function under the Charter is to exercise authority over academic matters. Section 23 of the Charter defines the Senate’s core function and powers as being “for the exercise of Academical superintendence and discipline over the Students, and all other persons resident within the same, and with such powers for maintaining order and enforcing obedience to the Statutes, Rules and Ordinances of the said College, as to the said Board may seem meet and necessary.” The Senate’s academic role is further reinforced by the Senate’s power to confer degrees (s. 26) and “to pass by-laws touching on any matter or thing pertaining to the conditions on which degrees in the several Arts and Faculties may be conferred.” However, these by-laws concerning the conferral of degrees are subject to the Board’s veto. They must be reported to the Board and will cease to be in force if they are disapproved of by the Board (s. 28).

What is less clear is the extent to which the Charter contemplates a role for the Senate over non-academic matters. The wording of s. 23 is at the heart of the question of statutory interpretation concerning the extent of the Senate’s powers and responsibilities over student non-academic discipline. In particular, does the Senate’s establishment “for the exercise of Academical superintendence and discipline over the Students” indicate that its inherent and entrenched powers include a general disciplinary power or only a limited power over academic discipline? This particular segment fragment may appear ambiguous when taken on its own. However, when read in context, it appears quite clear that the adjective “Academical” qualifies both “superintendence” and “discipline.”

To begin with, had the intent of s. 23 been to grant the Senate broad powers over discipline, rather than merely over academic discipline, the expressions “Academical superintendence” and “discipline” could easily have been stated in reverse order, so as to read “for the exercise of discipline and Academical superintendence over the Students.” Pursuant to the presumption of straightforward expression, it is presumed that if the legislator could have “easily expressed in clear and direct terms” a proposed interpretation, it would have done so.²⁰

Another important consideration is that s. 23 goes on to expressly provide the Board with a permissive power to *extend* the Senate’s powers. The Senate is established

for the exercise of Academical superintendence and discipline over the Students, and all other persons resident within the same, and with such powers for maintaining order and enforcing obedience to the Statutes, Rules and Ordinances of the said College, as to the said Board may seem meet and necessary. (emphasis added)

²⁰ *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 124 (per La Forest, Sopinka and Gonthier JJ.).

The precise powers that s. 23 permits the Board to grant to the Senate are “powers for maintaining order and enforcing obedience” to University legislation. These potential additional powers appear to themselves be disciplinary powers. Indeed, the first entry for “discipline” in the Oxford English Dictionary Online defines “discipline” as “[t]he practice of training people to obey rules or a code of behaviour, using punishment to correct disobedience.”²¹ However, if s. 23 already granted the Senate with a broad disciplinary power, it would be meaningless to permit the Board to extend the Senate’s disciplinary powers as s. 23 purports to do. It is well established that, “[t]o the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant.”²² In our opinion, an interpretation of s. 23 pursuant to which it directly confers upon the Senate powers over academic discipline, while also permitting the Board to extend the Senate’s disciplinary powers, should be preferred as it gives the most coherent meaning to all the words in s. 23.

On this interpretation, the Senate would currently derive its authority over non-academic discipline from the Board’s decision to grant it that authority by way of the *Purpose and Functions of Senate* Board enactment, adopted under s. 29 of the Charter (which has also received Senate approval). Under the heading “Legislative Functions,” s. 10 of *Purpose and Functions of Senate* provides:

Senate has the authority to [...] approve policies and procedures regarding student academic and non-academic matters. The authority to discipline students, including the power to require a student to withdraw from the University, resides with the Senate; responsibility for non-academic discipline of students may be delegated to student organizations.

If this interpretation is correct, then the Senate’s authority over student non-academic discipline could be revoked or amended by a subsequent enactment of the Board, but only after consultation with the Senate of the kind outlined above, as this would be a Board enactment under s. 29. The Board’s general authority to pass enactments reversing prior enactments is confirmed by the Board’s power under s. 20, “by any new Statutes, rules or ordinances to revoke, renew, augment or alter, all, every, or any of the said Statutes, rules and ordinances as to them shall seem meet and expedient.”

(E) Context of the Charter – Scheme for the Separation of Powers between the Board and the Senate

Although the above interpretation of the Senate’s powers over student non-academic discipline appears to be most consistent with the wording of s. 23 of the Charter, it remains to be considered whether the structure of the Charter or other aspects of the statutory context lead to another conclusion. In this respect, the most significant aspect of the statutory context is the separation of powers among the three governing bodies that the Charter establishes. Although the University Council’s advisory and other functions under the Charter would not entail direct

²¹ Oxford British and World English Dictionary, Oxford University Press (accessed on 24 July 2015, at: <http://www.oxforddictionaries.com/definition/english/discipline>).

²² *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, [2006] 1 SCR 715 at para. 45.

powers or responsibilities over student non-academic discipline, the distribution of such powers as between the Board and the Senate is more controversial. It is therefore necessary to examine whether the Charter's scheme of separation of powers between the Board and the Senate calls into question, or reinforces, the textual interpretation outlined above.

In principle, the Charter's scheme for the separation of powers between the Board and the Senate could militate in favour of interpreting s. 23 as granting a broad disciplinary power to the Senate, rather than merely a power over academic discipline. Conversely, that scheme could be inconsistent with any delegation of student non-academic discipline to the Senate by the Board, such that s. 10 of *Purpose and Functions of Senate* would exceed the Board's legislative authority by offending the s. 21 proviso preventing the Board from passing any enactment "repugnant to" the Charter. However, neither conclusion is supported by an analysis of the Charter in light of the case law on university governance and other statutory university governance regimes.

(1) Jurisprudential Treatment of Separation of Powers in University Governance

The leading authority on university governance in Ontario is the decision of the Ontario Court of Appeal in *Kulchyski v Trent University*²³ (hereinafter "*Kulchyski*"). The case involved an attempt to quash a resolution of the Board of Governors of Trent University authorizing the closure and sale of two of the University's colleges located in downtown Peterborough, on the grounds that the resolution engaged an educational policy issue and therefore required the assent of the Senate.²⁴ Sections 10 and 12 of *An Act to Incorporate Trent University*²⁵ (hereinafter "*Trent Act*") allocated powers between the Board and the Senate in terms that included the following:

10. Except as to such matters specifically assigned by this Act to the Senate or the councils of the faculties, as hereinafter referred to, the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University, including, but without limiting the generality of the foregoing, power, [...] (emphasis added)

12. The Senate is responsible for the educational policy of the University, and, with the approval of the Board in so far as the expenditure of funds and the establishment of faculties are concerned, may create such faculties, departments, schools or institutes or establish chairs as the Senate may determine, may enact by-laws and regulations for the conduct of its affairs and, without limiting the generality of the foregoing, has power, [...] (emphasis added)

The majority of the Court of Appeal upheld the decision of the Divisional Court to dismiss the judicial review challenge. In so concluding, the majority held that the decision to close the colleges was not a decision of education policy, but a pragmatic decision that the Board could

²³ *Kulchyski v Trent University*, [2001] OJ No 3237 (ONCA), leave to appeal to the SCC denied, [2001] SCCA No 516 [*Kulchyski*].

²⁴ *Ibid* at paras 1, 24.

²⁵ SO 1962-63, c192, ss. 10, 12.

make acting alone. The majority added that, “even if it was a decision involving educational policy,” and even if the Board had previously exercised its statutory power to approve the “expenditure of funds and the establishment of faculties” to implement such policy, “it cannot be argued that by so doing, the Board divested itself of its powers and obligations under [its enabling legislation] covering ‘the government, conduct, management and control of the University and its property, revenues, expenditures, business and affairs.’”²⁶ Moreover, a significant feature of the majority’s decision was a concern not to interpret the University’s enabling statute in a manner that would make responding to pressing pragmatic challenges strictly dependent on agreement between the Board and the Senate:

However, once again I suggest that the legislature could never have intended that the University’s bicameral governance system would be so inflexible that once a decision was jointly made, it could never be revoked or modified except by the joint agreement of both deliberative bodies. In this instance, the Board cannot be forced to continue to support the existence of the downtown colleges in the face of economic loss, financial necessities and concerns for the future of the entire University.²⁷

Justice Sharpe dissented based on his disagreement about the structure of governance that Trent University’s enabling legislation put in place. In his view, Trent University’s bicameral structure was such that a decision involving issues of general governance and University finances, within the authority of the Board, as well as issues of education policy, within the authority of the Senate, could only be made with the agreement of both bodies. Although this conclusion was rejected by the majority, Justice Sharpe’s comments on the bicameral structure of governance are nevertheless of some relevance. According to Justice Sharpe,

58 The allocation of powers as between the Board and the Senate represents an attempt to reflect and accommodate the interests and concerns that have to be taken into account in the governance of a modern university. Decisions relating to educational policy are assigned to the Senate, a body comprised primarily of members of the University’s academic community. Decisions relating to management and finances are assigned to the Board, a body comprised primarily of lay members, who reflect the broader community interest in the sound and prudent management of an important publicly funded institution. The bicameral scheme of governance is designed to provide an institutional framework that will allow the University to identify and achieve its academic and educational goals in a manner consonant with the interests of the community and public at large.

[...]

64 Bicameralism was first introduced in Ontario following the Report of the Royal Commission on the University of Toronto (Toronto: Queen’s Printer, 1906). The Royal Commission concluded at p. xxi that the history of the University of Toronto had “demonstrated the disadvantage of direct political control.” It sought to establish a scheme that would provide the university with independent governance, reflecting both the public interest in sound management and respect for academic judgment on academic

²⁶ *Kulchyski, supra* note 23 at para 32.

²⁷ *Ibid* at para 34.

issues. The Royal Commission's plan aimed "at dividing the administration of the University between the Governors, who will possess the general oversight and financial control now vested in the State, and the Senate, with the Faculty Councils, which will direct the academic work and policy." (Ibid.)

65 Bicameralism has both advantages and disadvantages. On the positive side, it provides a system of governance that distinguishes management issues from issues of educational policy and allocates responsibility for each to specialized governing bodies capable of reflecting the interests and concerns bearing upon the matters assigned. On the negative side, by dividing governing authority, bicameralism may complicate decision-making and, as the experience at Trent sadly shows, result in deadlock. Bicameralism was abandoned by the University of Toronto thirty years ago in favour of a unicameral Governing Council in which all estates are represented. Some other universities have retained the bicameral structure but have altered its operation by affording significant academic and student participation at the Board level. One could only gain an accurate appreciation of how bicameralism actually works at a particular university by careful study of that institution's arrangements, practices, and traditions.²⁸ (emphasis added)

In many respects, Justice Sharpe's comments on bicameralism at Trent University resonate with the separation of powers between the Board and the Senate at Queen's University (although given the role of the University Council, the structure at Queen's University may more properly be referred to as tricameral). The composition and powers of the Board and the Senate at Queen's University do suggest that the Board's focus and expertise concerns general governance and financial administration, whereas the focus and expertise of the Senate concerns academic matters. However, his caution that the precise governance structure of each institution must be understood "by careful study of that institution's arrangements, practices, and traditions" is apposite. Indeed, there are important differences between the *Trent Act* and the Queen's University Charter. As Justice Sharpe pointed out,

59 As I read the Trent Act, the powers of the Board and the Senate are both exclusive and overlapping. They are exclusive in the sense that where a matter is specifically assigned to one body, the other body lacks authority over that matter. For example, the Board has no authority to determine educational policy for the University. Similarly, the Senate has no authority to manage or control the property, revenues, and expenditures of the University. However, not all issues fall neatly into the categories of the matters assigned to the Board and the Senate respectively. As many issues confronting the University present more than one aspect, to that extent, the powers of the Board and Senate overlap. From one aspect, the issue will fall within a power assigned to the Board, while from another aspect, the same issue will fall within a power assigned to the Senate.

[...]

66 [...] The Trent Act specifically excepts from the Board's powers "such matters specifically assigned by this Trent Act to the Senate or the councils of the faculties ...". These words qualify all of the Board's powers, including its general governance power

²⁸ *Ibid* at paras 58, 64-65.

and its specific authority over property and expenditures.²⁹ I agree with the appellants' submission that by enacting these words, the legislature provided its own solution to potential conflicts between the Board and the Senate. The legislature subtracted authority over educational policy from the Board's powers and protected Senate's power over educational policy from encroachment by any power of the Board. Neither the Board's power of general governance nor its power of the purse allow it to usurp the role of the Senate to control, regulate, and determine the educational policy of the University. The Trent Act makes no provision for a "tie-break" mechanism to resolve a conflict between the Board and the Senate. The way out of deadlock is not unilateral action by the Board but debate, discussion, negotiation, and compromise, or all else failing, legislation.

67 There are two governing bodies, each with its own area of expertise and concern to be brought to bear upon the educational issues confronting the University. The Board cannot decide where to spend the University's resources without the Senate's determination of educational policy. Similarly, the Senate cannot implement an educational policy without the Board's determination to make available the required resources. (emphasis added)

This notion of exclusivity of powers appears to have been central to Justice Sharpe's analysis, particularly his view that a particular matter may have a double aspect, engaging the decision-making authority of both the Senate and the Board (an approach that the British Columbia Court of Appeal concluded "would present more problems in terms of practical application than it would solve"³⁰). However, the terms of the Queen's University Charter are quite unlike those of the *Trent Act* in that they cannot be read as establishing a strict exclusivity of powers between the Senate and the Board.

First, there is no language in the Charter analogous to that in the *Trent Act* expressly excepting from the Board's powers those powers conferred upon the Senate, or vice-versa.

Second, s. 20 of the Charter expressly grants the Board "authority to frame and make Statutes, Rules and Ordinances touching and concerning [...] the Studies, Lectures, Exercises, and all matters regarding the same." While, pursuant to s. 21, this legislative authority cannot be exercised in a manner repugnant to the Charter (e.g., to erode the Senate's responsibility over "Academical superintendence and discipline"), it nevertheless expressly grants the Board legislative jurisdiction within the sphere of the Senate's core academic mandate.

Third, the Senate is subordinate to the Board in important respects. Pursuant to s. 28, the Senate's power to pass by-laws governing the conferral of degrees – a core academic matter – is subject to the Board's power of disallowance. Moreover, pursuant to s. 29, the Board has the authority to "pass any enactments in regard to the Senate which the Board thinks proper," after having consulted with the Senate. As discussed above, a court would likely interpret the Board's s. 29 duty to consult with the Senate as imposing a significant procedural restraint on the Board's legislative authority, as well as a substantive duty on the Board to attempt to address and

²⁹ *Ibid* at paras 59, 66.

³⁰ *Faculty Assn. of the University of British Columbia v University of British Columbia*, 2010 BCCA 189, [2010] BCJ No 679 at para 66.

accommodate the Senate's position. Nevertheless, the Board's powers over the Senate appear consistent with a somewhat hierarchical structure, in which the Senate's expertise in academic matters is recognized, and to a significant degree protected, but the Board is entrusted with ultimate responsibility for the "good government" (s. 20) of Queen's University. Under the Charter, the Board's responsibility in this regard must respect the Senate's expertise in academic matters, but it does not appear to exclude those matters from the Board's competence.

The somewhat overlapping and hierarchical structure established by the Charter, and s. 29 in particular, is consistent with the view that the Board can legislate to broaden (and perhaps even narrow) the scope of the Senate's powers as long as the Senate's core academic mandate is neither altered nor eroded, and as long as it acts in consultation with the Senate. That is, it is precisely because the Senate is to a degree subordinate to the Board that the Board can delegate to the Senate additional powers consistent with its core academic mandate. In our opinion, this structure is how the Charter allows Queen's University to respond to pressing pragmatic challenges without strictly requiring agreement between the Board and the Senate, one of the concerns animating the majority in *Kulchyski*. Indeed, at least in some contexts, s. 29 of the Charter provides for Queen's University the type "'tie-breaker', or the equivalent of a paramountcy provision, if the exercise of powers by the Board and Senate, respectively, come into conflict" that the British Columbia Court of Appeal found to be absent when it considered legislation regulating public universities in that province in *Faculty Assn. of the University of British Columbia v University of British Columbia*.³¹

Thus, the particular features of the Charter, and those which distinguish it from the legislation considered in *Kulchyski* support an interpretation of s. 23 pursuant to which the Senate derives its powers over student non-academic discipline from the Board. Moreover, that structure, taken together with ss. 20 and 29, suggest that Board can properly provide (as approved by the Senate) under *Purpose and Functions of Senate* that the Senate has jurisdiction over student welfare, as it has done. In particular, under the heading "Central Function," s. 1 of *Purpose and Functions of Senate* provides that the Senate "is concerned with all matters that affect the general welfare of the University and its constituents." Under the heading "Academic Planning and Educational Environment Functions," s. 3 of *Purpose and Functions of Senate* provides:

Senate will [...] assume a shared responsibility, along with the Board of Trustees and the Administration of Queen's, for a living and learning environment that promotes the well-being of students. (emphasis added)

Such a mandate may extend somewhat beyond "[a]cademical superintendence and discipline over the Students, and all other persons resident within the same," within the meaning of s. 23. Nevertheless, it does not appear repugnant to the Senate's core academic mandate.

(2) Other Statutes Regulating University Governance

The mere existence of a separation of powers allocating general administration and financial matters to a board of governors or trustees, and academic matters to a senate, does not have necessary implications for the allocation of responsibility over student non-academic discipline

³¹ *Ibid* at para 49.

and welfare. While many Canadian universities have a governance model separating responsibility over general administration and finances from that over academic matters, their allocation of responsibility over student non-academic discipline and welfare is quite variable. A few examples from other Canadian jurisdictions will suffice to indicate the absence of a uniform model.

British Columbia's *University Act*, RSBC 1996, c 468 regulates the University of British Columbia, the University of Victoria, Simon Fraser University, the University of Northern British Columbia, as well as special purpose, teaching universities designated pursuant to the *University Act* (ss. 1, 3).³² That statute provides that "[t]he management, administration and control of the property, revenue, business and affairs of the university are vested in the board" of governors (s. 27(1)), whereas "the academic governance of the university is vested in the senate" (s. 37(1)). Under the *University Act*, "[t]he president has power to suspend a student and to deal summarily with any matter of student discipline" (s. 61(1)). The president's disciplinary power is subject to a requirement to promptly report the action to a standing committee of the senate, which exercises appellate jurisdiction over all such disciplinary action (s. 61(3)). However, the senate is only authorized "to establish a standing committee of final appeal for students in matters of academic discipline" (s. 31(1)(v), emphasis added). At the same time, the board of governors has the power to make rules consistent with the powers conferred on the board by the *University Act* (s. 27(2)(x)), which powers include powers to regulate the use of university property for activities and events, as well as noise and nuisances in connection with university property. The board of governors is also granted the power to impose and collect penalties, including fines, in relation to contraventions of such rules (s. 27(2)(x.1)), as well as to provide for the hearing and determination of disputes about the contravention of such a rule and imposition of such a penalty (ss. 27(2)(x.2)). The *University Act* therefore appears to contemplate the possibility of jurisdiction over student discipline being split between the senate's appellate jurisdiction over academic matters and the board's jurisdiction over various types of non-academic discipline.

The *Post-secondary Learning Act*, SA 2003, c P-19.5, sets out the general regime of governance for public universities in Alberta.³³ Under the *Post-secondary Learning Act*, the board of governors of a university "may make any bylaws the board considers appropriate for the management, government and control of the university buildings and land" (s. 18(1)). However, responsibility for academic matters is conferred upon the general faculties council, rather than the senate. Pursuant to s. 26(1), "[s]ubject to the authority of the board, a general faculties council is responsible for the academic affairs of the university." Under the *Post-secondary Learning Act*, "general supervision of student affairs" is conferred upon the general faculties council. The general faculties council is also authorized to establish a student affairs council (whose members may include academic staff, students and university officers) to deal with student affairs. Moreover, student discipline is treated as a single matter, not divided between

³² The British Columbia Court of Appeal considered the governance regime established by the *University Act* in *Faculty Assn. of the University of British Columbia v University of British Columbia*, *ibid*, see in particular paras 44-50.

³³ The Alberta Court of Appeal provided an overview of the governance scheme in the *Post-secondary Learning Act*, and the specific provisions dealing with student discipline, in *Pridgen v University of Calgary*, 2012 ABCA 139, [2012] AJ No 443, see in particular paras 46-48.

academic and non-academic discipline. Significantly, the general faculties council has the power to discipline students, subject to a right of appeal to the board; and it also has the power to delegate its disciplinary powers, including to student organizations. Thus, both the general faculties council and the board are granted responsibilities over student discipline as a single matter. The sections of the Act setting out the regime governing student affairs and discipline provide as follows:

Student Affairs

Student discipline

31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may

- (a) subject to a right of appeal to the board, discipline students attending the university, and the power to discipline includes the power
 - (i) to fine students,
 - (ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and
 - (iii) to expel students from the university;
- (b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper;
- (c) give to a student organization of the university the powers to govern the conduct of students it represents that the general faculties council considers proper.

(2) Any powers to govern the conduct of students given to a student organization pursuant to subsection (1)(c) are subject to the overriding control of the board, the president and the general faculties council.

Council on student affairs

32(1) A general faculties council may establish a council on student affairs to exercise immediate jurisdiction over student affairs with respect to any matters and in any manner the general faculties council determines and to exercise or perform any other powers, duties and functions the general faculties council determines.

(2) A council on student affairs may consist of

- (a) members of the academic staff of the university,
- (b) students of the university, and
- (c) officers of the university who have administrative responsibility for student affairs.

(3) A council on student affairs may make bylaws governing the calling of its meetings and the quorum and conduct of business at its meetings and generally as to the conduct of its affairs.

Yet another scheme of university governance and approach to student discipline can be found in *The University of Saskatchewan Act, 1995*, SS 1995, c U-6.1. Under that statute, the Board of Governors “is responsible for overseeing and directing all matters respecting the management, administration and control of the university’s property, revenues and financial affairs” (s. 48), while the University Council “is responsible for overseeing and directing the university’s academic affairs” (s. 60). Responsibility over academic and non-academic discipline is split between two governing bodies: the University Council and the Senate. Thus, the University Council has the power to “discipline students for academic dishonesty, including admonishing, dismissing, suspending or expelling students or imposing fines (s. 61(1)(h)). Powers over non-academic student discipline are conferred upon the Senate, a body whose other responsibilities include making recommendations regarding the establishment or disestablishment of any college, school, or department (s. 23(j)); appointing examiners for and making bylaws respecting the conduct of examinations for professional societies (s. 23(g)); and the granting of honorary degrees (s. 23(i)). In particular, paragraph 23(f) grants the Senate the authority to “make bylaws respecting the discipline of students for any reason other than academic dishonesty, including bylaws providing for the admonishing, dismissing, suspending or expelling of students or the imposition of fines on students.”

A final example is drawn from Newfoundland. The *Memorial University Act, RSNL 1990, c M-7*, provides for a similar separation of general powers between Memorial University of Newfoundland’s Board of Regents and its Senate. Thus, under the heading “General powers of board, s. 33 of the *Memorial University Act* provides that “[t]he management, administration and control of the property, revenue, business and affairs of the university are vested in the board.” As for the Senate, s. 56 provides that “[t]he senate shall have general charge of all matters of an academic character and it shall have power” over a number of enumerated items. However, powers over students discipline are allocated among the Board, the Senate and Faculty Councils. In particular, the Board has the power “to establish faculty councils and other bodies within the university, to prescribe how they shall be constituted, and to confer upon them powers and to assign to them duties in relation to discipline, conduct of libraries or other matters that the board may consider expedient” (s. 34(g)). The Board also has the power “to exercise disciplinary jurisdiction over the students of the university, with power, to take the following actions: (i) admonish, (ii) suspend, (iii) expel, (iv) fine, or (v) levy assessments upon them for damage to property” (s. 34(i)). The Senate, for its part, exercises an appellate jurisdiction over student discipline. It has the power “to exercise disciplinary jurisdiction with respect to students in attendance at the university, by way of appeal from a decision of the faculty council” (s. 56(q)).

From a more historical perspective, it is significant to observe that the Report of the Royal Commission on the University of Toronto,³⁴ which proposed a bicameral system of governance for the University of Toronto, did not view this recommendation as having implications for the allocation of authority over student discipline. The Commission’s Report recommended “dividing the administration of the University between the Governors, who will possess the general oversight and financial control now vested in the State, and the Senate, with the Faculty Councils, which will direct academic work and policy.” It added that the whole University

³⁴ (Toronto: Queen’s Printer, 1906) [University of Toronto Report].

administration should rest upon these “two executive branches.”³⁵ At the same time, however, the Report proposed a specific approach to discipline that seemed quite unrelated to that separation of powers:

In matters of discipline we are of the opinion that as far as possible each College and Faculty should be responsible for its own students. To deal with all cases of discipline which fall outside the jurisdiction of colleges or faculties we suggest that the Caput should have disciplinary jurisdiction. The Caput should also act in all cases of inter-college or inter-faculty discipline and where any doubt arises as to the proper disciplinary authority the Caput should have final power to resolve the doubt. A conflict of jurisdiction would in this way be speedily removed.³⁶

The Caput was to be a committee “consisting of the President and the heads of the various federated institutions, and the Deans of Faculties.” The creation of Caput was recommended to address difficulties that had arisen in the area of discipline:

At present the President and the heads of the colleges are unprovided with legal means for joint action in certain matters of discipline. In these cases, their conferences must be informal, and their decisions without binding effect. The absence of definite authority to enforce order amongst the undergraduates in specified circumstances where the jurisdictions of the University and the colleges appear to be ill-defined, is not a salutary condition. The Caput would provide for such emergencies. Through such a body the President of the University would have the opportunity of consulting the college heads when, in his judgment, the common interest demands it.³⁷

As such, it was proposed that discipline would be under the jurisdiction of the President, heads of institutions and Deans of faculties, not of the Board or the Senate.

As these examples show, the general policy of entrusting responsibility over a university’s general administration and finances to one governing body, and responsibility over academic matters to another, does not correspond to any particular scheme of responsibility over student discipline. Responsibility over academic and non-academic discipline may be split or fused. Moreover, the various governing bodies, or particular officers or delegates, may exercise jurisdiction over different aspects of student discipline, as well as over disciplinary matters at the first instance or appellate stage.

(F) Past Practice

A further relevant consideration when interpreting the provisions of the Charter is the past practice of Queen’s University and its governing bodies and officials with respect to student non-academic discipline and welfare.

³⁵ *Ibid* at xxi.

³⁶ *Ibid* at l.

³⁷ *Ibid* at xxviii-xxix.

According to the Supreme Court of Canada, in *Nowegijick v R*, “[a]dministrative policy and interpretation are not determinative but are entitled to weight and can be an ‘important factor’ in case of doubt about the meaning of legislation.”³⁸ In addition to formal interpretations and policies, past practice can also inform statutory interpretation. As Pierre-André Côté et al. explain, “[i]t is widely accepted that in the face of two competing interpretations, the courts should think twice before rejecting the one which has been implemented on a regular basis.”³⁹ Thus, “if an Act be fairly susceptible of the construction put upon it by usage, the courts will not disturb that construction.”⁴⁰ Côté et al. identify the following rationale for this rule: “usage creates reliance, and the application of a contrary interpretation will sometimes cause serious prejudice. A settled interpretation, if consistent with the text of the enactment, should not be overruled without good reason.”⁴¹

Thus, to the extent that the meaning of the Charter is ambiguous, the University’s past practice may be relied upon as an interpretive guide. Given the analysis above, we are of the view that the text and context of the Charter strongly support an interpretation of ss. 20, 23, and 29 pursuant to which the Senate derives its authority over student non-academic discipline and welfare from the Board. Nevertheless, it might still be argued that an ambiguity arises from the possibility that “Academical” does not qualify “discipline” in s. 23, such that the Senate’s powers over non-academic discipline are inherent. In our view, however, past practice at Queen’s University does not persuasively bolster such an interpretation.

It appears that throughout Queen’s University’s history, the Senate has exercised jurisdiction over student academic and non-academic discipline (as well as over student academic and non-academic activities more generally). In her review of the history of the Senate, Margaret Hooey explains that:

During its first 20 years, the Queen’s University Senate directly managed all of the academic planning and academic housekeeping tasks for the University. The Senate decided on all matters relating to curriculum and course content. It dealt with applications for admission, dealt with special cases such as applications for exemptions and deferrals, awarded bursaries and prizes (after the candidates had presented themselves), arranged for examinations, conducted oral examinations, and meted out sanctions for disciplinary infractions (i.e. a 5 shilling penalty for a student caught sneaking in late through a window). (emphasis added)⁴²

Hooey goes on to describe how, “[t]he first comprehensive set of procedures governing the government and management of the University (then Queen’s College) was framed by the Board of Trustees in 1862.” Those 1862 by-laws notably reduced the administrative burden on the Senate by providing for Faculty Boards to administer the affairs of each faculty. According to

³⁸ [1983] 1 SCR 29 at 37, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 SCR 851 at 859 (per de Grandpré J.). Justice Sharpe applied this principle in the university context in his dissenting reasons in *Kulchyski*, *supra* note 23 at paras 92-93.

³⁹ Côté et al, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 587 [Côté].

⁴⁰ *Reference re: Canadian Pacific Railway Co. Act (Canada)*, (1905), 36 SCR 42, cited in *ibid* at 587.

⁴¹ Côté, *ibid*, at 587.

⁴² Margaret Hooey, “The Queen’s University Senate Evolution of Composition and Function 1842 -1995” (March 1996) [Hooey]

Hooey, after 1860, “[t]he main focus of the Senate revolved around the academic and non-academic activities of students. A substantial proportion of Senate time was devoted to considering student disciplinary infractions and imposing sanctions.”⁴³

During these early years, the Senate could not have derived authority over student non-academic discipline from a Board enactment because the Board was only granted its s. 29 power to legislate with respect to the Senate in 1912, pursuant to an Act of Parliament. The first such Board enactment was passed in 1913.⁴⁴ Nevertheless, the Board’s authority under s. 23 of the Charter to determine that the Senate should have “such powers for maintaining order and enforcing obedience to the Statutes, Rules and Ordinances of the said College, as to the said Board may seem meet and necessary” was part of the original Charter.⁴⁵ As such, the mere exercise of jurisdiction over non-academic student discipline prior to 1913 is indeterminate as between a practice interpreting those powers as inherent to the Senate, rather than extended to the Senate by the Board.

Furthermore, it appears that from the early years, actors within Queen’s University carried out student discipline without close scrutiny of the legal source of such powers. In particular, student discipline was carried out by the students without formal authority or official recognition. The Report of the Royal Commission on the University of Toronto, published in 1906, included an analysis of the governance structures in place at various universities in North America at the time. The Report described the authority over discipline at Queen’s University in the following terms:

The College Senate, constituted of all the professors of the College, exercises academic superintendence and discipline over the students. In practice, however, the discipline of the students is carried out by themselves. The students of each Faculty have a court, called the *Concursus Iniquitatis et Virtutis*, to which the judges and other officers are annually elected, and this court, while not officially recognized, actually controls almost all matters of discipline.⁴⁶

Both the AMS website and the Queen’s University Encyclopedia claim that “[s]ince 1898, the Senate has officially delegated much of the responsibility for non-academic discipline to the students themselves.”⁴⁷ However, we have been unable to find and have not been provided with any formal documentation of such an “official delegation.” That such an official delegation would have been ignored in a Royal Commission Report published eight years later would be rather surprising, although the possibility of inaccuracy in that Report cannot be excluded.

After receiving formal authority to legislate with respect to the Senate in 1912, the Board immediately proceeded to pass an enactment in 1913 providing for a new composition for the

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Royal Charter of 1841, s. 22.

⁴⁶ University of Toronto Report, *supra* note 34 at 69.

⁴⁷ Queen’s University Encyclopedia, “Discipline of Students” (accessed 30 July 2015, at <http://www.queensu.ca/encyclopedia/d/discipline.html>); AMS, “AMS Non-Academic Discipline” (accessed 30 July, 2015 at <http://www.myams.org/about-your-ams/cia-commission-of-internal-affairs/ams-non-academic-discipline.aspx>).

Senate and a revised statement of its functions.⁴⁸ The Senate's various functions detailed by the 1913 enactment included the power "[t]o enforce the Statutes, Rules and ordinances of the University."⁴⁹ This set of functions remained in place until 1968, when it was significantly revised by the Board. Under the 1968 enactment, the Senate's functions included "[t]o be responsible for and to have authority to deal with all matters pertaining to the well-being and discipline of students" (s. 11).⁵⁰ Section 11 of the version of the *Purpose and Functions of Senate* that immediately preceded the one now in force similarly provided that the Senate was

[t]o have responsibility for the well-being of students and to have final responsibility for their discipline including the power to dismiss students for cause. The Alma Mater Society of Queen's University, the Society of Graduate and Professional Students share responsibility for, and have the right to promote, the well being of their members. In the discharge of its disciplinary power, the Senate shall have regard to the initial responsibility of the Alma Mater Society of Queen's University, the Society of Graduate and Professional Students for the discipline of students in non-academic matters; the Senate may review the decisions of the Alma Mater Society of Queen's University, the Society of Graduate and Professional Students and the Residences with respect to the discipline of students, and may take such action as it deems appropriate.⁵¹

The Senate has thus exercised jurisdiction over student non-academic discipline and affairs generally throughout the history of Queen's University. This past practice further supports the view that the structure of the Charter does not preclude the Senate from exercising such powers. However, we do not consider that it provides compelling interpretive guidance between an interpretation of s. 23 pursuant to which the Senate's powers over student non-academic discipline are inherent, as opposed to conferred upon the Senate by the Board.

Moreover, even if there were more specific evidence reflecting a historical consensus among actors at Queen's University that the Senate's powers over non-academic discipline were inherent, in our opinion, such a consensus should cede to the interpretive analysis above. Although past practice may be relevant, the Supreme Court of Canada has also made clear that "[i]f an interpretation is wrong, it does not make law. Estoppel by interpretation has not yet become a recognized doctrine of statutory construction."⁵²

Finally, it should be noted that, "where a statutory provision admits of more than one possible meaning, [a statutory authority], having decided that its former interpretation was incorrect, is not precluded from changing its practice."⁵³ Moreover, the Supreme Court of Canada has made clear that courts should generally show deference to a statutory authority's interpretation of its enabling legislation.⁵⁴ In this context, "prior decisions provide important context to the analysis"

⁴⁸ Hooey, *supra* note 42.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ As quoted in Non-Academic Discipline at Queen's (approved by Senate May 21, 2003) (as found at: <http://www.queensu.ca/secretariat/policies/senateandtrustees/nonacademic.html>).

⁵² *Imperial Oil Ltd. v Canada; Inco Ltd. v Canada*, 2006 SCC 46, [2006] 2 SCR 447 at para 59.

⁵³ *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, [2006] 1 SCR 715 at para 40.

⁵⁴ *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 at para 30.

to whether a statutory authority's interpretation of its enabling legislation is reasonable.⁵⁵ However, "[t]here is no rule of law that an administrative tribunal can never change its policies, nor change its interpretation of a particular policy, nor change the way that the policy will be applied to particular fact situations."⁵⁶ As such, if the Board and the Senate were to deliberately articulate an interpretation of the Charter that diverged from past practice, there is no reason to believe that this interpretation would be unlawful or that it would not receive the standard judicial deference. The issue might be complicated if the Board and the Senate formally disagreed about the scope of their respective powers under the Charter. Courts should not show deference to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals."⁵⁷ Thus, in the face of disagreement, a court would likely make its own determination of the proper interpretation of the allocation of powers under the Charter. In our view, that interpretation would correspond to the interpretation outlined above.

IV. POWERS OF QUEEN'S UNIVERSITY STAKEHOLDERS OVER NON-ACADEMIC DISCIPLINE AND WELFARE UNDER INTERNAL UNIVERSITY INSTRUMENTS

(A) Formal Structure of Powers Over Non-Academic Discipline and Welfare Under Internal University Instruments

In addition to the Charter, a number of internal University instruments regulate the allocation of responsibility over student non-academic discipline and welfare.

(1) Purpose and Functions of Senate

As previously mentioned, pursuant to its powers under s. 29 of the Charter, the Board has enacted *Purpose and Functions of Senate*.⁵⁸ As this enactment has been formally approved by the Senate,⁵⁹ representing consent to its terms, s. 29's consultation requirement has been more than satisfied. *Purpose and Functions of Senate* contains a number of provisions regulating responsibility over student non-academic discipline and welfare.

Under the heading "Central Function," s. 1 of *Purpose and Functions of Senate* provides:

1. Under the jurisdiction of the Royal Charter of 1841, Senate determines all matters of an academic character that affect the University as a whole, and is concerned with all matters that affect the general welfare of the University and its constituents. Senate shall serve as a forum for discussion and exchange of ideas among the members of the University community. (emphasis added)

⁵⁵ *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at para 18.

⁵⁶ *Ibid* at para 16.

⁵⁷ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 61.

⁵⁸ A review of the Minutes of the Board indicates that this enactment was ratified by the Board during the meeting of September 23, 2011.

⁵⁹ On April 28, 2011, see *Purpose and Functions of Senate*.

Under the heading, “Academic Planning and Educational Environment Functions,” s. 3 of *Purpose and Functions of Senate* provides:

Senate will [...] assume a shared responsibility, along with the Board of Trustees and the Administration of Queen’s, for a living and learning environment that promotes the well-being of students.

Under the heading, “Legislative Functions,” s. 10 of *Purpose and Functions of Senate* provides:

Senate has the authority to [...] approve policies and procedures regarding student academic and non-academic matters. The authority to discipline students, including the power to require a student to withdraw from the University, resides with the Senate; responsibility for non-academic discipline of students may be delegated to student organizations.

Under the heading “Appointment/Selection Functions,” s. 14 of *Purpose and Functions of Senate* provides:

Senate will [...] appoint, establish terms of reference, and have responsibility for committees that fulfill the functions of Senate.

Thus, through *Purpose and Functions of Senate*, the Board (with the Senate’s approval) has articulated the extent to which it has conferred responsibilities over student non-academic discipline and welfare to the Senate.

In particular, the language in s. 10 providing that “[t]he authority to discipline students [...] resides with the Senate” is a clear expression of the Board’s intent that responsibility for student discipline (both academic and non-academic, as the preceding sentence in s. 10 indicates) should lie with the Senate. This present arrangement does not, however, reduce the Board’s jurisdiction under ss. 20, 23 and 29 of the Charter to alter the Senate’s powers, in consultation with the Senate, and while not eroding the Senate’s core academic jurisdiction. Furthermore, s. 10 of *Purpose and Functions of Senate* purports to authorize the Senate to delegate responsibility for non-academic discipline of students to student organizations. The extent to which this provision is lawful will be examined below.

Sections 1 and 3 of *Purpose and Functions of Senate* also express the Board’s intent that the Senate should exercise responsibility over student welfare. The Senate should be understood as having broad responsibility in this regard, given the expansive language in s. 1: “Senate [...] is concerned with all matters that affect the general welfare of the University and its constituents” (emphasis added). A wide interpretation of the Senate’s responsibilities over student welfare is further supported by s. 10, which provides the Senate with a broad legislative jurisdiction over “student academic and non-academic matters.” While the Senate’s responsibility for student welfare is broad, it is not exclusive. Rather, through *Purpose and Functions of Senate*, the Board has explicitly indicated that this is a responsibility that is shared between the Senate, the Board, and the Administration of Queen’s University (s. 3). As such, each of the actors has an interest in student welfare, which would include such matters as health and safety.

Finally, s. 14 of *Purpose and Functions of Senate* expressly authorizes the Senate to establish committees and to delegate Senate powers to those committees. Again, the lawfulness of this purported authorization to delegate will be examined in detail below.

(2) Senate Policy on Non-Academic Discipline at Queen's

The primary Senate document purporting to confer jurisdiction over student non-academic discipline to student organizations, the AMS and the SGPS, is the Senate's policy on Non-Academic Discipline at Queen's, which was approved by the Senate on May 21, 2003 (hereinafter "2003 Policy"). The Senate's authority to adopt this policy and others outlined below derives from the s. 10 of *Purpose and Functions of Senate* power to "approve policies and procedures regarding student academic and non-academic matters."

The "Introduction" to the 2003 Policy affirms the Senate Committee on Non-Academic Discipline's (referred to by the acronym "SONAD") commitment to student control over non-academic discipline at Queen's. Given Senate approval, the following position can be taken to be that of the Senate:

At the March 2003 meeting of SONAD, this body reaffirmed the University's commitment to peer-centered non-academic discipline. Peer-centered non-academic discipline at Queen's is founded on two interdependent concepts: trust and tradition, a trust in the willingness and ability of the student body to discipline fellow students in non-academic matters and a tradition of more than fifty years born out of that trust. To date, with few exceptions, this confidence has been well founded and in the view of the Committee, the Senate should continue to respect the basic principle that students at Queen's ought to regulate and control their own behaviour. It is expected that any abuses that have occurred in the past will be avoided or limited in the future by adherence to the general guidelines outlined in this final draft, but this does not preclude the Senate's re-evaluating non-academic disciplinary procedures if circumstances should so warrant. Clearly it will require the support, trust and co-operation of all members of the community if each of the responsible bodies is to fulfill its role effectively. (emphasis added)

Under the heading "AMS and SGPS Judicial Committees and the Residence Discipline Tribunal," the 2003 Policy then goes on to provide:

The AMS and the SGPS Judicial Committees and the Residence Discipline Tribunal derive their authority and jurisdiction through the AMS and SGPS from the Senate. Senate Function 11 states:

To have responsibility for the well-being of students and to have final responsibility for their discipline including the power to dismiss students for cause. The Alma Mater Society of Queen's University, the Society of Graduate and Professional Students share responsibility for, and have the right to promote, the well being of their members. In the discharge of its disciplinary power, the

Senate shall have regard to the initial responsibility of the Alma Mater Society of Queen's University, the Society of Graduate and Professional Students for the discipline of students in non-academic matters; the Senate may review the decisions of the Alma Mater Society of Queen's University, the Society of Graduate and Professional Students and the Residences with respect to the discipline of students, and may take such action as it deems appropriate.

The Faculty Boards of the Faculties and Schools are responsible, through the authority of Senate, for exercising academic discipline. They have jurisdiction over non-academic discipline of students when unacceptable behaviour occurs in the context of a specific component of the academic program in which the student is registered (i.e., field trips, laboratories, survey school, clinical settings) or in an academic or academic-related setting. In cases of discipline or behaviour not related to the academic work or program of the student, Faculty Boards will expect the Judicial Committee of the AMS and SGPS to serve as the initial disciplinary mechanism and must regard them as such.

This portion of the 2003 Policy is the clearest statement of the Senate's intention to delegate responsibility over student non-academic discipline to the AMS and SGPS that we have identified in our review. This is unfortunate, as this portion of the 2003 Policy is manifestly out of date, resting its authority on a prior version of *Purpose and Functions of Senate* and a "Function 11," which has now been replaced by s. 10 (or "Function 10"). While the 2003 Policy states that the AMS and SGPS derive their authority over student non-academic discipline from the Senate, the bulk of the language affirming the initial responsibility of the AMS and SGPS over such matters is contained in language quoted from a now repealed Board enactment.

The 2003 Policy also provides for a measure of oversight to be exercised by the Senate over non-academic discipline. It requires that the AMS, SGPS, and Residences report to the Senate annually or at other times on request on their non-academic disciplinary activities. Under the heading "Judicial Committees, The Residence Discipline Tribunal and the Senate," the 2003 Policy provides:

The Senate shall receive reports from the AMS, SGPS and the Residences annually and at other times when requested by the Senate or one of its constituencies. The annual report of the AMS will include a summary of actions from the Chief Prosecutor's Office and a summary of actions from the Judicial Committee. The SGPS Judicial Committee and the Residences will also submit a report containing a summary of actions from their respective tribunals.

Copies of decisions made by the Judicial Committees and the Residence Discipline Tribunal will be filed with the Coordinator of Dispute Resolution Mechanisms at the same time as they are filed with the Judicial Committee Clerks.

In addition, the 2003 Policy sets out general guidelines for non-academic disciplinary processes. Thus, the policy states that "[i]t is expected that the Judicial Committees of the AMS, SGPS and Residences will function primarily as administrative tribunals." It also provides that certain procedural fairness requirements must be complied with in all non-academic disciplinary

proceedings, and enumerates certain participatory rights that “[t]he Senate Committee on Non-Academic Discipline recommends” be observed in all tribunal proceedings.

The 2003 Policy also provides for appeals from AMS, SGPS, and Residences disciplinary tribunal decisions. However, the appeals process set out have been substantially displaced by the more recent Queen’s University Senate Policy on Student Appeals, Rights & Discipline,⁶⁰ discussed below.

The 2003 Policy includes some very general guidance on sanctions. Thus, it broadly indicates the types of sanctions available to student organizations, providing that “[a] range of sanctions is available to the Judicial Committees of the AMS and the SGPS including reparations, community service, fines, bonds, withdrawing of university-wide or local privileges, and recommendation to the appropriate authority for expulsion from a particular jurisdiction and recommendation to Senate for suspension or requirement to withdraw from the University.” Moreover, the 2003 Policy states that, although the system is decentralized, “[i]t is important, therefore, that the judgments made and sanctions imposed by the various disciplinary bodies be based on university-wide standards and criteria.” The issue of sanctions is, however, addressed in greater detail in the Student Code of Conduct.

Significantly, the sections of the 2003 Policy dealing with procedural fairness and sanctions each describe the non-academic disciplinary processes undertaken by the AMS and SGPS as being carried out “on behalf of” the University.

As illustrated by the reference to “Senate Function 11” (now a differently worded Function 10), the Senate Policy on Non-Academic Discipline at Queen’s is somewhat out of date. A new Senate policy, *Senate Policy on the Jurisdiction of Non-Academic Discipline*, has been prepared and a motion to rescind the 2003 Policy and replace it with this one will be voted upon on September 29, 2015. The background to that motion explains:

At the September 26, 2014 meeting of the Senate Committee on Non-Academic Discipline (SONAD), it was agreed to add an item on the jurisdiction of Queen’s various non-academic discipline systems to the Committee’s work plan for the upcoming academic year. It was noted that, although there is information regarding non-academic discipline (NAD) jurisdiction within the policy documents of each of the existing NAD systems, its distributed nature may be confusing to students with multiple affiliations who are involved in NAD cases.

Evidently, this new policy does not have effect yet within Queen’s University. If it comes into effect, it will clarify the responsibilities of the Senate, Faculty Boards, Provost, AMS and SGPS, Residences, Athletics & Recreation, the University Student Appeal Board, the Senate Committee on Non-Academic Discipline over student non-academic discipline. It will further provide for the Ombudsman to have the authority to resolve disputes as to jurisdiction. The new policy notably clarifies that “[t]he Senate has ultimate jurisdiction for non-academic discipline; all delegated authoritative bodies report directly to the Senate through their established and/or Senate approved policies” and updates the statement of the Senate’s functions to match the current

⁶⁰ February 26, 2004, as most recently amended by the Senate on April 28, 2015.

version of *Purpose and Functions of Senate*. Unlike the 2003 Policy, the new policy does not address procedural fairness or sanctions. Significantly, the new policy provides for the role of student organizations in the following terms:

The Senate has delegated initial responsibility for non-academic discipline of students to the Alma Mater Society (AMS) and to the Society of Graduate and Professional Students (SGPS) respectively for students, full-time, part-time, or otherwise registered. Those students that are not members of either society would fall under the jurisdiction of the society of which they would normally be a member based on their classes or program. The AMS and the SGPS cannot require a student to withdraw from the University, but instead may recommend this to SONAD. SONAD conducts reviews of individual cases of non-academic discipline in which a decision-making body has recommended that a student be required to withdraw for reasons of non-academic discipline and the student did not submit an appeal to the USAB.

In our view, separate from the difficulties with delegation discussed below, this language is less capable of effecting a delegation of responsibility to the AMS and the SGPS because it more clearly suggests that such delegation finds its source elsewhere. Specifically, it states that: “[t]he Senate has delegated initial responsibility for non-academic discipline of students to the Alma Mater Society (AMS) and to the Society of Graduate and Professional Students (SGPS)” (emphasis added). While there are advantages to this new policy in terms of clarifying the jurisdiction of various actors over student non-academic discipline, the noted language would operate to further call into question the legality of any delegation of authority over student non-academic discipline to the AMS and the SGPS.

(3) Queen’s University Student Code of Conduct

A further Senate document regulating student non-academic discipline at Queen’s University is the Queen’s University Student Code of Conduct⁶¹ (hereinafter “Code”). The Code defines the allocation of responsibilities over various aspects of student discipline; regulates available sanctions and procedural fairness requirements in student disciplinary hearings; and confirms the role of Senate bodies in hearing appeals and in ordering the most serious sanction of student withdrawal.

The Code outlines the general structure of authority over student discipline in the following terms:

Senate has responsibility for the well-being of students and has the final responsibility for their discipline including the power to dismiss students for cause. The Senate Residence Committee is responsible for approving the overall process for Residence Student Discipline. The Principal or various bodies within the University may refer cases involving one or more students to the University Student Appeal Board (USAB) for a

⁶¹ Approved by Senate April 24, 2008 (effective July 1, 2008, most recently amended January 21, 2014). A review of the Minutes of the Senate on January 21, 2014 indicates that the Senate is considered to have the requisite authority to amend Code acting alone, Minutes of the Board from over the period of September 29, 2006 to March 6/7, 2015 indicate that the Board has not formally ratified the Code.

hearing so that a decision may be made. Otherwise, in the discharge of its disciplinary power, the Senate shall have regard to the initial responsibility of the Alma Mater Society (AMS) and the Society of Graduate and Professional Students (SGPS) of Queen's University for the discipline of students in non-academic matters. [footnote 7 to the Code cites Senate Function 11, again from a previous version of *Purpose and Functions of Senate*]

Queen's University retains the right to exercise emergency powers, including the issuance of a Notice of Prohibition. The University administration may exercise emergency powers if satisfied that the interests or safety of other students, staff, faculty, or members of the public would be endangered by the student's continued presence at Queen's University or specific part thereof or by the student continuing in a course or program. A Notice of Prohibition may be used to bar a student from entering some or all of Queen's University pending the outcome of a proceeding. The exercise of emergency powers, including the issuance of a Notice of Prohibition, takes effect immediately and is not suspended pending a hearing.

Faculty boards or their delegated bodies have jurisdiction to deal with issues of academic integrity and dishonesty as well as non-academic misconduct in an academic setting, and to impose sanctions.

Neither the University nor any authorized University judicial official shall pursue disciplinary action if the same complaint is being addressed, or has already been handled, by another University authority. The *Senate Policy on Appeals, Rights and Discipline* provides a final internal appeal process and establishes a University-wide body, the USAB, to hear both academic and non-academic matters.

Queen's University recognizes that all members of the University Community have the right to be free from harassment and discrimination. A complaint of harassment or discrimination may be brought under the Queen's University *Harassment/Discrimination Complaint Policy and Procedure*.

The Code also defines the sanctions available for its violation. These include a notice of misconduct, as well as orders requiring a student to make a written apology, to attend relevant education programming, to perform community service, to pay restitution, a bond, or a fine, or recommending that a student be withdrawn from the University for a specified period. Referring to s. 9 of the *Queen's University Senate Policy on Student Appeals, Rights & Discipline*, the Code specifies that

The jurisdiction of the AMS and the SGPS does not include the power to require a student to withdraw from the University. The AMS and the SGPS judicial committees may recommend to the appropriate Senate committee (i.e. the University Student Appeal Board if the decision is appealed, or the Senate Committee on Non-Academic Discipline (SONAD) if the decision is not appealed) that a student be required to withdraw from the University.

The Code also provides that hearings of disciplinary matters must conform to principles of procedural fairness, including adequate participatory rights and compliance with the rule against bias. The Code enumerates a list of specific participatory rights that must be observed in all tribunal proceedings.

The Code provides that “[w]here the student believes that the decision reached by the decision-maker is unreasonable, or contrary to University policy or the principles of fairness, or that the process followed was contrary to the procedures established by the decision-maker, the student may appeal the case to the appropriate University authority, generally the USAB.”

(4) Terms of Reference – Senate Committee on Non-Academic Discipline

Operating under s. 14 of *Purpose and Functions of Senate*, the Senate has established the Senate Committee on Non-Academic Discipline and established its Terms of Reference (hereinafter “SONAD Terms of Reference”). The SONAD Terms of Reference invest the Senate Committee on Non-Academic Discipline with general advisory and oversight functions over non-academic discipline, as well as reporting duties to the Senate. Specifically, they task the Senate Committee on Non-Academic Discipline:

To review regularly and to recommend changes to Senate policies addressing non-academic discipline. SONAD shall report annually to the Senate regarding the work of the committee.

To review the annual report of the AMS Judicial Affairs Office, the SGPS, the Residence Discipline Report, the Athletics and Recreation annual report, and the Provost’s Office annual report on disciplinary cases as referred to the Committee by the Senate, and to report to the Senate on these matters as required.

To conduct a review of individual cases of non-academic discipline in which no appeal has been brought to the University Student Appeal Board, according to the procedure set out in the Senate Policy on Student Appeals, Rights and Discipline [...] at section 9. SONAD shall report (in summary form) annually to the Senate on the number and types of cases it has reviewed.

To address any other matter referred to the committee by the Senate.

(5) Queen’s University Senate Policy on Student Appeals, Rights & Discipline

The Senate has also adopted the Queen’s University Senate Policy on Student Appeals, Rights & Discipline (hereinafter “SARD”).⁶² Significantly, s. 1(b) of SARD specifies that “[o]ther than as expressly stated herein, this Policy does not create, alter or eliminate any existing academic or non-academic discipline procedures of first instance or internal appeals that are now, or may later be, in place.” Moreover, s. 8(a) of SARD further provides:

⁶² February 26, 2004, as most recently amended by the Senate on April 28, 2015.

Students who violate the Code of Conduct or other rules may be brought before the discipline adjudication body having jurisdiction over the subject matter.

Non-academic discipline at Queen's is enforced by the University's administrative officers, faculty boards, departmental committees, the Alma Mater Society (AMS) and the Society of Graduate & Professional Students (SGPS) Judicial Committees, and the residence discipline process. Current Queen's policies and the subject matter of the case will determine which adjudication body has jurisdiction in any particular case. Unless expressly stated, this Policy does not grant or alter the jurisdiction of any discipline adjudication body.

As such, SARD's statements regarding first instance or internal appeals in non-academic disciplinary matters should not be viewed as regulating or controlling those processes, unless specifically indicated. Moreover, SARD cannot be relied upon as a jurisdiction-conferring instrument for any discipline adjudication body, unless this is expressly stated. These features of SARD are in contrast, for example, to the procedural fairness and sanctions provisions of the Code.

SARD establishes USAB (i.e., the University Student Appeal Board). USAB derives its authority from the Senate and may make recommendations to Senate regarding matters of policy arising from a proceeding decided by USAB (SARD, s. 24(a)). Pursuant to s. 17 of SARD, USAB's role in non-academic discipline includes the jurisdiction to hear

- appeals by students from non-academic discipline decisions of the AMS and SGPS Judicial Committees; faculty boards and other final academic decision-making bodies; the Residences administration and tribunals; the Vice-Provost (or delegate) regarding the issuance of a Notice of Prohibition or exercise of other emergency powers;
- cases of non-academic discipline referred directly to USAB by the Provost, in which case USAB exercises initial and full jurisdiction over the matter;
- any matter concerning a student referred to it by the Senate, a faculty board, or the AMS or SGPS Judicial Committee, or the Provost and Vice-Principal (Academic).

The available grounds of appeal before USAB are somewhat restricted. Thus, USAB's appellate jurisdiction is limited to the grounds that the decision-making body failed to follow its rules or regulations, failed to follow the rules of natural justice, violated University policies, or made an unreasonable decision (SARD, s. 21).

The AMS and the SGPS do not have authority to require a student to withdraw from the University. However, s. 9 of SARD provides that the AMS and SGPS Judicial Committees may recommend to either USAB or the Senate Committee on Non-Academic Discipline that a student be required to withdraw from the University. If a student appeals a decision of the AMS or SGPS Judicial Committee, USAB has jurisdiction to approve the recommendation to require a student to withdraw. If a student does not appeal such a decision, the requirement that a student withdraw will only take effect after it has been approved by the Senate Committee on Non-

Academic Discipline, which must be satisfied that appropriate procedures have been followed and that the recommended period of withdrawal is reasonable. If the Senate Committee on Non-Academic Discipline is not so satisfied, it may require a reconsideration by the AMS or SGPS Judicial Committee or that its own sanction be applied. Section 9 of SARD further requires the Senate Committee on Non-Academic Discipline to report annually to the Senate (in an anonymized form) on the non-academic discipline cases it has reviewed.

Section 12 of SARD also requires decision-making bodies that are subject to USAB's appellate jurisdiction to advise students subject to disciplinary decisions of the decision and the student's right to appeal in writing.

Finally, SARD recognizes that "[t]he University administration retains the power to exercise emergency powers when necessary, including the issuance of a Notice of Prohibition to bar a student from entering some or all of Queen's University pending the outcome of a proceeding, if satisfied that the interests or safety of other students or members of the public would be endangered by the student's continued presence at Queen's University or specific part thereof or by the student continuing in a course or program." (SARD, s. 36(a)).

(6) Guidelines for the Handling of Non-Academic Discipline by Faculty Boards

This policy, which was endorsed by the Senate on March 1, 1984, states that jurisdiction over non-academic discipline in an academic context rests with Faculty Boards. It sets out the basic conditions for a fair hearing, and it discusses how adjudicative authority may be delegated.

(7) Queen's University Residences Residence Student Conduct Process

This policy, which was approved by the Senate on March 3, 2005, and most recently revised April 29, 2014, outlines the broad principles and framework for non-academic discipline in residence. It explains that the University has vested overall responsibility for University Residences to the Dean of Student Affairs. The policy further indicates that students who live in residence contractually agree to abide by the policies, rules and regulations that govern acceptable conduct. The policy affirms that the residence student conduct process is peer-based, involving student leadership at all levels. It also specifies that the Senate has delegated authority for overseeing and approving the residence student conduct process to the Senate Residence Committee, which is responsible for the well-being of resident students and holds Residence Administration accountable for the effective implementation of Senate policies, including student conduct. The policy also provides that a standing committee of the Senate reviews the residence student conduct process to ensure its integrity and compliance with University policies and procedures, and reports to the Senate Committee on Non-Academic Discipline

(8) Athletics & Recreation Non-Academic Discipline Judicial Process (Discipline Policy)

This policy, which was approved by the Senate on April 22, 2010, sets out the non-academic disciplinary process that applies to student participants on Inter-University teams and clubs, in Intramural sports programs, and in other recreational programs and clubs at Queen's University (s. 1). It provides that "the Director of Athletics & Recreation has the responsibility for ensuring

the effective operation of the policies and processes that deal with non-academic discipline in Athletics & Recreation activities,” while reserving the Director’s right to refer a matter to USAB under s. 17(c) of SARD.

(9) MOU between President and CEO of the AMS and Principal and Vice-Chancellor of Queen’s University

We have also reviewed a Memorandum of Understanding between the then President and Chief Executive Officer of the Alma Mater Society, Doug Johnson, and the Principal and Vice-Chancellor of Queen’s University, Daniel Woolf, dated September 11, 2012. The MOU states, *inter alia*, that

The AMS non-academic discipline system was founded in 1898, with authority delegated by the Senate. Senate most recently reaffirmed support for the AMS peer-administered judicial system, and its driving principles, in 2006 and again in 2008.

[...]

The University recognizes the inherent value and efficacy of the AMS non-academic discipline system and unequivocally supports the underlying philosophy of peer-administered discipline

[...]

For the 2012-13 academic year, an interim protocol was established for cases that the Provost (or delegate), assumed authority for handling. Outside of the list of items the AMS has established as not being within their jurisdiction, the Provost had handled a number of cases involving students on rooftops and malicious activity involving Blue Lights. Going forward the interim protocol will not continue, but rather the improvements and changes outlined below will be followed and implemented. Therefore complaints involving AMS members will be forwarded to the AMS Commission of Internal Affairs except in the following circumstances:

1. The Residence or Athletic discipline system has sole jurisdiction;
2. The Provost exercises his authority under sections 17 or 36 of the Senate Policy on Student Appeals, Rights, and Discipline (SARD)3;
3. The case falls under AMS policy as offenses not dealt with by the AMS judicial system: blatant discrimination (sexual, racial or otherwise), harassment, sexual assault, serious assault of a non-sexual nature, or murder;
4. The incident is of an academic nature or occurs in an academic setting.

The MOU then sets out “a list of changes the AMS has implemented, or is in the process of implementing, to improve the efficiency and accountability of the non-academic discipline

system” as well as “a list of tasks that the AMS, the University, and other stakeholders, will undertake over the 2012-13 academic year to continue to enhance non-academic discipline at Queen’s.” It is striking that these changes to the student non-academic disciplinary process are set out in an MOU between the AMS and the Principal and the Vice-Chancellor of the University, rather than as a formal Senate document regulating the terms of delegation over non-academic discipline to student organizations.

Given that the Principal and Vice-Chancellor does not have authority to confer jurisdiction over student non-academic discipline to student bodies, this document should be viewed more as a political understanding than a legal statement of AMS’s jurisdiction. It involves a political undertaking that the Provost (or delegate) will cease to exercise disciplinary powers that had been asserted on an interim basis. Similarly, AMS’s undertakings with respect to improvements are not an exercise of control over that body by the Senate, which has purportedly granted it jurisdiction over non-academic discipline.

(B) Legality of the Senate’s Delegation of its Powers over Non-Academic Discipline to Student Organizations

In our opinion, the Senate’s has authority over student non-academic discipline by virtue of that authority being conferred on the Senate by the Board. Pursuant to ss. 29 and 23 of the Charter, the Board has granted the Senate authority over student non-academic discipline by way of s. 10 of *Purpose and Functions of Senate*. Such provision for the Board extending the Senate’s “powers for maintaining order and enforcing obedience to the Statutes, Rules and Ordinances of the said College” is expressly contemplated by s. 23 of the Charter. However, it remains necessary to examine the legality of the Senate’s delegation of its powers over non-academic discipline to student organizations that are distinct corporate entities (the AMS and the SGPS).

(1) Principles Governing Sub-Delegation

a. Delegatus non Potest Delegare

The legal analysis of the Senate’s delegation of its powers over student non-academic discipline begins with a general principle of statutory interpretation known as the *delegatus non potest delegare* (“a delegate cannot delegate”) rule. The Supreme Court of Canada has summarized the rule as follows:

It is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*.⁶³

Writing for the majority of the Supreme Court of Canada in *Forget v Quebec (Attorney General)* (hereinafter “*Forget*”), Justice Lamer (as he then was) explained that “[t]he *delegatus non potest*

⁶³ *Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 at para 93 [*Therrien*], cited with approval in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249 at para 65 [*Moreau*].

delegare rule prevents the holder of a power which entails the exercise of a discretion from conferring the exercise of that power on some other person or agency.”⁶⁴ However, the principle against sub delegation is merely a canon of construction and not a rule of law.⁶⁵ As such, it will be displaced by express or implied statutory authorization to delegate.

b. Express Statutory Provisions

Depending on the express terms of a statute, a sub delegation may be permitted, prohibited, or even required. In *Forget*, the enabling legislation “expressly authorize[d] the Office [de la langue française] to create committees to assist it in carrying out its function.”⁶⁶ At the same time, the legislation required the Office to enact regulations for the purpose of assessing whether professional candidates have an appropriate knowledge of French. As such, establishing a committee and assigning to it responsibility for preparing a French proficiency test was found to be a sub delegation expressly permitted by the statute.⁶⁷

Moreover, where the legislation provides for particular procedures, and for particular bodies to exercise particular powers within that procedure, those specific procedures must be respected. Accordingly, where a statute establishes a disciplinary procedure, “the general powers in an Act cannot be used to circumvent specific legislative directions regarding the conduct of discipline proceedings.”⁶⁸ For example, in *Moreau-Bérubé v New Brunswick (Judicial Council)*, New Brunswick’s legislation establishing a disciplinary procedure for judges specifically provided for an inquiry panel to investigate the conduct of a judge, but also “clearly indicate[d] that the [Judicial Council of New Brunswick] [wa]s to make the decision with regard to the sanction” taking into account the inquiry panel’s findings of fact. Thus, the Council could not be bound by the inquiry panel’s findings of fact as this would amount to the Council abdicating its decision-making power to the inquiry panel,⁶⁹ an unlawful sub delegation. Conversely, a statute can require that certain decision-making powers be exercised by a delegate. In *Therrien (Re)*, the Supreme Court of Canada found that under Quebec’s legislation governing judicial discipline, “it was specifically the intent of the legislature that decision-making authority be assigned to a committee of inquiry.”⁷⁰ In that case, the legislation provided that the Conseil de la magistrature was bound by the conclusions drawn by the committee of inquiry.⁷¹

⁶⁴ [1988] 2 SCR 90 at para 35 [*Forget*].

⁶⁵ *Myers v Law Society of Newfoundland*, [1998] N.J. No. 206 (Nfld CA) at para 39, citing *Reference re Regulations (Chemical) under War Measures Act (Canada)*, [1943] SCR 1; *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243, [2009] 2 FCR 466 at para 74 (leave to appeal to SCC denied, [2008] SCCA No 403); *Re Peralta et al and The Queen in Right of Ontario et al* (1985), 49 OR (2d) 705 (ONCA) at 717, aff’d [1988] 2 SCR 1045 (SCC).

⁶⁶ *Forget*, *supra* note 64 at para 34.

⁶⁷ *Ibid* at para 34.

⁶⁸ *Myers v Law Society of Newfoundland*, [1998] N.J. No. 206 (Nfld CA) at para 23.

⁶⁹ *Moreau*, *supra* note 63 at paras 61-66.

⁷⁰ *Therrien*, *supra* note 63 at para 93.

⁷¹ *Ibid* at para 94.

c. *Implied Statutory Authority to Delegate*

There are also many circumstances in which courts will find an implied statutory intention to permit sub delegation. In this regard, courts will be guided by the context and structure of the statutory scheme, taken together with considerations of administrative efficiency and pragmatism. In determining whether delegation is implicitly authorized, courts observe the general principles outlined by Professor John Willis in his article “Delegatus Non Potest Delegare”:

This question is answered in practice by comparing the *prima facie* rule [that statutory powers cannot be delegated] with the known practices or the apprehended needs of the authority in doing its work; the court inquires whether the policy-scheme of the statute is such as could not easily be realized unless the policy which requires that a discretion be exercised by the authority named thereto be displaced; it weighs the presumed desire of the legislature for the judgment of the authority it has named against the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner and where there is a conflict between the two policies it determines which, under all the circumstances, is the more important.⁷²

d. *Administrative vs. Judicial or Legislative Powers*

The existence of an implied authority to delegate a statutory power is often described in terms of a distinction between “ministerial” or “administrative” powers, which typically can be delegated, as opposed to “legislative” or “judicial” powers, which typically cannot. Accordingly,

A power to delegate will often be found to exist by implication if the decision-making in question can be classified as “ministerial” or “administrative”, as opposed to “legislative” or “judicial” in nature. More particularly, in the context of the presumption against subdelegation, a grant of authority will be characterized as “ministerial” or “administrative” if it authorizes, or requires, administrative action that involves the exercise of little or no significant discretion or independent judgment, or is limited to gathering information or signing documents. Furthermore, a decision made on the basis of expertise of a technical or scientific nature may also be described as “administrative” for this purpose.

Needless to say, however, statutory grants of authority authorize a *spectrum* of administrative action, from the purely mechanical at one end, to instances at the other end where the element of discretion or judgment is substantial. And not unexpectedly, there is no “bright-line” test for distinguishing administrative acts from other types of decision-making by officials. As was said by one judge: “there is sometimes a fine line to be drawn between powers that are legislative or administrative.” Accordingly, courts are apt to deal more satisfactorily with the realities of public administration when they adopt a pragmatic or functional analysis. Thus, from that perspective, statutory powers should

⁷² John Willis, “Delegatus Non Potest Delegare” (1943) 21 Can Bar Rev 257 at 261, as cited in *Myers v Law Society of Newfoundland*, [1998] N.J. No. 206 (Nfld CA) at para 39; see also *Morgan v Acadia University*, [1985] NSJ No 74 (NSSC TD) at para 81.

only be labelled as “administrative” when considerations of practicality and efficiency, which generally favour subdelegation, outweigh those of accountability and judgment, which usually favour a decision by the statutorily-designated body or official.⁷³
(emphasis added)

Although the distinction between administrative acts, as opposed to legislative or judicial ones cannot be precisely defined, the courts and commentators have provided guidance on how the distinction can be drawn. Thus, the difference between a legislative and an administrative power has been described in the following terms:

A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy of expediency or administrative practice.⁷⁴

As for the difference between a judicial and an administrative decision, the conclusiveness and procedural trappings of a decision are relevant considerations. Thus, “a body exercising powers which are of a merely advisory, deliberative, investigatory or conciliatory character, or which do not have legal effect until confirmed by another body, or involve only the making of a preliminary decision will not normally be held to be acting in a judicial capacity,”⁷⁵ but rather, in an administrative one. Additionally, if the decision-maker has formal and procedural attributes of a judicial nature, including an adversarial process, public hearings, the ability to compel the attendance of witnesses, compliance with strict rules of evidence, and the ability to impose sanctions by way of imprisonment, fine, damages or mandatory or prohibitory orders, and to enforce obedience to their commands.⁷⁶

e. Degree of Discretion, Control and Oversight

The presence and degree of discretion conferred upon the sub delegate is a significant factor in determining whether the power is administrative, such that the authority to sub delegate may be implied. Where the sub delegate has no discretion, the rule against sub delegation will not apply. Thus, the rule was not engaged in *Forget*, where the Office de la langue française had assigned to a committee the responsibility of preparing a French proficiency test, in accordance with five criteria set out by the Office. According to the reasons of Justice Lamer,

The committee’s only function is to prepare examinations reflecting the knowledge of French appropriate to the exercise of each profession in accordance with the criteria

⁷³ DJM Brown and John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 2008) at 13-37 to 13-38, cited in *Vrabc v College of Physicians and Surgeons of British Columbia*, 2009 BCSC 675, [2009] BCJ No 1000 at para 175. See also: *Northeast Bottle Depot Ltd. v Alberta (Beverage Container Management Board)*, 2000 ABQB 572 at para 44.

⁷⁴ SA de Smith, Lord Woolf, and J Jowell, *Judicial Review of Administrative Action*, 5th ed (London: Sweet & Maxwell, 1995) at 1006 [de Smith, Woolf and Jowell], as cited with approval in *Northeast Bottle Depot Ltd. v Alberta (Beverage Container Management Board)*, 2000 ABQB 572 at para 50 [*Northeast Bottle*].

⁷⁵ de Smith, Woolf, and Jowell, *ibid* at 1012-1015, as cited with approval in *Northeast Bottle*, *ibid* at para 53.

⁷⁶ de Smith, Woolf, and Jowell, *ibid* at 1013, as cited with approval in *Northeast Bottle*, *ibid* at para 54.

determined by the Office. The committee has no discretion: it cannot formulate new criteria nor alter the criteria imposed by the Office as it sees fit. The committee's function is therefore purely administrative and limited to the preparation of tests.⁷⁷

Conversely, if the decisions or actions involve “the exercise of discretion in matters of a substantive nature which do, or may, affect the rights of an individual, then they fall within the judicial or quasi-judicial category.”⁷⁸ Absent express statutory authorization, the jurisprudence generally does not permit sub-delegation of important discretionary powers to an administrative official.⁷⁹

Even if an authority to sub delegate discretionary powers can be implied, the validity of the delegation will depend upon the degree of supervision and control exercised by the delegating authority, as well as the seriousness of the potential impact. The Alberta Court of Queen's Bench has cited with approval the following principles set out by SA de Smith, Lord Woolf, and J Jowell:

1. Where an authority vested with discretionary powers affecting private rights empowers one of its committees or sub-committees, members or officers to exercise those powers independently without any supervisory control by the authority itself, the exercise of the powers is likely to be held invalid... (*Madoc Township v. Quinlan* (1972) 21 D.L.R. (3d) 136; *R. v. Sandler* (1971) 21 D.L.R. (3d) 286).
2. The degree of control (a priori or a posteriori) maintained by the delegating authority over the acts of the delegate or sub-delegate may be a material factor in determining the validity of the delegation. In general the control preserved...must be close enough for the decision to be identifiable as that of the delegating authority... [*Registered trademark v. Board of Assessment, etc.* (1965) 49 D.L.R. (2d) 156 (tax assessment board, by simply adopting valuations made by official, failed to perform statutory duties)].
3. How far, if at all, delegation of discretionary power is impliedly authorised may also depend on the amplitude of the power, the impact of its exercise upon individual interests and the importance to be attached to the efficient transaction of public business by informal delegation of responsibility.
4. It is improper for an authority to delegate wide discretionary powers to another authority over which it is incapable of exercising direct control, unless it is expressly empowered so to delegate...A Canadian provincial marketing board, exercising delegated authority, could not sub-delegate part of its regulatory powers to an inter-provincial authority. (*Prince Edward Island Potato Marketing Board v. Willis (H.B.) Inc.* [1952] 2 S.C.R. 392.)⁸⁰

⁷⁷ *Forget*, *supra* note 64 at para 35.

⁷⁸ *St. Peters Estates Ltd. v Prince Edward Island (Land Use Commission)*, [1990] PEIJ No 121 at [add pinpoint].

⁷⁹ *Bonin v Canada (Attorney General)*, 2010 FC 1308, [2012] 3 FCR 744 at paras 49-50.

⁸⁰ de Smith, Woolf, and Jowell, *supra* note 74 at 36-365, as cited with approval in *Northeast Bottle*, *supra* note 74 at para 45.

f. Administrative Necessity and Efficiency

Finally, the whole analysis is informed by pragmatic considerations of administrative necessity and efficiency. In particular, “one can conclude that Parliament intended sub-delegation to occur, even in the absence of express words to that effect, where legislation delegates a power to a person who clearly will not be able to exercise it personally.”⁸¹ Similarly, in *Forget*, although there was an express authorization to sub-delegate and there was no delegation of discretion, Justice Lamer’s reasons also took administrative efficiency and convenience into account:

Moreover, I think that for reasons of efficiency and convenience the creation of such a committee was necessary. It was also desirable for the committee to be made up of members from outside, including a representative of the professional corporation. This representative is in the best position to assess the language skills appropriate for the practice of the profession in question.⁸²

(2) Sub delegation of University and College Disciplinary Powers

For our purposes, cases that have considered the legality of sub delegation in the university and college disciplinary context are of particular assistance. The Trial Division of the Nova Scotia Supreme Court in *Morgan v Acadia University*⁸³ (hereinafter “*Morgan*”) considered the authority of Acadia University’s Board of Governors to delegate its powers over student discipline to other actors within the University. Acadia University’s incorporating statute conferred broad powers upon the Board of Governors in the following terms:

8(a) The Board of Governors shall have the control and management of the property and funds of the said corporation, and shall have power to adopt and carry into effect by-laws, resolutions and regulations touching and concerning the instruction, care, government and discipline of the students of said university and academy, and any other preparatory or academical or other department, and touching and concerning all other matters and things of every nature and kind within the scope of this act which to them may seem good, fit and useful for the well ordering and advancement of the said university and academy, and any other preparatory or academical or other department, provided the same be not repugnant to the provisions of this act or any law in force in this province, and may from time to time alter, vary, or rescind the same.⁸⁴

The Board of Governors had delegated its responsibility over student discipline to the Dean of Students. The Board had also approved the structure and procedure of a two-tiered disciplinary process, in which two adjudicative bodies (each with majority student representation) would hear

⁸¹ *Northeast Bottle Depot Ltd. v Alberta (Beverage Container Management Board)*, 2000 ABQB 572 at para 48, citing *R v Lyding*, [1998] AJ No 153 (ABQB) at 8; *Association des juristes de l’État c Rémillard*, [1994] JQ no 2963 (QCSC) at para 43.

⁸² *Forget*, *supra* note 64 at para 37.

⁸³ [1985] NSJ No 74 [*Morgan*].

⁸⁴ *Act of Incorporation of Acadia University*, NS Laws 1891, c 134, s 8, as cited in *Morgan v Acadia University*, [1985] NSJ No 74 (NSSC TD) at para 7.

disciplinary matters at first instance and decide appeals.⁸⁵ The Court summarized the salient features of the process in the following terms:

- 11 Step one is a pre-hearing meeting with the Dean. This is an option open to either party to pursue. This is generally when the facts are not seriously in issue.
- 12 Step two is a hearing by and before a “Judicial Board” (the Board) composed of 5 persons. One is a residence dean, one a member of student union management, an upper class female and an upper class male student and one member of the student representative council.
- 14 The student may appear personally before the Board or be represented by a student “advisor”. Lawyers are not permitted to take part in proceedings before the Board.
- 15 Step three is a pre-appeal meeting with the Dean. This may be arranged by either party.
- 16 After a hearing by the Board either party has a right to appeal to the Judicial Appeals Committee (the Committee) on grounds of appeal set forth in the Student Handbook.
- 17 The Committee consists of 4 students and 3 faculty members. [...]
- 18 At the Committee hearing the student may be represented by counsel. [...]

Following a hearing before the Judicial Board and an appeal before the Judicial Appeals Committee, the Judicial Appeals Committee decided to fine the student for violating a policy on open liquor on campus (\$100) and for verbal abuse (\$15), as well as to order a bond posted by the student (\$50) forfeited and require a new one be posted.⁸⁶

On an application for judicial review, the student argued that the Board of Governors was not authorized to delegate the power over student discipline vested in it by Acadia University’s incorporating legislation. The Court rejected this argument invoking primarily pragmatic considerations:

I find the very nature of the duty required by the scope and objects of the legislation is such that a delegation be envisioned in interpreting the section. It would, I find, be impractical and inappropriate to consider otherwise. With several residences, with female and male students living in the contemporary university setting, such delegation is only fair and practical. The delegation to the Dean and by him to students and faculty seems to me to be also fair and practical. To hold otherwise I find would be unrealistic today.⁸⁷
(emphasis added)

⁸⁵ *Morgan, supra* note 83 at paras 8-9.

⁸⁶ *Ibid* at para 42.

⁸⁷ *Ibid* at para 82.

However, the Court also pointed out that the disciplinary powers had not been entirely delegated as “[t]he ultimate decision on the suspension or expulsion of a student, the extreme sanction, is exercised by the Governors.”⁸⁸ This conclusion was subsequently highlighted by Chief Justice MacDonald of the Trial Division of the Prince Edward Island Supreme Court in *Neville v Holland College*,⁸⁹ (hereinafter “*Neville*”) discussed further below.

It is also noteworthy that, in the context of a disciplinary process within the administrative structure of the University, the Court expressed approval of student discipline being carried out by students themselves:

76 It must be borne in mind, I find, that the Board and the Committee are vehicles to administer internal university discipline, conducted primarily by students, composed primarily of students, for students. This is, as well, a part of their educational experience. These hearings are reasonably formally structured but enable each party to present evidence and to cross-examine those who give evidence.

[...]

90 [...] The internal disciplinary proceedings are in themselves an educational exercise for students as well as an efficient, inexpensive and fair way of dealing with disciplinary problems. Discipline is being meted out by the peers of the student.

Morgan suggests that legislation granting governing bodies of universities broad powers should be interpreted as implicitly authorizing a considerable degree of sub delegation to committees and boards within the university’s administrative structure. However, the decision of the Trial Division of the Prince Edward Island Supreme Court in *Neville* demonstrates the importance of a coherent and proper foundation for the delegation of powers over student discipline.

The legislation governing Holland College,⁹⁰ which was at issue in *Neville*, granted the Board of Governors broad powers over the general administration and finances of the College, as well as over educational policies. The Court held that these powers included the power to discipline students. The legislation also explicitly authorized the Board of Governors to establish and delegate any of its powers to committees.⁹¹

Mr. Neville was accused of cheating on an examination. The disciplinary process followed by Holland College in his case involved him being summarily dismissed from the Police Science program in which he was enrolled by the Director of the Atlantic Police Academy, without having the opportunity to make representations. He was, however, allowed to appeal that decision to a three-member Student Appeal Board, where a fresh hearing was conducted and both sides were allowed to present evidence. The Student Appeal Board upheld the decision to dismiss Mr. Neville.⁹²

⁸⁸ *Ibid* at para 83.

⁸⁹ [1995] PEIJ No 167 at para 25 [*Neville*].

⁹⁰ *Holland College Act*, RSPEI 1988, Cap H-6.

⁹¹ *Neville*, *supra* note 89 at paras 7-9, citing *ibid*, ss. 10(e), (g), 12(1)(a),(b), and (e).

⁹² *Neville*, *ibid* at paras 1-5.

The Court found that this procedure was fundamentally defective because the Student Appeal Board was not properly constituted. Chief Justice MacDonald held that, “[w]hile there is no question that the Board of Governors was given by the *Holland College Act* the power to delegate certain powers it possessed, there is no evidence before me that it delegated or attempted to delegate the appeal procedure upon which it now relies.” Holland College had relied upon the following documents as authorizing the procedure that had been followed:

- (1) A Board Policy [...], which provides that a student may be terminated from a program for cause and may appeal the termination;
- (2) A Board Regulation [...], under which the Board delegates to the principal of each school the authority to terminate a student for cause and which further provides that a student terminated for cause shall be advised of his right of appeal;
- (3) An Executive Regulation [...], which provides for the procedure that must be followed on the termination of a student for cause;
- (4) An Executive Regulation [...], which deals with student appeals and which, in particular, provides for the appointment of a three-member Board, the Appeal Board.⁹³

However, the “Executive Regulations” relied upon were invalid because there was no evidence that they had been legally adopted. As Chief Justice MacDonald explained,

14 Nowhere in the *Holland College Act* is there any power given to the Executive. Neither is the Executive defined. Further, there is no evidence before me as to who constitutes the Executive and counsel could not agree as to who made up the Executive. Without there being clear evidence that the Student Appeal Board was properly constituted then there is no alternative then to declare its decision void. It is incumbent on the respondent to establish that it has exercised its jurisdiction properly. If the respondent is unable to do so then the Student Appeal Board can not be said to be properly constituted. Consequently, the power to deal with student disciplinary problems would remain with the Board of Governors.

15 [...] If the Board of Governors had not delegated to the Student Appeal Board the power to hear student appeals, then the Student Appeal Board’s decision would have no effect. [...]

[...]

20 To have jurisdiction is to have the power to do a certain matter. Without being given the power to do an act the action of the tribunal is void. [...]

[...]

⁹³ *Ibid* at para 10.

43 The third and fourth regulations referred to by the respondent as giving jurisdiction or authority to the Student Appeal Board are the ones which I find no evidence as to their origination. It is the reliance upon these regulations that I find to be fatal to the respondent's submission that the decision of the Student Appeal Board is not subject to review.⁹⁴

Significantly, the Court also identified as a further defect in Holland College's case that, "[e]ven if Executive Regulation 70-10-2 was within jurisdiction, it was not followed."⁹⁵ While the regulation clearly granted a student the right to appeal to the "Director of Administrative Services," the Court found that

52 The applicant was not given that right to present his appeal in this matter to the Director of Administrative Services. While clause two of this regulation states that the Director of Administrative Services shall appoint a three-member Board, the purpose of that board is not set forth. Neither is the right of the Director to sub-delegate his right to hear an appeal set forth in the regulation. At the very least I find the regulation ambiguous.

(3) Sub delegation of Statutory Powers to Third Parties

Courts have also had the opportunity to consider the legality of sub delegation of statutory powers to third parties outside the administrative structures of the delegating body. There is no general rule that statutory powers cannot be sub delegated to third parties. Indeed, in some instances, contracting-out to third parties may be expressly authorized by the statute. In other cases, a court may conclude that the advantages of a particular statutory power being exercised by an independent body may militate in favour of finding an implied statutory power to delegate. More generally, where an implied power to delegate exists, a delegation to a private contractor may be a legitimate option available to the statutory actor, particularly where this actor retains ultimate decision-making authority, and/or exercises strict control and supervision over contractor's activities.

In *Canadian Union of Public Employees (Airline Division) v Air Canada*⁹⁶ (hereinafter "*Air Canada*"), the Federal Court found that the Canadian Human Rights Commission was authorized by its enabling statute to retain a private company to conduct an investigation into a pay equity complaint that had been made to the Commission. The private company investigated the complaint and provided a report to the Commission, which concluded that the evidence did not indicate the existence of a pay equity issue under the *Canadian Human Rights Act*. This report formed the basis of the Commission's own Investigation Report, which "was very brief and essentially relied upon the findings made" in the private company's report to recommend that the Commission dismiss the human rights complaint.⁹⁷ Both the private company's report and the Commission's Investigative Report were then provided to the Commissioners of the Canadian

⁹⁴ *Ibid* at paras 14-15, 20, 43.

⁹⁵ *Ibid* at para 51.

⁹⁶ 2013 FC 184, [2013] FCJ No 230 [*Air Canada*].

⁹⁷ *Ibid* at paras 12-16.

Human Rights Commission, who accepted the recommendations in the Commission's Investigative Report and dismissed the complaint.⁹⁸

The complainant challenged the Commissioners' decision before the Federal Court, arguing that the Canadian Human Rights Commission "did not have the jurisdiction to delegate its investigative obligations under the [*Canadian Human Rights Act*] to a third party private sector corporation."⁹⁹ The Federal Court disagreed on the basis that the statute expressly provided that the Commission could "for specific projects, enter into contracts for the services of persons having technical or specialized knowledge of any matter relating to the work of the Commission to advise and assist the Commission in the exercise of its powers or the performance of its duties and functions under this Act."¹⁰⁰ The Court further emphasized that, even though a private company had been retained to conduct the investigation, the Commissioners continued to exercise their statutory responsibility to decide whether the human rights complaint should be dismissed, referred elsewhere, or sent to the Canadian Human Rights Tribunal for a hearing.¹⁰¹ Finally, the Court pointed out that the pay equity investigation could place considerable demand on the Commission's resources, and the Commission "needs to be able to manage its resources as it sees fit, and to seek outside assistance and expertise where it deems it necessary to do so."¹⁰²

In *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*¹⁰³ (hereinafter "*LSUC*"), the Federal Court of Appeal considered the legality of the Governor General in Council's sub delegation of the power to determine who is authorized to act as an immigration consultant to an independent self-regulating professional body. The Court held that this sub delegation was implicitly authorized by a provision of the *Immigration and Refugee Protection Act* authorizing the Governor General in Council to adopt regulations "govern[ing] who may or may not" act as an immigration consultant.¹⁰⁴

The Court accepted that leaving the qualifications for membership and the conditions for good standing to a self-regulating body of immigration consultants amounted to a sub delegation of the Governor-in-Council's legislative power. However, the Court held that "the desirability of maintaining a distance between the Executive and the regulation of the profession by an independent regulatory body [were] sufficient to displace the presumption against sub-delegation." According to the Court, "the advantages of permitting an independent self-regulatory body to draw up the details of the scheme, which can quickly respond to emerging problems, [were] sufficiently cogent as to lead to the conclusion that section 91 implicitly authorize[d] the sub-delegation to CSIC effected by the Regulations."¹⁰⁵

⁹⁸ *Ibid* at para 22.

⁹⁹ *Ibid* at para 23.

¹⁰⁰ *Ibid* at para 46, citing *Canadian Human Rights Act*, RSC 1985, c H-6, s 32.

¹⁰¹ *Air Canada*, *ibid* at para 52.

¹⁰² *Ibid* at para 56.

¹⁰³ 2008 FCA 243, [2009] 2 FCR 466, leave to appeal to SCC denied, [2008] SCCA No 403.

¹⁰⁴ *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243, [2009] 2 FCR 466, leave to appeal to SCC denied, [2008] SCCA No 403 at paras 57, 72-80 [*LSUC*], citing *Immigration and Refugee Protection Act*, SC 2002, c 27, s 91.

¹⁰⁵ *LSUC*, *ibid* at paras 73-80.

In *Association des juristes de l'État c Rémillard*¹⁰⁶ (hereinafter “*Rémillard*”), the Quebec Superior Court held that Quebec’s Minister of Justice had not unlawfully delegated his statutory duties to exercise superintendence over and direct the organization of the administration of justice in Quebec by retaining private sector lawyers to act as mediators in small claims proceedings. Rather, the Court held that, by contracting with individuals from the private sector, the Minister had not renounced his ability to supervise and direct their participation in the administration of justice. Indeed, insofar as the Minister retained his statutory powers, he was entitled to choose the means by which he discharged them, i.e., through public servants or private contractors.¹⁰⁷

(4) Application of Principles of Sub delegation to Queen’s University

The Charter does not provide any express statutory authority for the Senate to delegate its powers over student non-academic discipline and welfare. The Charter does explicitly authorize the Board to extend the Senate’s disciplinary powers to non-academic matters (ss. 20, 23 and 29), as well as to establish and confer powers upon committees of the Board (s. 15(b)). However no such express powers of delegation are conferred upon the Senate.

At the same time, the Charter does not establish any specific procedure for student non-academic discipline or processes for ensuring student welfare. As such, there are no clearly defined statutory functions assigned to particular bodies in the areas of student non-academic discipline and welfare that would preclude the possibility of an implied authority to delegate.

In our opinion, pragmatic considerations, much like those considered by the Court in *Morgan*, provide compelling reasons to believe that the Charter implicitly authorizes the Senate to sub delegate its powers over student non-academic discipline and welfare. Queen’s University has grown into an institution of large scale. As of Fall 2014, there were over 22,000 students enrolled at the University.¹⁰⁸ The Senate is one of the governing bodies at the apex of this institution, and is therefore of necessity primarily concerned with matters of policy within its core academic mandate. It is composed of 68 members drawn from the faculty, students, staff, and administration of the University.¹⁰⁹ In the words of the Court in *Morgan*, it would be impractical, inappropriate, and unrealistic to interpret the Charter in such a way as to require the Senate to exercise its powers over student discipline directly. Indeed, these practical considerations are longstanding. Nearly fifty years ago, Vice-Principal Gibson stated in the July 11, 1967 meeting of the Senate that:

The unprecedented growth and expansion of the University in the ‘60’s has caused a devolution of functions....Responsibilities formerly carried by the Senate are now being fulfilled admirably by other bodies and while preserving the power to deal with many of its traditional functions, the Senate is now free to assume a new and vital role in the

¹⁰⁶ [1994] JQ no 2963 (QCSC).

¹⁰⁷ *Ibid* at para 42.

¹⁰⁸ Queen’s University, “Quick Facts” (accessed on July 31, 2015, available at: <http://www.queensu.ca/discover/quickfacts>).

¹⁰⁹ Queen’s University, “Senate Composition 2014-2015” (accessed on July 31, 2015, available at <http://www.queensu.ca/secretariat/senate/composition.html>).

development of the University...a policy-making body rather than an Administrative Board was envisaged, a body that will concentrate on issues of central importance...¹¹⁰

Furthermore, the jurisprudence reviewed does not suggest that a statutory authority may only delegate its powers to an entity within its own administrative structure. Although the Senate does not have express statutory authority to contract-out its functions, as was the case in *Air Canada*, *LSUC* and *Rémillard* indicate that authority to sub delegate to third parties can also be implied.

That being said, in *LSUC*, the presumption against sub delegation was overcome because there were obvious advantages to allowing immigration consultants to be governed by a self-regulating professional body that was independent of the Executive, which would generally be on the other side of immigration matters. The courts might be willing to recognize the value of university discipline being administered by students themselves (as the Court did in *Morgan*). However, it is quite another thing to argue that there is a value in student discipline being performed by student organizations that fall outside the formal structures of a university. Unlike in *LSUC*, we do not consider that there is a valid policy objective in having student non-academic discipline performed, at first instance, by corporations that are independent of the university. On the contrary, it is precisely because the University has an interest in certain conduct that such conduct is even captured by the University's disciplinary rules. Thus, the Code "applies to all conduct by a student that has a real and substantial connection to the legitimate interests of the University and/or the members of the University community."

Rémillard arguably provides a broader rationale for recognizing an implicit authority to sub delegate a statutory power. The Court in that case appeared to accept as a general proposition that a statutory authority with the power to sub delegate should be able to choose whether to do so by contract or within its internal structures. Nevertheless, the Court also emphasized that the Minister in that case had retained his statutory powers to supervise and direct the organization of the administration of justice. This suggests that the statutory authority must retain the same degree of oversight and control over the activities of the delegate as it would be required to exercise were the power delegated within the statutory authority's own administrative structures. It is, moreover, reasonable to conclude that contractual terms may need to be more precise in constraining the contractor than internal instruments of delegation because it may be inherently more difficult to supervise and control an outside third party than a member of the same institution.

Given the general principles outlined above, the Senate must exercise a significant degree of control and supervision when it delegates powers over student non-academic discipline. The AMS and SGPS Judicial Committees have considerable discretionary authority to affect the rights of students. The non-academic disciplinary proceedings of the AMS and SGPS Judicial Committees also fall much closer to the judicial than the administrative end of the spectrum of decision-making powers. They are not advisory, deliberative, investigatory or conciliatory in character. Although they are subject to the student's right to appeal to USAB, they are not merely preliminary proceedings. Rather, they are first instance adjudicative hearings where findings of fact and compliance with University standards of conduct are made. These findings are deferred to by USAB, which may only review them on specific grounds. Moreover, they are

¹¹⁰ Hooey, *supra* note 42.

final if the student chooses not to appeal (e.g., where the sanction is manifestly inadequate). AMS and SGPS Judicial Committee hearings also have many of the procedural trappings of a court proceeding, although the process is considerably less formal. They also impose sanctions including attendance at education programming and payment of fines. Although they may only recommend that a student withdraw, *Morgan* suggests that the imposition of this most serious sanction, even when approved by the Senate Committee on Non-Academic Discipline or USAB, should be closely supervised by the Senate itself (e.g., through the reporting duties of those bodies).

However, Senate instruments that purport to apply to AMS and SGPS non-academic disciplinary processes, such as the Code, the 2003 Policy (and its proposed replacement policy) and SARD, provide for only limited control over the conduct of those processes. These instruments only generally outline the procedural fairness guarantees that should be afforded to students in any disciplinary hearing, without specifying any particular process. Similarly, these documents merely list available sanctions and provide very broad principles for their application. The availability of student appeals to USAB does increase the level of Senate control over AMS and SGPS disciplinary proceedings, but again, the degree of control is significantly restricted by the fact that only students can appeal AMS and SGPS disciplinary decisions. In order to provide adequate supervision and control, further measures would need to be added to those in place. In particular, (a) there should be mechanisms allowing the Senate to oversee the treatment of all non-academic disciplinary complaints, perhaps through (i) a requirement that the AMS and SGPS report in a summary fashion to the Senate Committee on Non-Academic Discipline on the disposition of all complaints, (ii) the possibility that, based on such reports, the Senate Committee on Non-Academic Discipline could order the reconsideration of a disciplinary matter by the student organization or refer the matter directly to USAB; (iii) the provision of enhanced jurisdiction to the Provost to refer cases of non-academic discipline directly to USAB in any case where the Provost is satisfied that such action is justified by the seriousness of the conduct at issue or the inadequacy of the disciplinary response of a student organization; (iv) the possibility of complainant appeals to USAB; and (b) there should be a process of formal Senate approval of AMS and SGPS disciplinary procedures. We emphasize that there is no particular formula for achieving adequate Senate control and supervision over AMS and SGPS disciplinary procedures, and Queen's University has flexibility to select the institutional response that best suits it.

More importantly, in our opinion, there is currently no formal instrument that effectively operates to delegate to the AMS and SGPS authority over non-academic discipline. While s. 10 of *Purpose and Functions of Senate* authorizes the Senate to make such a delegation, no such delegation has been properly performed. Most Senate instruments appear to assume that such a delegation has already been effected elsewhere (where is never mentioned). As noted above, the 2003 Policy is the clearest statement of an intent to delegate non-academic disciplinary powers to the AMS and SGPS. However, because the AMS and SGPS are distinct corporate entities, the Senate cannot simply confer powers upon them using internal University instruments. Even if the Senate could unilaterally hand disciplinary powers over to AMS and SGPS, the various Senate instruments that purport to impose controls on the AMS and the SGPS disciplinary processes have no authority to bind those separate corporations. In order to delegate powers to a third party, and exercise control over how those powers are discharged, a statutory authority must contract with the third party. Therefore, unless the non-academic disciplinary process is

overhauled so that it is performed by entities internal to the University, it must be regulated by detailed contracts that outline the powers and responsibilities of AMS and SGPS. Indeed, the example of *Neville* should serve as a caution. The purported exercise of disciplinary powers without adequate legal foundation may be quashed by a court as simply void.

In light of our conclusion that there has not been a valid delegation of the Senate's powers over student non-academic discipline to the AMS and SGPS, the possibility that the University may be held responsible for harm that arises from improper handling of the non-academic disciplinary process is heightened.¹¹¹ The University is a single corporate entity. Therefore, delegation of authority among its officers, its governing bodies or their subcommittees should not be expected to diminish the University's liability, in the event that a breach of contract, a tortious breach of a duty of care, or other actionable claim against the University arises. To the extent that the University can be pursued for the failure of its disciplinary process, its defective attempt to delegate its disciplinary power to third party student bodies cannot shield it from liability. Furthermore, if the University owes a duty of care to students with respect to the administration of non-academic discipline, it cannot discharge that duty simply by contracting-out the non-academic discipline process to a third party. At minimum, the University would have to show that it exercised sufficient diligence both in contracting with student organizations for their provision of non-academic discipline (e.g., by stipulating contract terms that would ensure an adequate process) and in supervising the performance of those obligations by student organizations.¹¹²

Finally, it is our opinion that the Senate can withdraw responsibility over student discipline from the students entirely. Indeed, we are of the view that responsibility has not been properly

¹¹¹ The extent of a university's liability in tort, contract or otherwise, for the improper handling of its disciplinary process is ill-defined in Canadian law. Examples of potential claims that could be made include a breach of contract claim by the subject of a disciplinary decision for denial of university privileges forming part of the contract as a result of inadequate disciplinary proceedings; or a tort claim by the victim of conduct by a student who posed a known risk to others and who should have been disciplined as a result of a previous incident. As a general matter, universities can owe their students a duty of care. In *Young v Bella*, 2006 SCC 3, [2006] 1 SCR 108, the Supreme Court of Canada held that a university owed its student a duty of care in the context of university representatives negligently reporting a social work student to child protection services. A more directly relevant case is *Powlett and Powlett v University of Alberta et al*, [1934] AJ No 14. In that case, the majority of the Alberta Court of Appeal found the Board of Governors of the University of Alberta (the University was not, itself, an incorporated legal entity) liable in tort for the psychological injuries that a minor student suffered during "initiation" activities performed in residence. The Board was found negligent because its agent, the Provost, had failed to exercise any supervision or control whatsoever over initiation activities. The Provost had merely implored the chairman of the initiation committee, a student, to take all precautions against physical injury or injury to self-respect, while specifically avoiding obtaining any details about those initiation activities. Finally, the recent decision of the Ontario Court of Appeal in *Gauthier c Saint-Germain*, 2010 ONCA 309, [2010] OJ No 1771, further affirms the possibility of students making claims in tort, contract or otherwise against a university.

¹¹² *LR v Bromley Estate*, 2013 NLCA 24, [2013] NJ No 216 at para 162, leave to appeal to SCC refused, [2013] SCCA No 243, citing *Lewis (Guardian ad litem of) v British Columbia*, [1997] 3 SCR 1145 (per McLachlin J) at paras 49-50. These cases also recognize that, in some cases, a statutory duty may not be delegable at all. Where legislation clearly places a duty on a statutory authority and that statutory authority contracts-out the performance of its statutory functions, the statutory authority may have to ensure that the contractor does not act negligently. In such cases, if the contractor is negligent, it will be no defence for the statutory authority to claim that it did not act negligently. In our opinion, it is unlikely that a court would view the responsibility of the Board or the Senate under the Charter as sufficiently precise to give rise to a non-delegable duty with respect to the provision of non-academic discipline, but the standard duties remain and are themselves significant.

delegated in the first place. Even if it had been, s. 10 of *Purpose and Functions of Senate* merely permits, but does not require the Senate to delegate responsibility for non-academic discipline to student organizations (“responsibility for non-academic discipline of students may be delegated to student organizations” (emphasis added)). Thus, there is nothing to prevent the Senate from reversing such a delegation. Indeed, pursuant to s. 29 of the Charter, the Board could even remove from the Senate its authority to delegate responsibility for student non-academic discipline to student organizations, as long as this was done in consultation with the Senate.

We trust that this opinion will be of assistance to you. Should you require any clarifications or further information, please do not hesitate to contact us.

Regards,

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