IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

BEN PARK

Appellant

- and –

FLAVELLE COLLEGE

Respondent

FACTUM OF THE RESPONDENT

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PART I – OVERVIEW

1. The central objective of every academic institution is to provide its students with a meaningful education. In Flavelle, the accessibility of artificial intelligence ("**AI**") tools – capable of near-perfect imitations of human authorship and analysis – threatens to completely undermine the ability of its colleges and universities to meet this objective by facilitating rampant academic misconduct among students.

2. In responding to this danger, Flavelle College (the "**College**") crafted two software-based frameworks of their own intended to reduce instances of misconduct. ExamTech captures a minimal amount of student data in a setting attracting a low expectation of privacy, and strikes the appropriate balance between Charter interests and the College's statutory objectives. DecideAI aids in objective, efficient, and reasonable decision-making in fair and open disciplinary contexts with considerable procedural protections for students.

3. While writing a final exam, Ben Park ("**Mr. Park**") was flagged for eleven instances of suspicious conduct by ExamTech. He did not provide any cogent justification for this conduct to DecideAI or to the Dean of Academic Integrity (the "**Dean**" or "**Dean Grondin**") in an oral hearing. Afforded an opportunity to make his case, he failed. Caught in his second instance of cheating in three years, the Dean made the perfectly reasonable decision to expel him.

4. The policies and decisions do not offend the Charter or the principles of administrative law. Rather, they represent measured, informed choices from a leading institution afforded considerable discretion in a setting of particular expertise. Those choices are entitled to stand.

PART II – FACTS AND PROCEDURAL HISTORY

5. The Respondent accepts the Appellant's statement of the facts and procedural history, subject to three clarifications and points of emphasis. First, the room scan conducted by ExamTech is a *quick* check of the student's workspace for any unauthorized aids. The brevity of the room scan should not be minimized, and does not amount to an ongoing or comprehensive "search" of an entire study space. Second, ExamTech is only operational while students write their exams or draft submissions for credit, and not during every stage of assignment preparation. Finally, the College did not just "struggle" to detect AI-related academic misconduct prior to the College's implementation of ExamTech; it had failed completely. Students were 90% less likely to be found guilty of AI-related academic misconduct than those accused of other misconduct.

PART III - STATEMENT OF ISSUES

6. There are four issues in this appeal, grouped into two categories:

With respect to ExamTech,

a. Does the College's use of ExamTech infringe section 8 of the Charter?

b. Did the Falconer Court of Appeal err when it found that the College's policies were a justifiable intrusion on students' expectation of privacy?

With respect to DecideAI and Ben Park ("**Mr. Park**"),

c. Was the decision to expel Mr. Park unfair or unreasonable?

d. Was the decision to implement DecideAI unreasonable?

7. The answer to each of these questions is "no".

PART IV – ARGUMENT

THE EXAMTECH POLICY

A. EXAMTECH DOES NOT VIOLATE A STUDENT'S SECTION 8 RIGHTS

1) Students have a significantly diminished expectation of privacy in this case

8. We agree with the Appellant that the College is bound by the Charter.[1] We also agree that the issue the Appellant has raised—whether the College has the constitutional authority to enact the ExamTech policy—is reviewable on a standard of correctness.[2]

9. The Appellant bears the burden of proving that the students have an objectively reasonable expectation of privacy in the subject matter of ExamTech's search vis-à-vis the state.[3] A "search", for the purposes of section 8 protection, only occurs when an individual can establish a reasonable expectation of privacy in the subject matter of the supposed "search".[4] At the outset, students at the College have a significantly diminished expectation of privacy in the information that ExamTech may share with human observers.

10. The Supreme Court has routinely held that privacy interests within the administrative context are greatly reduced.[5] There are two primary reasons for this position. First, the Court has held that there are aspects of private society that must be effectively regulated. Once regulated, compliance and inspections made in accordance with any regulation (or in this case, policy) are to be expected as a routine feature of participating within that aspect of private life.[6] Second,

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[1] Appellant Factum at para 11.
[2] Appellant Factum at paras 13-14.
[3] *R v Edwards,* [1996] 1 S.C.R 128 at para 43, Book of Authorities Tab 1 [BOA]; *R v El-Azrak*, 2023 ONCA 440 at para 28 [*El-Azrak*], BOA Tab 2.
[4] *R v Spencer,* 2014 SCC 43 at paras 16-17 [*Spencer*], BOA Tab 3; *El-Azrak, supra* note 3 at para 27, BOA Tab 2.
[5] *R. v McKinlay Transport Ltd.*, [1990] 1 SCR 627 at p. 645-646 [*McKinlay Transport*], BOA Tab 4. See also: *El-Azrak, supra* note 3 at para 65, BOA Tab 2; *Power Workers' Union v Canada (Attorney General)*, 2023 FC 793 at para 151 [Power Workers'], BOA Tab 5.
[6] *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission),* [1990] 1 S.C.R 425 at pp. 506- 507, [*Thomson Newspapers*] BOA Tab 6.

"searches" conducted within the administrative context do not "carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian".[7]

11. The Supreme Court in *R v Nolet* held that an expectation of privacy is "necessarily low" when the subject matter of the search is vulnerable to random checks in compliance with a regulatory scheme.[8] The Court held that an individual may hold a stronger expectation of privacy against the world at large, but this does not impact the significant "spot check" powers that a regulatory body may hold, and those regulatory powers substantially diminish any expectation of privacy that individual may have vis-à-vis the state.[9]

12. This case is like *Nolet*. Students have a significantly diminished expectation of privacy in relation to the College because they know in advance that they will be monitored by ExamTech while writing their exams. Any "search" by ExamTech occurs in an administrative context where students can expect that they will be subject to "checks" to ensure their compliance with the College's *Code of Conduct* (the "**Code**"). When students open ExamTech, they can expect that the academic integrity policy will be enforced and that they are engaging in a social and/or business activity in which there is a very low expectation of privacy.[10]

13. A diminished expectation of privacy is relevant in considering the reasonableness of the ExamTech policy.[11] The College agrees that a diminished expectation of privacy does not prevent section 8 from being engaged. Section 8 does not require the "highest" form of privacy to be engaged.[12] However, as the ExamTech policy currently stands there is no breach of section 8. The ExamTech policy is sufficiently narrow and tailored.

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[7] *Power Workers'*, *supra* note 5 at para 129, BOA Tab 5; *Comite Paritaire de l'industrie de la chemise v Potash*, [1994] 2 S.C.R 406 at p. 421, BOA Tab 7.
[8] *R v Nolet*, 2010 SCC 24 at para 31 [*Nolet*], BOA Tab 8.
[9] *Ibid*, at paras 31, 43, BOA Tab 8.
[10] *McKinlay Transport*, *supra* note 5 at p. 646, BOA Tab 4.
[11] *R v Orlandis-Habsburgo*, 2017 ONCA 649 at para 11, BOA Tab 9.
[12] *R. v Buhay*, 2003 SCC 30 at para 22, BOA Tab 10. See also: *R v Forrest*, 2022 ONCJ 643 at para 28, BOA Tab 11.

2) <u>The subject matter of ExamTech's search is tailored and limited</u>

14. ExamTech does not engage in a near-limitless search. The Court has held that the subject matter of the search must be defined functionally by assessing what the College is "really after".[13] The real subject matter of interest to the College is behaviour that occurs during the temporal limits of an exam that supports an inference of academic misconduct. The subject matter of the search is circumscribed, as the *only* information that will ever be accessible to the College or any human observer is this specific behaviour.

15. ExamTech does not engage students' territorial privacy interests. The subject matter of the search is not the student's home. The use of ExamTech does not functionally place the state within a student's home. As the Court held in *R v Tessling*, even if information is held within an object or a place, this alone does not make that place or object the subject matter of the search.[14]

16. ExamTech may incidentally gather information about a student's home, but the College is never functionally placed within a student's home. The Supreme Court held in *Tessling* that the subject matter of the search was *not* the accused's home itself, but was instead the heat sources within a home and the suggestion that these heat sources may relate to a grow op.[15] Like *Tessling*, although information about a student's home may be incidentally captured by ExamTech, the student's physical home itself is not the subject matter of the College's search.

17. The Ontario Court of Appeal recently held that territorial privacy interests are not engaged when the true subject matter of the state's search is informational. In *Dosanjh*, the court held that the subject matter of the search was not the accused's car but rather electronic data from the car's information system contained within the car.[16] The Court held that there were no territorial privacy

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[13] *R v Ward*, 2012 ONCA 660 at para 67, BOA Tab 12. *R v Dosanjh*, 2022 ONCA 689 at para 115 [*Dosanjh*], BOA Tab 13.
[14] *R v Tessling*, 2004 SCC 67 at para 62 [*Tessling*], BOA Tab 14. *Dosanjh*, *supra* note 13, at para 116, BOA Tab 13.
[15] *Tessling*, *supra* note 14 at paras 3, 34, 62, BOA Tab 14.
[16] *Dosanjh*, supra note 13, at para 116, BOA Tab 13.

interests engaged in this case as the police did not seek to obtain physical evidence from the car or even fingerprint the car.[17] Similarly, the College does not seek to physically access students' homes. The Appellant's concerns, properly understood, primarily address *information* about a student that may be revealed to the state through the room scan functionality contained within ExamTech.[18] The true subject matter of ExamTech's monitoring is purely informational.

18. The subject matter of ExamTech's "search" does not engage a student's personal privacy interest. ExamTech does not use biometric facial recognition technology.[19] The College is not "touching" or "searching" a student's body.[20] Courts have explained that "it would be unwise to embark on a novel discussion of this issue [facial recognition in the section 8 context] in a case where it does not arise in any relevant way and where there is no proper factual record as to how and when and where the technology is being used".[21] The Ontario Court of Appeal has held that the subject matter of the search must remain anchored in reality and not hypotheticals.[22]

3) The "place" of any search is the public domain of a student's computer

19. ExamTech only "searches" public elements of a student's computer. The Ontario Court of Appeal has recognized that a person's computer is not an "indivisible object".[23] The state must craft a limit on the "place" that is searched when the object of the search is someone's computer.[24] The College has done exactly this: ExamTech does not explore a student's computer indiscriminately or treat the computer as a monolith. ExamTech only monitors information linked to and set out in the College's academic integrity policy.[25] ExamTech does not allow for a near-

[17] *Ibid,* BOA Tab 13.
[18] Appellant Factum at paras 32-33.
[19] Official Problem at para 16.
[20] *Tessling, supra* note 14 at para 21, BOA Tab 14.
[21] *R v McPherson*, 2023 ONSC 232 at para 105, BOA Tab 15.
[22] *El-Azrak, supra* note 3 at para 40, BOA Tab 2.
[23] *R v Jones*, 2011 ONCA 632 at paras 48-49, 52 [*Jones*], BOA Tab 16.
[24] *Ibid,* BOA Tab 16.
[25] Official Problem at paras 15-16.

limitless search of the student's computer.[26] Instead, ExamTech "limits the type of information that may be monitored and subsequently disclosed, the purpose for which it may be disclosed, and the persons to whom the information may be disclosed".[27]

20. The Supreme Court held in *R v J.J.* that there is a distinction between records that are created in the "private" and "public" domains.[28] Records, such as one-on-one communications, created in the private domain are intended to be private.[29] Records created in the public domain could be reasonably accessed by multiple people, like those on social media. The public domain is much less likely to attract an expectation of privacy.[30]

21. ExamTech does not search the "private domain" of the students' computers. ExamTech does not search the "files", "folders" and "subfolders" stored on a student's computer.[31] ExamTech does not search "documents, images, audio files, videos and other digital representations that are stored on drives".[32] ExamTech does not search the cloud storage of a student's computer. ExamTech does not search private messaging apps installed on a student's computer.

22. Any element of the "private" domain of a student's computer captured by ExamTech is either too distanced from the student's biographical core to attract section 8 protection or arises where the student has voluntarily chosen to relinquish that information to ExamTech.

23. ExamTech will only gain access to the "private" domain of a student's computer if the student knowingly and voluntarily exposes this aspect of their computer to ExamTech. Students are only meant to be writing their exams while ExamTech is operational.[33] ExamTech will only

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[26] *Wakeling v United States of America,* 2014 SCC 72 at para 55, BOA Tab 17. Official Problem at paras 15-16.
[27] *Ibid,* BOA Tab 17.
[28] *R. v J.J.,* 2022 SCC 28 at para 60, BOA Tab 18.
[29] *Ibid,* BOA Tab 18.
[30] *Ibid,* BOA Tab 18.
[31] *Jones*, *supra* note 23 at para 48, BOA Tab 16.
[32] *Ibid,* BOA Tab 16.
[33] Official Problem at para 15.

view the private domain of a student's computer if the student knowingly exposes elements of the private domain of their computer while they understand that the software is active.

24. A student must use their discretion and actively choose to expose the private domain of their computer to ExamTech. When they do so, they have relinquished their expectation of privacy over that information. As the Appellant has acknowledged, "the concept of privacy as control is grounded in the concept that information about a person fundamentally belongs to that person, who retains the *discretion* to communicate the information to others or keep it to himself or herself".[34] Students have control over which "private files" they open up while ExamTech is operational: they decide whether they open up their messaging applications while ExamTech is screen recording, manage the internet searches that they conduct while ExamTech is operational, control the objects that may be captured by the ExamTech room scan, and govern what they say while the ExamTech application is recording.[35] Students at all times maintain the discretion to either keep personal information to themselves or to share that information with ExamTech.

25. There is a reduction in a privacy interest when someone deliberately shares information with a third party.[36] Students can freely decide to open the private domain of their computers to ExamTech, but they run the risk that this information may be shared with the Dean if there is a reasonable suspicion of academic misconduct. As the Ontario Court of Appeal held in *Elementary Teachers*, it is important to assess whether someone is otherwise indifferent to their privacy interests.[37] In this case, students would have to not only be indifferent but in fact voluntarily invite ExamTech to view the private domain of their computer. The heart of section 8 interests, namely

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[34] *Spencer*, *supra* note 4 at para 40, BOA Tab 3.
[35] Official Problem at paras 15-16, 18.
[36] *Elementary Teachers Federation of Ontario v York Region District School Board*, 2022 ONCA 476 at para 57 [*Elementary Teachers*], BOA Tab 19. See also: *Tessling*, *supra* note 14, at para 40, BOA Tab 14.
[37] *Elementary Teachers*, *supra* note 36 at para 57, BOA Tab 19.

the discretion to choose who to share intimate private information with, is not undercut by ExamTech. Students always retain meaningful discretion over their personal information.

26. Any residual information that is captured despite a student's control over their privacy, such as a keystroke pattern, is not significant enough to attract section 8 protection. Courts have routinely held in the criminal law context that IP addresses and Globally Unique Identification numbers, viewed alone, do not attract a reasonable expectation of privacy.[38] Keystroke patterns reveal little information in isolation, and only reveal information that is significantly distanced from one's biographical core when compared to IP addresses and GUID numbers.

27. Keystroke patterns are unlikely to reveal "the user's sexual preferences, his or her taste in music, art, or literature or any inferences that stem from that information".[39] Instead, keystroke patterns are only likely to identify if someone is typing in a consistently similar fashion or if they deviate from their usual manner of typing, demonstrated through changes in their speed of typing, length of pauses, or editing maneuvers.[40] Even in the criminal context, where privacy interests are heightened, the courts have held that IP addresses and GUID numbers are "entirely benign" and unlikely to reveal personal details.[41] A keystroke pattern is similarly benign; accordingly, this information does not come within the ambit of section 8.

28. The "place" where the search occurs can only be fairly characterized as the public domain of a student's computer. All the information that ExamTech will ever have access to is generated by the aspect of a student's device that is made "accessible" to a third party by a student

[38] *R v Nguyen,* 2017 ONSC 1341 at paras 36-40 [*Nguyen*], BOA Tab 20*; R v Hughes*, 2023 ONSC 109 at para 187 [*Hughes*], BOA Tab 21; See also: *El-Azrak, supra* note 3 at para 54, BOA Tab 2.
[39] *Hughes, supra* note 38 at paras 188-189, BOA Tab 21.
[40] Kołakowska, A., Landowska, A, "Keystroke Dynamics Patterns While Writing Positive and Negative Opinions" (2021) 21:17 Sensors Journal. p. 19 [Finding that no element of keystroke analysis accurately discerns emotional cues, and that the speed of typing and the use of the space bar are most heavily relied upon in any keystroke analysis].
[41] *Nguyen, supra* note 38 at para 46, BOA Tab 20; *Hughes, supra* note 38 at para 110, BOA Tab 21.

themselves, or aspects of the device such as the keystroke patterns which are distanced from a student's biographical core.

B. THE COLLEGE'S ACADEMIC INTEGRITY FRAMEWORK IS REASONABLE

29. The College's academic integrity policy is itself reasonable, and reasonable searches do not breach section 8. The purpose of the College's policy, the low levels of intrusiveness, and the mechanisms that the College has chosen to administer its policy all demonstrate that the policy is measured and reasonable. ExamTech is carefully tailored to be non-intrusive, its policy is purpose driven, and information will only be viewed by one human observer at the College – the Dean – and only then if there is reasonable suspicion that a student has engaged in academic misconduct.

30. A lower standard of reasonableness is required in this case. The full safeguards in *Hunter v Southam* are inappropriate in this context as the Dean has significant discretion to supervise students' compliance with the *Code*.[42] As the Supreme Court held in *McKinlay Transport*, if the requirement of reasonable and probable grounds for judicial authorization is incompatible with the regulatory or administrative scheme, then the *Hunter* criteria are inapplicable.[43]

31. The lower level of reasonableness applicable in this case requires that the College's interest in ensuring compliance with the *Code* be measured against the students' potential privacy interests.[44] In this case, the College has a heightened interest in protecting against AI-related academic misconduct: when this conduct is left unchecked, it erodes the ability of the College to meet its objectives of providing high quality educational and vocational training.[45] The students' privacy interests in this case are significantly diminished and ExamTech is non-intrusive.

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[42] *McKinlay Transport*, *supra* note 5 at pp. 648-649, BOA Tab 4. See also: *Power Workers'*, *supra* note 5 at paras 90-93, BOA Tab 5.
[43] *McKinlay Transport*, *supra* note 5 at pp. 648-649, BOA Tab 4.
[44] *Ibid*, at p. 649, BOA Tab 4.
[45] Official Problem at para 47.

ExamTech will not view information related to the intimate details of a student's lifestyle unless the student relinquishes this information to the College with full knowledge of the risk of review by the Dean and there is reasonable suspicion of academic misconduct.

1) The purpose of the College's policy weighs in favour of its reasonableness

32. The Dean uses ExamTech to ensure that students comply with the *Code* and to further the key objective of the College: the fulsome education of its students.[46] The College presented evidence of the importance of preserving academic integrity in the lower court. This evidence revealed that rampant academic misconduct led to "graduates struggling to find and maintain employment in their first five years after graduation".[47] The pass rate for professional licensing exams also plummeted following the rise of AI and creation of a hybrid learning environment.[48]

33. The College's interest is heightened in this case. The College must be capable of adapting to changing circumstances that threaten its cardinal purpose as an academic institution. The College had clear evidence that traditional means of exam proctoring were completely failing to detect AI-related misconduct,[49] and implemented ExamTech only after it was apparent that AI-supported misconduct had undermined the College's ability to meet its statutory mandate.[50] Without this policy, the key object of the College's existence would effectively be discarded. It is reasonable that the College be empowered to protect the integrity of its education system.

2) ExamTech's search is non-intrusive

34. The College's policy is non-intrusive as it does not allow a near limitless search of a student's computer. ExamTech limits the information that the program may monitor. The

[46] Official Problem, opinion of Lyon JA at para 54; Appendix A, s. 2.
[47] Official Problem at para 47.
[48] Official Problem at para 47.
[49] Official Problem at para 12.
[50] Official Problem at paras 13, 47.

information that ExamTech does monitor is specifically aimed at discovering academic misconduct, not revealing intimate details about the student. For example, ExamTech uses keystroke patterns and syntax analysis to see if a student may have copy pasted an AI-generated sentence.[51] ExamTech does not run searches of the files on a student's hard drive to assess that student's particular diction or word choice. Consequently, ExamTech is carefully tailored to reduce any intrusion into the students' intimate personal information.

35. Any access that ExamTech may get to private information stored on a student's computer would arise from a student's voluntary choice to reveal that information, and students retain direct control over the "private domain" of their computer.

36. This context can be distinguished from cases where courts have considered it "irrelevant" that the individual attempting to establish a section 8 breach has "released or otherwise disseminated" their intimate personal information. In *R v Marakah*, the individual disclosed information to another private citizen and still evinced an intention to keep the information private or out of the reach of the state.[52] Here, students know that they are revealing information to ExamTech, not a private citizen, and they assume the risk of this information being shared with the Dean if there is reasonable suspicion of academic misconduct. Students have not demonstrated an intention to keep their information private: neither the FSA nor Mr. Park have suggested that they intended to shield any information that was viewed by ExamTech.

37. ExamTech does not peer into a student's home. The room scan functionality of ExamTech is brief and limited.[53] Students also have control over where they choose to write their exams and what information or objects may be captured by the brief room scan. As the record shows, Mr.

[51] Official Problem at para 16.
[52] *R v Marakah*, 2017 SCC 59 at paras 23 and 158, BOA Tab 22 [Although in the dissent, paragraph 158 summarizes the Chief Justice's opinion on this issue].
[53] Official Problem at para 16.

Park freely and meaningfully chose what would be captured behind him as he performed the room scan.[54] The room scan is non-intrusive as the brevity and lack of after-the-fact review align the function of this room scan with the College's purpose in identifying academic misconduct and the use of unauthorized study aids. Students can also take simple steps, like flipping family pictures over, if they are particularly troubled by the risk that the Dean may incidentally view information in the background when they are reasonably suspected to have engaged in academic misconduct.

38. Any inadvertent "exposure" of the private domain of the students' computer or exposure to private communications is both mitigated and non-intrusive as ExamTech—not a human observer—assesses the information in the moment: there is no after-the-fact analysis of the information.[55] Further, this information will never be seen by a human observer unless there is a reason for the Dean to view that precise moment of inadvertent exposure because it is reasonably suspected to contain evidence related to academic misconduct.

3) <u>ExamTech is designed to minimize any intrusion into the student's privacy</u>

39. The mechanism chosen by the College to pursue and implement its policy is designed to be non-intrusive. The College's use of AI minimizes the risk that the record created will ever be viewed by a human observer. ExamTech is carefully designed to prevent the College from viewing the student's private information until there is a reason for the College to view discrete chunks of the information. As Justice Lyon wrote in the Falconer Court of Appeal, "akin to the criminal law context, the real intrusion of privacy only happens when there is reason for that intrusion".[56]

40. The "real-time" review mechanism chosen by the College to detect academic misconduct further reduces any intrusion on the student's privacy interests. ExamTech does not meticulously

[54] Official Problem at para 33.
[55] Official Problem at para 17.
[56] Official Problem at para 54; See also: *McKinlay Transport*, *supra* note 5, at p. 650, BOA Tab 4.

review the record after the fact.[57] This means that ExamTech is not designed to "fish out" personal information about each specific student.[58] Instead, ExamTech engages in a brief, in–the-moment review of a student's conduct to ensure compliance with the *Code*. ExamTech only reveals chunks of relevant information to human observers at the College once there is a reasonable suspicion that a student has engaged in academic misconduct.

41. The reasonableness of the College's policy is supported by the reliability and efficacy of ExamTech in detecting academic misconduct.[59] At the trial level, Justice Fogel accepted as a finding of fact that both ExamTech and DecideAI could deliver their promised functionality in a reliable and consistent way.[60] The Supreme Court has held that the accuracy and reliability of a tool is relevant to the reasonableness of the search.[61] Even in the criminal law context with heightened privacy interests, the Supreme Court has held that a "high degree of accuracy" in the means used for a search has justified a lower standard of reasonable suspicion.[62] ExamTech successfully identifies cheating 90% of the time. This is a high degree of reliability.[63]

42. ExamTech allows for adequate after-the-fact review by human observers following a finding of academic misconduct. The Supreme Court has held that a "less exacting" review is required in the administrative context.[64] The Court has further explained that the ability to question the reliability of a seizure device and push back on the consequences attached to that same seizure will allow for adequate review.[65] In this case, students can review and challenge the pieces of

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[57] Official Problem at para 17.
[58] See: *Nguyen*, *supra* note 38, at para 102, BOA Tab 20.
[59] Official Problem at paras 48-49.
[60] Official Problem at para 49.
[61] *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 67 [*Goodwin*], BOA Tab 23.
[62] *Ibid*, BOA Tab 23.
[63] *R v Kang-Brown*, 2008 SCC 18 at para 38, BOA Tab 24 [Where the Court held that a 92% accuracy rate met the "high degree" of reliability threshold in the criminal law context].
[64] *Goodwin*, *supra* note 61, at para 71, BOA Tab 23.
[65] *Ibid*, at paras 73-75, BOA Tab 23.

information that ExamTech has flagged as suspicious. The entire record that ExamTech uses to ground its reasonable suspicion of academic misconduct can be meaningfully reviewed, and are in fact reviewed by both the student and the Dean.[66]

43. If a student has been flagged for misconduct, the record created by ExamTech will not be purged for one year.[67] This means that the student can use the ExamTech record in its entirety to meaningfully challenge a finding of academic misconduct. An after-the-fact review on the accuracy of ExamTech's suspicion of academic misconduct can be done on a *de novo* basis, as the students can challenge the finding of academic misconduct alongside the results of ExamTech's "search". The opportunity for review of the findings made by ExamTech and the associated consequences support the policy's reasonableness.[68]

44. Even if the Court finds that the College's use of ExamTech constitutes a search, the reasonableness of the policy prevents a breach of section 8. The College's policy is reasonable as the mechanism selected to enforce the policy is non-intrusive, the mechanism is reliable, and the purpose of the policy is compelling and non-criminal in nature. The reasonableness of the ExamTech policy is also demonstrated by the College's strong interest in enforcing the *Code* and the policy's minimal and non-invasive contact with a student's diminished privacy interests.

C. EXAMTECH IS JUSTIFIED UNDER SECTION 1 OF THE CHARTER

45. Even if this court finds that ExamTech violates section 8 of the Charter, it represents a justifiable limit on the privacy rights of students and satisfies the *Oakes* test.[69]

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[66] Official Problem at paras 19, 25.
[67] Official Problem at paras 18-19, 25.
[68] *Goodwin*, *supra* note 61 at para 72, BOA Tab 23. *Power Workers'*, *supra* note 5 at paras 147, 150, BOA Tab 5.
[69] R. v. Oakes, [1986] 1 SCR 103 at paras 69-70, BOA Tab 25.

46. We agree with the Appellant that the College's objective of detecting and preventing academic misconduct facilitated by AI and other unauthorized study aids is a pressing and substantial objective, and that the ExamTech policy is rationally connected to this objective.[70] Properly considered, the College's framework is also minimally impairing and proportionate.

1) ExamTech is minimally impairing

47. The use of ExamTech is minimally impairing as the system is carefully tailored to achieve the College's objective. The means chosen by the state to achieve its objective need not be perfect.[71] Instead, the means chosen must fall within a reasonable range of possibilities.[72] ExamTech is designed to ensure that any intrusion on a students' privacy is minimal.

48. ExamTech has five significant inherent limits that demonstrate the minimally impairing nature of the software. These include: i) the use of software to monitor students instead of an agent of the state, ii) a "search" by the College only occurs after there is reasonable suspicion of academic misconduct, iii) ExamTech uses real time monitoring instead of meticulous after-the-fact review, iv) ExamTech only monitors the public domain of a student's computer, and v) much of the information that ExamTech monitors, like keystroke patterns and syntax analysis, is entirely benign and distanced from the core of section 8 protection.

49. The alternatives the Appellant has suggested are improper because they alter the College's objective. The College's objective must be taken as it is.[73] In this case, the College's objective is to uphold the academic integrity of the *entire* institution by detecting and preventing the use of artificial intelligence pervasive in a hybrid learning environment.[74] The Appellant's directive that

[70] Appellant Factum at para 67.
[71] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 37, 54 [*Hutterian Brethren*], BOA Tab 26.
[72] *Ibid*, BOA Tab 26.
[73] *Hutterian Brethren*, *supra* note 71, at paras 55, 59-60, BOA Tab 26.
[74] Official Problem at paras 10-12.

measures to prevent academic misconduct only be used in *some* classes fails to capture the College's full objective, which is to detect and deter AI-related misconduct on behalf of all students.[75] The Appellant's proposal of step-by-step drafts also fails to meet this objective, as it is only applicable to written assignments and does not address the need to proctor exams effectively.[76] Further, as the Supreme Court held in *McKinlay Transport*, self-reports may not be effective where there is a legitimate interest in ensuring compliance with a scheme.[77] Finally, the Appellant's suggestion that the College focus only on students suspected of academic misconduct—determined by the traditional proctoring system with a 90% failure rate— does not meet the College's objective in a real and substantial manner, as it does not engage with the College's aim of ensuring that *all* students comply with the *Code*.[78]

2) <u>ExamTech is proportionate in its effects</u>

50. The salutary effects of the College's policy outweigh any deleterious effects. The College's policy addresses a serious and novel threat to the quality and integrity of the College's fundamental purpose. The widespread use of AI represents a pervasive, exigent challenge that facilitates academic misconduct, detracts from the quality of professionals produced by the College, and negatively impacts the employability of graduates.[79] These consequences are a direct result of the ubiquity of generative AI tools, like TalkGBP, and their accessibility in a hybrid learning environment. These consequences subvert the key object of the College: the fulsome training and education of its students.[80]

[75] Appellant Factum at para 70.
[76] Appellant Factum at para 70.
[77] *McKinlay Transport*, *supra* note 5 at p. 648, BOA Tab 4.
[78] Appellant Factum at para 70; Official Problem at para 12.
[79] Official Problem at para 47.
[80] Official Problem at para 54 and Appendix A, s. 2.

51. The College's policy has transformed a 90% failure rate in detecting academic misconduct to a 90% success rate, with the benefits flowing to students and the public at large.[81] Every student has an interest in ensuring that they are assessed fairly and in accordance with their own efforts. The public also expects professionals to enter the workforce with the skills and experience necessary to contribute to society. The re-introduction of fair, merit-based evaluations that promote individual competency is perhaps the most substantial salutary effect an academic institution can provide to the broader community, and should be given appropriate consideration.

52. The deleterious effects are minimal. Students should expect the College to enforce its policies, including the *Code,* and the framework chosen for monitoring student compliance is carefully tailored to ensure that students' "biographical core" information always remains in their exclusive control. Any "search" by the College occurs only after a student is reasonably suspected to have engaged in academic misconduct. Students' diminished privacy interests are minimally impacted as the College's policy limits the type of information that may be disclosed, the purpose for which information may be disclosed, and to whom the information is disclosed.

53. The ExamTech policy is a measured and proportionate response to the exigent threat of AI-related academic misconduct. Unchecked academic misconduct diminishes the value and benefits of education. ExamTech empowers the College to harness AI capabilities to protect its core function while intruding on a student's privacy as minimally as possible. The benefits of ExamTech vastly outweigh the comparatively minimal effects on students' section 8 rights.

54. ExamTech addresses a pressing and substantial objective, is rationally connected to this objective, is minimally impairing of the rights of students, and produces meaningful salutary

[81] Official Problem at paras 12, 30, 48.

effects that outweigh any detriment to students of the College, including Mr. Park. Accordingly, ExamTech is demonstrably justified under Section 1 of the *Charter*.

THE DECIDEAI POLICY

A. THE DECIDEAI POLICY IS PROCEDURALLY FAIR

1) The college owes a moderate duty of procedural fairness to Mr. Park

55. The Respondent agrees that the College owes Mr. Park a duty of procedural fairness with respect to its academic and disciplinary decisions, and that the applicable standard of review is correctness. However, we differ significantly in our conception of the content necessary for a fair process in this context. As the Supreme Court explained in *Baker v Canada (Minister of Citizenship and Immigration)*, the simple existence of a duty of fairness does not determine what requirements will be applicable in each set of circumstances.[82] The concept of procedural fairness is eminently variable and sensitive to the factual matrix.[83]

56. In the circumstances of Mr. Park and Flavelle College, the requisite level of procedural fairness lies at the mid-point of the spectrum. While the decision of the Dean is certainly important to Mr. Park, the important weight that must be afforded to the framework selected by the College in its particular institutional context has the effect of significantly attenuating the level of procedural fairness owed.

[82] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21 [*Baker*], BOA Tab 27.
[83] *Knight v Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682 [*Knight*], BOA Tab 28.

a) The College's statute, constraints, and expertise carry significant weight

57. The College's operation pursuant to a generous statutory scheme, its considerable experience in academic discipline, and the threats posed by AI work in concert to reduce the procedural protections required of the school. As the Supreme Court explained in *Baker*, "the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances".[84] In this case, the College possesses both the discretion to fashion disciplinary procedures and the expertise to ensure those procedures are responsive to the challenges facing the contemporary academic environment.

58. First, the Supreme Court has repeatedly emphasized the importance of respect for administrative choice and its effect of expanding the range of procedures capable of satisfying the duty of fairness.[85] In *Knight v Indian Head School Division No. 19*, the Court explained that the principle of procedural fairness is not intended to impose rigid rules, but instead should "allow administrative bodies to work out a system that is flexible, adapted to their needs and fair", one that achieves a balance between "fairness, efficiency and predictability of outcome".[86]

59. The *Colleges Act* (the "**Act**") provides exceptional discretion to the College and the Dean to form disciplinary policies. S. 97 of the *Act* contains no reference to any specific form or content the College must adhere to in the constructions of these procedures beyond the generalized obligation of fairness.[87] S. 23(1)(4) of the school's *Code* empowers the Dean to make "any order"

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[84] *Baker*, *supra* note 82 at para 27, BOA Tab 27.
[85] *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 at para 231, BOA Tab 29.
[86] *Knight*, *supra* note 84 at p. 685, BOA Tab 28.
[87] Official Problem, *Colleges Act*, s. 97.

deemed necessary to safeguard academic integrity or deter future misconduct.[88] The clear intent behind this legislative scheme is to defer to the College in crafting processes that are responsive to the array of exogenous factors that bear materially on its foundational objective – the fulsome education of its students.[89] Courts should give "important weight" to this fact when assessing where the line between fairness, efficiency, and predictability is drawn.[90]

60. Second, the College possesses considerable institutional expertise and implements policies under a unique set of constraints in a manner that has the effect of further reducing the necessary level of procedural protection. As Justice Gonthier reasoned in *IWA v Consolidated-Bathurst*, "the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties".[91] Courts have historically been reluctant to interfere in the matters of academic institutions with internal dispute resolution mechanisms.[92] The College is the province's largest academic institution, in operation since 1826 and serving 50,000 students annually.[93] It enjoys an excellent reputation as a leader in a variety of technological fields and disciplines, including artificial intelligence.[94] No institution is better equipped to evaluate the relationship between the academic disciplinary process and the burden that effective and accessible AI places on that process, and no institution is better positioned to design a responsive framework.

61. The constraints placed on the College, and the enormity of the task in front of it, are difficult to understate but must be considered in the procedural fairness analysis.[95] Generative AI

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[88] Official Problem, *Code of Conduct*, s. 23(1)(4)(b)(iv).
[89] Official Problem, decision of Lyon JA at para 54.
[90] *Baker*, *supra* note 82 at para 27, BOA Tab 27.
[91] *IWA v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at p. 327 *[IWA]*, BOA Tab 30.
[92] *Harelkin v University of Regina*, [1979] 2 SCR 561 at p. 594 [*Harelkin*], BOA Tab 31.
[93] Official Problem at para 6.
[94] Official Problem at paras 8, 14.
[95] *IWA*, *supra* note 91 at p. 325, BOA Tab 30.

has driven an enormous increase in academic misconduct and drastically reduced the College's ability to properly respond to those charges. The record indicates that when the College's students do enter the workforce, they struggle to find and maintain employment, and their success rates in professional licensing exams have plummeted.[96] In responding to this task, the College has implemented a tailored and flexible disciplinary scheme. This flexibility is well-known to Mr. Park, who has already benefitted from the Dean's exercise of discretion and issuance of a warning for his prior instance of academic misconduct.[97] Viewed in light of all of the circumstances, a moderate level of fairness best accords with the reality of the artificial intelligence threat facing the College, the composition of its enabling statute, and its particular expertise on the one hand, and the importance of the decision to the students on the other.

62. However, irrespective of whether the requisite level of procedural fairness owed to Mr. Park is placed at the mid-point or the high-point of the spectrum, the rights afforded by the College's decision-making framework throughout the review process allow it to fulfill its duty.

2) The process afforded to Ben Park was procedurally fair

a) The test for procedural fairness

63. The duty of procedural fairness manifests in two requirements: first, the right of individuals to present their case fully and fairly; second, the right to have decisions made by an independent and impartial adjudicator.[98] The Falconer Court of Appeal held that Mr. Park was provided a process consistent with both values. There is no reason to depart from this conclusion.

[96] Official Problem at para 47.
[97] Official Problem, Appendix E.
[98] *Baker*, *supra* note 82 at para 28, BOA Tab 27.

b) Mr. Park had ample opportunity to be heard

64. Mr. Park was afforded every opportunity to make meaningful submissions that provided justifications for his eleven instances of suspicious conduct. He was unable to do so. Mr. Park's case does not reveal any procedural defect inherent in the DecideAI policy; rather, it is illustrative of the fact that it remains incumbent on a student to make a compelling case in their own defense.

65. In *Khan v University of Ottawa*, the Ontario Court of Appeal highlighted three factors that were relevant to a determination of fairness in the context of an academic dispute attracting a higher level of fairness. First, academic disputes involving the issue of credibility should be accompanied by an in person, oral hearing where the student may make submissions. Second, the decision-maker should consider the circumstances surrounding the impugned conduct and make reasonable inquiries. Third, the affected individual should have the ability to contradict or correct the record prior to the issuance of a decision against them.[99] By providing Mr. Park with the ability to make written submissions *in addition* to the three procedures outlined in *Khan,* the College's DecideAI process meets any and all concepts of fairness.

66. At first instance, Mr. Park was given the opportunity to explain each individual instance of suspicious conduct with the use of categories that reflect historically applicable justifications.[100] These includes categories for "medical emergencies" and "distraction or discomfort".[101] Rather than selecting one of these options – either of which would have been a reasonable interpretation of the alleged symptoms experienced by the student – Mr. Park chose to offer "no explanation".[102]

[99] *Khan v. Ottawa (University of)*, [1997] OJ No 2650 (CA) at paras 16, 24, 32 [*Khan*], BOA Tab 32.
[100] Official Problem, Appendix C.
[101] Official Problem, Appendix C.
[102] Official Problem at para 36.

Nor did Mr. Park provide any cogent justification when prompted for further submissions, which included space to highlight any personal, familial, or physical challenges relevant to his conduct.[103]

67. The oral hearing further allowed the College to discharge its duty of fairness under the *Khan* framework in its entirety.[104] First, Mr. Park appeared in person before Dean Grondin, where he was entitled to produce evidence and make submissions to support his explanation of a panic attack.[105] Second, rather than engaging in perfunctory adjudication, the Dean made reasonable inquiries of the student in order to be properly apprised of the full context, including asking about the nature and extent of Mr. Park's anxiety.[106] Finally, Mr. Park retained the right to correct any inaccuracy or dispute the inferences drawn by the Dean or DecideAI during this hearing.

68. Once again, Mr. Park's failure to make use of the procedural tools available to him should not be confused for a failure of the College to provide the tools at all, and in this sense the circumstances here differ materially from the jurisprudence relied on by the Appellant. Unlike Ms. Khan, who was not informed of the factors relied upon by her reviewing committees nor given the opportunity to have her credibility assessed by the final decision-maker,[107] Mr. Park entered his hearing with the benefit of the preliminary report produced by DecideAI, the specific video evidence forming the basis for the charge, and made his case to the person responsible for determining the truthfulness of his statements.[108] Unlike the complainant in *Ford,* Mr. Park was not summarily denied the opportunity to plead his case or challenge the record.[109]

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[103] Official Problem at para 36; Appendix C.
[104] Oral hearings remain a rare requirement: *Baker*, *supra* note 82 at para 33, BOA Tab 27; *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 58, BOA Tab 33; *Khan*, *supra* note 99 at para 21, BOA Tab 32.
[105] Official Problem at para 37; *Code of Conduct*, ss. 23(1)(2) and 23(1)(3).
[106] Official Problem at para 37.
[107] *Khan*, *supra* note 99 at para 19, BOA Tab 32.
[108] Official Problem at paras 25, 42.
[109] *Ford v University of Ottawa*, 2022 ONSC 6828 at para 71 [*Ford*], BOA Tab 34.

69. The ultimate question, as the Supreme Court held in *Baker*, is whether "considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly".[110] Afforded the rare oral hearing,[111] provided timely notice,[112] and fully informed, Mr. Park was given this opportunity and more.

c) Initial errors can be corrected in the subsequent hearing with the Dean

70. Notwithstanding that the DecideAI framework afforded Mr. Park the right to be heard, if this court concludes otherwise, any procedural defect was subsequently remedied by the presence of the Dean's review of the submissions and evidence of the student. The procedural rights of Mr. Park remained safeguarded.

71. In *McNamara v. Ontario Racing Commission*, Justice Abella held that "the jurisprudence is clear that [procedural defects] can be cured by a subsequent hearing in which natural justice is accorded. This renders 'nugatory any alleged earlier failure to accord ... such natural justice in any of the earlier hearings'".[113]

72. The principles of natural justice are satisfied by the subsequent hearing before the Dean because students understand the case they must meet and are given every opportunity to meet it.[114] The nomenclature attached to this hearing is immaterial: it matters not whether appearing before the Dean is called an "appeal", a *de novo* review, or something else entirely. What matters, as *McNamara* explains, is what actually takes place.[115] DecideAI does not make "decisions" with respect to culpability or sanctions, and instead produces non-binding recommendations based on

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[110] *Baker*, *supra* note 82 at para 30, BOA Tab 27.
[111] *Khan*, *supra* note 99 at para 21, BOA Tab 32.
[112] Official Problem, *Code of Conduct*, ss. 23(1)(2) and 23(1)(3).
[113] *McNamara v Ontario Racing Commission*, [1998] O.J. No. 3238 [ON CA] at para 26 [*McNamara*], BOA Tab 35. *Harelkin*, *supra* note 92 at p. 581, BOA Tab 31.
[114] *McNamara*, *supra* note 113 at para 28, BOA Tab 35.
[115] *Ibid*, BOA Tab 35.

objective criteria that the Dean is free to – and often does – depart from.[116] It did not make a "decision" with respect to Mr. Park. Before the Dean, Mr. Park can present fresh evidence, contradict inaccuracies, and give oral and written representations.[117] As Justice Jin concluded at the Court below, rather than receiving "perfunctory" reviews, students receive the "full, fair and open" consideration required to cure procedural defects.[118]

3) Students are still heard by an independent and impartial decision-maker

a) The right to an independent and impartial adjudicator

73. The second principle underpinning the concept of procedural fairness requires decisions to be made using a "fair, impartial, and open" process.[119] Such a process is predicated on the absence of a reasonable apprehension of bias and the presence of decision-making independence. The presence or absence of a biased state of mind on the part of the adjudicator is determined with reference to all of the circumstances of a particular case.[120] Similarly, concluding that a decision-maker is sufficiently independent requires consideration of a variety of factors, including the nature of the decision, the interests at stake, and with regard for the full process.[121] The test for both inquiries is the same, and asks whether a reasonably informed person, viewing the matter realistically and practically, could reasonably perceive bias on the part of the adjudicator.[122]

b) The Dean remains an impartial decision-maker

74. In the context of the disciplinary framework employed by the College and administered by the Dean, no reasonable perception of bias exists. While the risks of institutional and automation

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[116] Official Problem, FSA Letter at para 41.
[117] Official Problem at para 26; *Code of Conduct*, ss. 23(1)(2) and (1)(3).
[118] Official Problem, opinion of Jin JA at para 58. *Ford*, *supra* note 109 at para 90. *McNamara*, *supra* note 113 at para 27.
[119] *Baker*, *supra* note 82 at para 28, BOA Tab 27.
[120] *R v Généreux*, [1992] 1 SCR 259, at pp. 283–284 [*Généreux*], BOA Tab 36.
[121] *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 83-84 [*Matsqui*], BOA Tab 37.
[122] *Newfoundland Telephone Co. v Newfoundland (Public Utilities Board)*, [1992] S.C.J. No. 21 at para 22, BOA Tab 38. *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at p. 394 [*Committee for Justice*], BOA Tab 39.

bias are real and support a careful, measured approach to the implementation of assisted decision-making tools, each of these risks is significantly attenuated by the structure and safeguards present in the College's DecideAI framework.

75. The Appellant asserts that, prior to entering the hearing with a student, the "Dean has already read and been primed of the student's guilt or innocence by the predictions of DecideAI".[123] It is implied that this is sufficient to cause the Dean to suffer from automation bias, and thus unable to adjudicate impartially.

76. However, this limited picture ignores the many contextual factors that eliminate any perception of bias stemming from the automation phenomenon. The Dean also enters the oral hearing with the benefit of written representations from students provided with the preliminary report prepared by DecideAI, and thus in possession of an opportunity to challenge the accuracy of the information used to generate the report.[124] The Dean possesses the unaltered video evidence of the impugned conduct and is free to draw the conclusions supported by their own eyes.[125] At the hearing, the Dean further considers the oral representations of students like Mr. Park, including their answers to specific questions and any additional challenges to the factors or information that may bear on the Dean's ultimate conclusion.[126]

77. In *State v Loomis*, the Supreme Court of Wisconsin considered the use of COMPAS, a risk assessment tool that provided decisional support to sentencing courts by predicting the likelihood of recidivism for a particular accused. Like DecideAI, COMPAS generates its prediction by comparing information gathered on the individual to others with similar data characteristics. Like DecideAI, COMPAS was challenged on the basis that it violated the petitioner's procedural rights.

[123] Appellant Factum at para 89.
[124] Official Problem at para 25.
[125] Official Problem at para 25.
[126] Official Problem at para 26; Appendix C.

In denying the petition and affirming the legitimacy of the use of decision-making aids, the Court wrote:

> "If a COMPAS risk assessment were the determinative factor considered at sentencing this would raise due process challenges regarding whether a defendant received an individualized sentence…Ultimately, we disagree with Loomis because consideration of a COMPAS risk assessment at sentencing along with other supporting factors is helpful in providing the sentencing court with as much information as possible in order to arrive at an individualized sentence."[127]

78. DecideAI predictions are not a determinative factor in the decisions issued by the Dean. As Justice Lyon found at the Falconer Court of Appeal, the Dean remains the final arbiter of culpability and sanction.[128] This is made clear by the 30% of cases where the Dean departs from the recommendations of the software. The College's disciplinary framework provides space for the Dean to exercise their professional judgment and disregard the tool where appropriate. Where this space exists, the problems associated with automation bias are ameliorated and the procedural rights of the individual are respected. This was the conclusion reached by the Court in Loomis, despite evidence that indicated that decision-makers only departed from COMPAS recommendations approximately 10% of the time.[129]

79. Nor is the Appellant's contention that the Dean's prior involvement in the development of DecideAI sufficient to ground a reasonable apprehension of bias, because there is no "personal and distinct" interest on the part of the Dean.[130] Dean Grondin was not the individual responsible

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[127] *State v Loomis*, 2016 WI 68 at paras 68, 72 [*Loomis*], BOA Tab 40.
[128] Official Problem, opinion of Lyon JA at para 57.
[129] *Loomis*, *supra* note 127 at paras 70-71, BOA Tab 40.
[130] *Pearlman v Law Society (Manitoba)*, [1991] 2 S.C.R. 869 at p. 892 [*Pearlman*], BOA Tab 41.

for the funding and construction of the software,[131] and his involvement was limited to a consultation on the factors relevant to appropriate sanctions. The comparison to Chairman Crowe in *Committee for Justice and Liberty v National Energy Board* is only applicable if the Dean were given the binary choice between the College's adoption of DecideAI and the adoption of a competing software designed by an entity that the Dean never led; such circumstances are not present here. The general interests of the Dean in promoting the academic integrity of the institution exist independent of DecideAI, and the notion that he possesses some individualized interest in the success of the software is simply too remote to support a charge of bias.[132]

c) DecideAI is impartial

80. As an objective analytical tool operating with the benefit of more than two decades of past disciplinary decisions, DecideAI itself adheres to the principles of impartiality by issuing a recommendation solely on the merits of the case before it.[133] The Appellant's attempt to distinguish the College's previous disciplinary system from the DecideAI framework, arguing that the particular weight assigned to relevant factors would previously "depend on the facts of the particular case and the discretion of the decision maker".[134] This remains unchanged: the Dean continues to receive the full context associated with any particular instance of academic misconduct and is not beholden to the report generated by the software.

81. DecideAI's consideration of Mr. Park's past academic misconduct in arriving at a disciplinary recommendation is not evidence of bias, but instead demonstrates the software's proper consideration of a relevant factor in sanctioning.[135] In any event, the specifics of Mr. Park's

[131] Official Problem at para 14.
[132] *Matsqui*, *supra* note 121 at para 76, BOA Tab 37; *Pearlman*, *supra* note 129 at p. 891-892, BOA Tab 41.
[133] *Généreux*, *supra* note 120 at p. 282, BOA Tab 36.
[134] Appellant Factum, at para 91.
[135] *Kozak v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 124 at para 57 [*Kozak*], BOA Tab 42.

academic misconduct were evaluated more fulsomely by the Dean prior to the issuance of his decision. Because DecideAI dispenses with many of the frailties and imperfections associated with human decision-making to provide objective support,[136] a reasonable person would not conclude that the software is incapable of judging initial submissions fairly.

d) The Dean remains an independent adjudicator

82. Dean Grondin's interest in furthering the academic integrity of Flavelle College does not undermine his independence as an adjudicator. Independence is characterized by the freedom to decide according to one's own conscience and the absence of improper, external control.[137] Importantly, in determinations of independence, the "legitimate interests of the agency in the overall quality of its decisions cannot be ignored".[138]

83. The Appellant implies that the Dean's independence is undermined as a result of previously providing input on the factors considered by DecideAI, and that the College's interest in improving the consistency of its disciplinary process and reducing instances where students "get away" with cheating amounts to a pre-judgement of proceedings.[139]

84. In doing so, the Appellants seem to impose a requirement that the College and Dean have absolutely no interest, current or previous, in the structure and outcome of disciplinary proceedings. But the requirements of administrative tribunals are not so restrictive.[140] The mere presence of influence on an opinion or reasons is not inherently problematic, provided the *decision* is that of the decision-maker.[141] Clearly, a College and Dean empowered by statute to promote the

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[136] Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. AM. 6889, 6890 (2011) (finding that the likelihood of a favorable ruling is greater at the very beginning of the work day or after a meal)
[137] *Généreux*, *supra* note 120 at pp. 283-284, BOA Tab 36; *Valente v The Queen*, [1985] 2 SCR 673 at para 16, BOA Tab 43; *Kozak*, *supra* note 135 at para 57, BOA Tab 42.
[138] *Kozak*, *supra* note 135 at para 57, BOA Tab 42.
[139] Appellant Factum at para 94.
[140] *Iwa*, *supra* note 91 at pp. 323-324, BOA Tab 30.
[141] *Bovbel v Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 563 (FCA) at pp. 570-571, BOA Tab 44. *Weerasinge v Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 330 at pp. 337-338, BOA Tab 45.

academic integrity of the institution will necessarily possess an interest in reducing unpunished instances of cheating. But an academic disciplinary process does not engage, for example, concerns regarding security of the person that often accompany immigration proceedings. The Dean is not asked to determine the interests of the people to whom he owes his appointment or compensation.[142] Each of these factors favours a more relaxed construction of independence.[143]

85. A reasonable person, viewing the matter realistically and practically, would not conclude that the school and the Dean's involvement in the creation of a tool that assists in improving the quality and consistency of academic disciplinary proceedings amounts to a substantial likelihood that cases will be pre-judged. In the context of an administrative body faced with grave, ongoing concerns about the consistency and efficacy of its decision-making apparatus in a world with ubiquitous, misconduct-facilitating software, the College and the Dean must have some latitude to devise means of "maintaining and enhancing the consistency and quality of its decisions".[144]

B. THE DECISION TO EXPEL BEN PARK IS REASONABLE

1) The test for substantive reasonableness

86. The Respondent agrees with the Appellants that the standard of review applicable to the decision to expel Mr. Park is reasonableness.

87. Reasonableness is deferential standard of review, grounded in the principles of judicial restraint and a respect for the distinct role of administrative decision-makers in Canadian law. This deference is afforded in recognition of their inherent expertise; closest to the relevant facts and evidence, and operating with the benefit of experience in their particular fields, administrative

[142] *Matsqui*, *supra* note 121 at para 100, BOA Tab 37.
[143] *Ibid*, at paras 84, 98, BOA Tab 37.
[144] *Kozak*, *supra* note 135 at para 56, BOA Tab 42.

decision-makers enjoy meaningful advantages over their judicial counterparts in arriving at informed conclusions in their specific arenas.[145]

88. A reasonable decision is one that is justifiable, transparent, and intelligible, made within the applicable legal and factual constraints that bear on the decision-maker.[146] As the Supreme Court explained in *Canada (Minister of Citizenship and Immigration) v Vavilov*, a court must be satisfied that a decision's flaws are sufficiently central or significant as to undermine the decision's justification, transparency, and intelligibility.[147] The burden rests with the Appellant to demonstrate the unreasonableness of a decision.[148]

2) <u>The decisions issued against Ben Park are reasonable</u>

89. In *Vavilov*, the Supreme Court describes two general categories of unreasonable decisions. The first is where the decision is not internally coherent; it exhibits some significant logical flaw or lack of rationality that calls into question the entire chain of analysis. The second is where the decision is unjustified in relation to the "constellation" of relevant law and facts.[149]

90. The decisions made by Dean Grondin with the support of DecideAI do not fall into either category. Rather, the use of DecideAI promotes coherent, rational decision making and works in harmony with the statutory scheme, the evidence before the decision-maker, and the submissions of students like Mr. Park to inform outcomes that are within the Dean's considerable discretion.

a) The expulsion decision is internally coherent

91. The Dean's decision to expel Mr. Park for accessing an unauthorized study aide on his final examination does not exhibit the irrationality that would justify judicial intervention under the first

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[145] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49 [*Dunsmuir*], BOA Tab 46. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para 33, Tab 47.
[146] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23-24 [*Vavilov*], BOA Tab 48.
[147] *Ibid*, at para 13, BOA Tab 48.
[148] *Ibid*, at para 100,
[149] *Ibid*, at paras 102, 105, BOA Tab 48.

Vavilov category of unreasonableness. The decision was based on a two-part analysis free from circular reasoning, logical fallacies, or absurd premises.[150]

92. The Dean's reasons show that he first considered the evidence captured by ExamTech, including Mr. Park's 10-minute absence from his computer, the presence of multiple voices in the background, and the unusual eye movement and keystroke activity upon the student's return.[151] The Dean then supplemented this information with the results of his questioning at the oral hearing, and in particular noted that Mr. Park offered no persuasive evidence for any of his justifications. Mr. Park was unable to provide medical evidence speaking to the alleged panic attack or a history of anxiety, and offered no explanation for the presence of multiple voices in a single-occupancy apartment.[152] From this, Dean Grondin concluded that Mr. Park was not credible, and only then turned to the recommendation of DecideAI.

93. The decision to expel Mr. Park clearly turns on the lack of a trustworthy explanation for any of the evidence offered against him and his prior history of academic misconduct, and not merely the calculations of DecideAI.[153] When the Dean's decisions are considered with sensitivity for the institutional setting and in light of the record,[154] it is evident that the success of Mr. Park's submissions depended on the Dean's acceptance of his statements - in other words, his credibility.[155] When, free from any software, Dean Grondin exercised his professional judgement and determined that the student's justificatory statements had no basis, the resulting conclusion that Mr. Park had cheated was completely logical. Being Mr. Park's second cheating offence in three years at the school, the ultimate sanction was perfectly justifiable.

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[150] *Ibid*, at para 104, BOA Tab 48.
[151] Official Problem, Appendix E.
[152] Official Problem at para 33 and Appendix E.
[153] Official Problem, Appendix E.
[154] *Vavilov*, *supra* note 146 at paras 94, 96, BOA Tab 48.
[155] *Khan*, *supra* note 99 at para 23, BOA Tab 32.

94. The Appellants contend that DecideAI has taken the "mental load" off the Dean, co-opting the reasoning process and assuming the role of decision-maker in a manner that undermines the logic of any conclusion.[156] This position is not supported by the law or the record. The Dean remains the final arbiter with respect to decisions about credibility, culpability, and penalties.[157] This reasoning would effectively confine the future use of assistive decision-making tools in Canadian administrative law to instances where the "assistance" is so minimal as to undermine the rationale and benefits for employing the software in the first place. As the Federal Court held recently in *Haghshenas v Canada*:

> "[T]he Applicant suggests that a decision rendered using Chinook cannot be termed reasonable until it is elaborated to all stakeholders how machine learning has replaced human input and how it affects application outcomes... I agree the Decision had input assembled by artificial intelligence, but it seems to me the Court on judicial review is to look at the record and the Decision and determine its reasonableness in accordance with *Vavilov*. Whether a decision is reasonable or unreasonable will determine if it is upheld or set aside, whether or not artificial intelligence was used. To hold otherwise would elevate process over substance."[158]

95. The translucence of DecideAI's analytical process is irrelevant. Rare – or nonexistent – is the discretionary administrative context that publishes line-by-line weights assigned of the factors under assessment with the granularity desired by the Appellants. DecideAI merely supplements the analysis of the Dean, who remains equipped to issue reasonable decisions and did so in the case of Mr. Park.

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[156] Appellant Factum at para 99.
[157] Official Problem, opinion of Lyon JA at para 57.
[158] *Haghshenas v Canada (Citizenship and Immigration)*, 2023 FC 464 at paras 24, 28, BOA Tab 49.

96. Comparisons to the unreasonable decisions cited by the Appellant offer a helpful contrast that reinforces the rationality of the Dean's decision. In *Khan*, for example, the Committee tasked with reviewing Ms. Khan's impugned final exam made no inquiries before pronouncing on the "infallibility" of the law school's examination procedures and rejecting her case: it concluded that the examination was conducted perfectly because it ignored any evidence that could dispute that finding.[159] In *Ford*, the foundation of the complainant's reasonableness argument centered on the fact that the student's evaluators performed a "mid-term" evaluation 52 hours into a 419 hour practicum. In finding that such a decision was incoherent, Justice Leiper explained that "[u]nder no definition of "mid-term," could 52 hours out of 419 be considered a logical 'mid-term' point. The Tutor recognized this in commenting that it would be impossible for the Applicant to have completed the Practicum after such a short time and was critical of his self-assessment. That logic would have to apply equally to the Preceptor's feedback."[160]

97. The absurdities that characterize the conclusions of the decision-makers in *Khan* and *Ford* have no parallel in the Dean's reasons with respect to Mr. Park: instead, there is clearly a "line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived".[161]

b) The expulsion decision is justified in light of the facts and law

98. The second fundamental flaw pointing to the unreasonableness of a decision arises where a decision is not justified in light of the relevant legal and factual constraints imposed on the

[159] *Khan*, *supra* note 99 at para 25, BOA Tab 32.
[160] *Ford*, *supra* note 109 at para 76, BOA Tab 34.
[161] *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at para 55, BOA Tab 50.

decision-maker.[162] In *Vavilov*, the Court identified seven contextual elements generally relevant to evaluating the reasonableness of a particular decision.[163] In the case of Mr. Park, the relationship between the governing statutory scheme, the evidence and facts before the Dean, and the submissions of the parties supports the reasonableness of Dean Grondin's decision.

99. The decision to expel Mr. Park is justifiable and intelligible when viewed under a statutory scheme that tasks the College with providing a "comprehensive program of career-oriented, post-secondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment, and to support the economic and social development of their local and diverse communities",[164] and creates a Dean for the purposes of upholding the academic integrity of the institution as a means of advancing those goals.[165] The issuance of lesser penalties in the face of repeated cheating – especially those unaccompanied by plausible explanations – is not consonant with either the mandate of the Dean or the College.

100. The decision is also justifiable in light of the evidence and facts before the decision-maker and is properly responsive to the limited submissions of Mr. Park. Dean Grondin did not fundamentally misapprehended the evidence or fail to account for the facts before him.[166] The reasons instead demonstrate a responsiveness and alertness to the position of Mr. Park in the manner suggested by the Court in *Vavilov*,[167] and each individual statement of Mr. Park was considered and ruled upon by the Dean.[168]

101. Consequently, and because the Dean does not succumb to either fundamental reasonableness flaw described in *Vavilov*, the decision to expel Mr. Park is entitled to stand.

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[162] *Vavilov*, *supra* note 146 at para 105, BOA Tab 48.
[163] *Ibid*, at para 106, BOA Tab 48.
[164] Official Problem, *Colleges Act*, s. 2(2).
[165] Official Problem at para 7.
[166] *Vavilov*, *supra* note 146 at para 126.
[167] *Vavilov*, *supra* note 146 at paras 127-128, BOA Tab 48.
[168] Official Problem, Appendix E.

C. THE DECISION TO IMPLEMENT DECIDEAI IS VALID AND REASONABLE

102. The Appellant also challenges the reasonableness of the decision to implement the DecideAI scheme on the basis that the entire framework, by virtue of its alleged procedural defects, exists as an improper exercise of discretion under the College's enabling statute.[169] In effect, the Appellant says that DecideAI is *ultra vires*, doomed to produce unfair results in every case. This contention should be rejected, for two reasons.

103. First, the decision to implement DecideAI is perfectly congruent with the limitations of the *Colleges Act*, which imposes an obligation to craft "fair" procedures but otherwise defers to the College in determining the specific processes necessary to promote the fulsome education of its students.[170] Regulations benefit from a presumption of validity, and a successful challenge to the *vires* of regulations requires that they be shown to be "inconsistent with the objective of the enabling statute or the scope of the statutory mandate".[171] Importantly, a *vires* argument does not turn on whether a reviewing court believes that the methods chosen will actually achieve the statutory objective, and is only concerned with whether the regulation can be described as "irrelevant", "extraneous" or "completely unrelated" to the overarching purpose.[172]

104. A policy intended to protect the academic integrity of the College by deterring academic misconduct is not "completely unrelated" to promoting the education of a college's students. Moreover, the considerable procedural protections afforded to students like Mr. Park under the DecideAI policy – including notice, the ability to make written submissions and lead evidence, an oral hearing, an opportunity to correct the record and answer questions, access to the factors

[169] Appellant Factum at para 106.
[170] *Colleges Act*, s. 97. Official Problem, opinion of Lyon JA at para 54.
[171] Katz Group Canada Inc. v Ontario (Health and Long-Term Care), 2013 SCC 64, at paras 24-25 [*Katz*], BOA Tab 51; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 54, BOA Tab 52.
[172] *Katz*, *supra* note 171 at para 28, BOA Tab 51.

employed by DecideAI and the individualized report considered by the Dean, and the provision of reasons – are indicative of an eminently fair process. The choice to implement DecideAI does not evince a "disregard" for the College's delegated authority, but rather demonstrates compatibility with the appropriate definitions of fairness and meaningful education in modern Flavelle.

105. Second, even if the DecideAI policy does not benefit from a presumption of validity and is instead reviewed on the standard of reasonableness, the College's particular construction of its academic disciplinary process does not suffer from an absence of justifiability, intelligibility, and transparency.[173] The College's interpretation of fairness under the novel circumstances presented by generative AI tools still conforms to the broad principles of the common law outlined in *Baker* and the specific requirements imposed on academic institutions as articulated in *Khan.* Because the concept of fairness forms the core of the Appellant's *vires* challenge, if this court finds for the Respondent on the procedural issues discussed above, the challenge must fail.

PART V - ORDER SOUGHT

106. The Respondent seeks an order dismissing the appeal and affirming the validity of the ExamTech and DecideAI policies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on this 21st day of September, 2023.

Emma Danaher

Emma Danaher and Ryan Reid

Counsel for the Respondent

[173] *Vavilov*, *supra* note 146 at paras 15, 105, BOA Tab 48.

PART VI - BOOK OF AUTHORITIES

JURISPRUDENCE

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1	*R v Edwards*, [1996] 1 S.C.R 128	**43**
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22	*R v Marakah*, 2017 SCC 59	**23, 158**
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24	*R v Kang-Brown*, 2008 SCC 18	**38**
25	*R v Oakes*, [1986] 1 S.C.R 103	**69-70**
26	*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37	**37, 54-55, 59-60**
27	*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817	**21, 27-28, 30, 33**
28	*Knight v Indian Head School Division No. 19*, [1990] 1 S.C.R. 653	**682, 685**

29	*Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15	**231**
30	*Iwa v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282	**323-325, 327**
31	*Harelkin v University of Regina*, [1979] 2 SCR 561	**581, 594**
32	*Khan v. Ottawa (University of),* [1997] OJ No 2650 (CA)	**16, 21, 23-25, 32**
33	*Singh v Minister of Employment and Immigration,* [1985] 1 SCR 177	**58**
34	*Ford v University of Ottawa*, 2022 ONSC 6828	**71, 76, 90**
35	*McNamara v Ontario Racing Commission*, [1998] O.J. No. 3238 [ON CA]	**26, 28**
36	*R v Généreux*, [1992] 1 SCR 259	**283, 284**
37	*Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3	**76, 83, 84, 98, 100**
38	*Newfoundland Telephone Co. v Newfoundland (Public Utilities Board)*, [1992] S.C.J. No. 21	**28, 41**
39	*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369	**394**
40	*State v Loomis*, 2016 WI 68	**68, 70-71, 72**
41	*Pearlman v Law Society (Manitoba)*, [1991] 2 S.C.R. 869	**891-892**
42	*Kozak v Canada (Minister of Citizenship & Immigration)*, 2006 FCA 124	**56-57**
43	*Valente v The Queen*, [1985] 2 SCR 673	**16**
44	*Bovbel v Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 563 (FCA	**570-571**
45	*Weerasinge v Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 330	**337-338**
46	*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49	**49**
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48	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65	**13, 15, 23-24, 94, 96, 100, 102, 104-106, 126-128**
49	*Haghshenas v Canada (Citizenship and Immigration)*, 2023 FC 464	**24, 28**
50	*Law Society of New Brunswick v Ryan*, 2003 SCC 20	**55**
51	Katz Group Canada Inc. v Ontario (Health and Long-Term Care), 2013 SCC 64	**24-25, 28**
52	*Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17	**54**

LEGISLATION

Flavellian Charter of Rights and Freedoms

Rights and freedoms in Flavelle

1 The Flavellian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Colleges Act

Colleges

2(1) Colleges of applied arts and technology may be established by regulation.

Objects

(2) The objects of the colleges are to offer a comprehensive program of career-oriented, postsecondary education and training to assist individuals in finding and keeping employment, to meet the needs of employers and the changing work environment, and to support the economic and social development of their local and diverse communities.

Carrying out its objects

(3) In carrying out its objects, a college may undertake a range of education-related and training-related activities, including but not limited to,

(a) entering into partnerships with business, industry and other educational institutions;
(b) offering its courses in the French language where the college is authorized to do so by regulation;
(c) adult vocational education and training;
(d) basic skills and literacy training;
(e) apprenticeship in-school training; and
(f) applied research.

Internal dispute resolution processes

97 The College may establish fair procedures for resolving any and all disputes between the College, faculty, students, staff, or any combination thereof.

FLAVELLE COLLEGE *CODE OF CONDUCT*

Section 21
Exam Proctoring

All examinations and written submissions for credit must be completed either through the use of the ExamTech software or with the supervision of the ExamTech software. Data collected by the ExamTech software will only be used to:

1) detect unauthorized assistance; and
2) to improve the efficiency of any artificial intelligence systems in use by the College.

Section 22
Academic Offences

It is an academic offence to access unauthorized study aids during an examination or assignment for credit.

Section 23
DecideAI Reports

The Dean of Academic Integrity shall consider the reports generated by DecideAI when determining whether a student is guilty of an academic offence and when determining the nature and contents of an order.

Section 23(1)
Procedure for Academic Discipline

1. Notice of Violation
    a) If a student is accused of an academic offence, the College shall provide notice in the form and manner prescribed by the Dean of Academic Integrity.
        a. The notice shall:
            i. Be provided to the student no later than 30 days from on which the College discovered the commission of the Academic Offence; and
            ii. State the allegation against the student and the basis for the allegations.

2. Written submissions
    a) A student accused of an academic offence is entitled to submit written submissions in the form and manner prescribed by the Dean of Academic Integrity to the Dean of Academic Integrity.

a. Students must submit written submissions no later than 7 days prior to an oral hearing.

3. Oral Hearing
   a) A student accused of an academic offence is entitled to an oral hearing before the Dean of Academic Integrity. Oral hearings shall be for a period not more than 1 hour and shall take place not more than 30 days from the day on which the student is provided notice.

4. Review and Orders
   a) When considering whether a student is guilty of an academic offence, and subject to section 23, the Dean of Academic Integrity may consider any factor deemed appropriate.

   b) Where the Dean of Academic Integrity is satisfied on a balance of probabilities that the academic offence of which the student is accused was committed by the student, the Dean of Academic Integrity may make any of the following orders:

      i. An order that the student be placed on academic probation;
      ii. An order that the student be suspended from any program provided by the College for a period not less than 6 months and no more than 1 year.
      iii. An order that the student be expelled from the College and not considered for re-entry for a period not less than 10 years; or
      iv. Any other order as necessary for the purposes of maintaining the academic integrity of the College and deterring future instances of academic misconduct.

   c) When considering whether to make an order and determining the contents of that order, and subject to section 23, the Dean of Academic Integrity shall consider any factor deemed appropriate.

   d) The Dean of Academic Integrity may attach any condition to their orders which they consider to be appropriate in the circumstances.

   e) The Office of the Dean of Academic Integrity shall provide written notice of the decision made by the Dean of Academic Integrity no later than 60 days from the date of the oral hearing, and such notice shall contain the reasons for the decision and any orders made by the Dean of Academic Integrity.

f) The College shall disclose to the public the decision, reasons for decision, and written submissions of the student for all decisions made by the Dean of Academic Integrity. This information will be anonymized, but where circumstances warrant, the Dean of Academic Integrity may order the publication of the name of the person found to have committed the offence.

g) The Dean of Academic Integrity shall disclose any reliance on artificial intelligence in coming to their decision.