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 APPELLANT

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PART I – OVERVIEW AND FACTS

A. OVERVIEW

1. Artificial Intelligence presents both risks and opportunities for post-secondary education. AI-assisted academic misconduct stands to undermine the value of education for students and educational institutions alike. The ExamTech and DecideAI Policies enacted by Flavelle College were implemented with the intention of curbing the risk of AI-assisted cheating. Although the College has good reason to take steps to combat this problem, like all state actors, the College is bound by the law, including the constitution and its enacting statute. The College must also ensure that the disciplinary procedure is fair and that students accused of academic misconduct are given reasonable decisions.

2. The ExamTech Policy violates s. 8 of the Charter, subjecting all students to intrusive, extended searches with minimal possibility for judicial oversight. The ExamTech Policy is not a reasonable limit on students' s. 8 rights: it is not minimally impairing and is vastly disproportionate in its deleterious effects.

3. The decision to expel Ben Park was not procedurally fair as it violated Mr. Park's right to be heard and to have an independent and impartial adjudicator. The decision to expel Mr. Park was also unreasonable, as it was neither internally coherent nor justified in light of the relevant factual and legal constraints. Finally, the decision to implement the DecideAI policy itself was unreasonable, as the decision is not justifiable given the legal constraints operating on the College.

B. STATEMENT OF FACTS

4. Flavelle College (the "**College**") is a public post-secondary institution enacted under the Colleges Act (the "***Act***"). Under the Act, the College may establish fair procedures for resolving all disputes between the College and students. The Dean of Academic Integrity (the "**Dean**") is responsible for handling the administration of academic policies under the College's Code of Conduct (the "***Code***") and any academic disputes.

5. Recently, the College has observed a significant increase in the prevalence of academic misconduct, including using AI-powered text generators. As these AI tools have become more

sophisticated, the College has struggled to detect and punish cheating. There has also been a significant backlog of academic discipline hearings.

6. In September of 2024, the College's Board of Directors decided to enhance the College's exam proctoring and disciplinary policies by permitting the use of two new technologies. Section 21 of the *Code* was altered to require that all examinations and written assignments be completed through ExamTech (the "**ExamTech Policy**"). ExamTech is an AI software that analyzes the data it collects from students in real-time, flagging any behaviour it deems "suspicious." ExamTech must be open and operational whenever a student works on an exam or assignment and collects information including. Section 23 of the *Code* was also modified to permit the Dean to consider reports generated by DecideAI. This program predicts the likelihood that the student cheated and suggests a corresponding sanction (the "**DecideAI Policy**").

7. The Appellant, Ben Park, was an engineering student at Flavelle College. Mr. Park completed a computer science exam on April 13, 2026, after which he was flagged by ExamTech. Mr. Park wrote his exam from home. With a view to the bookshelf behind him, ExamTech captured family photos, a collection of Christmas cards, and some books, including George Orwell's *1984*. Following his participation in the College's new academic discipline process with DecideAI, Mr. Park was found to have violated the *Code* and was expelled. Subsequently, Mr. Park sought judicial review of the ExamTech and DecideAI policies, as well Dean's decision to expel him.

C. PROCEDURAL HISTORY

1) The Decision of the Divisional Court

8. Fogel J found that the College's use of ExamTech violated s. 8 of the *Charter* and could not be saved under s.1. He also held that College's use of DecideAI in its disciplinary process was procedurally unfair and that the specific decision to expel Mr. Park was both procedurally unfair and unreasonable. Both the ExamTech and DecideAI Policies were struck down and the expulsion decision against Mr. Park was quashed.

2) The Decision of the Falconer Court of Appeal

9. The Falconer Court of Appeal unanimously held that the ExamTech Policy was reasonable within the meaning of s. 8, and that accordingly Policy did not violate s.8. Lyon JA and Jin JA held that the decision to expel Ben Park was both procedurally fair and reasonable, and that the decision to implement the DecideAI Policy was also reasonable. Beltran JA dissented and adopted the reasoning of Fogel J. The Policies were returned to force and the expulsion decision was reinstated.

PART II – STATEMENT OF ISSUES

10. There are four issues on appeal:

i. Whether the College's ExamTech Policy violates section 8 of the *Charter*;

ii. If yes, whether this infringement is justified under section 1 of the *Charter*;

iii. Whether the decision to expel Mr. Park was unfair or unreasonable; and

iv. Whether the decision to implement the DecideAI Policy was unreasonable.

PART III – ARGUMENT

I. THE EXAMTECH POLICY

A. THE COLLEGE IS BOUND BY THE *CHARTER*

11. The College has conceded that, in enacting the ExamTech Policy, it was bound by the *Charter*.[1] This was not disputed in any of the judgements below.[2] The College is a creature of statute. Furthermore, the state exercises "routine or regular" control over the College for two reasons.[3] First, because the College's Board—including the Dean of Academic Integrity—is appointed and removable at the Minister's pleasure.[4] Second, because the government may, at any time, direct the College's operations through a binding policy directive.[5]

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[1] Respondent Factum, at para 8.
[2] Official Problem, at paras 45-60.
[3] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at page 311, Book of Authorities, Tab 1 [BOA].
[4] *Douglas College v Douglas/Kwantlen Faculty Association*, [1990] 3 SCR 570 at page 584 [*Douglas College*], BOA, Tab 2.
[5] *Douglas College*, at page 584 BOA, Tab 2.

B. THE STANDARD OF REVIEW IS CORRECTNESS

1) The ExamTech Policy raises a constitutional question

12. The standard of review applicable to the ExamTech Policy is correctness.

13. This case raises the constitutional question of whether the ExamTech Policy violates s. 8 of the *Charter* and whether it can be saved under s. 1. Constitutional questions like these are an exception to the presumption of reasonableness review that this court established in *Canada (Minister of Citizenship and Immigration) v Vavilov*.[6] As the *Vavilov* majority held, "the constitutional authority to act must have determinate, defined, and consistent limits"[7] and is a question on which the courts, in upholding the constitution and the rule of law, must have the final say.[8]

14. *Vavilov* and *Doré v Barreau du Québec* both held that reasonableness review is appropriate where courts are asked to review the *Charter* compliance of discretionary and adjudicated administrative decisions falling within a decision maker's lawful mandate.[9] The ExamTech Policy, however, is not an adjudicated decision: it does not involve, for example, findings of fact, applications of principle, or determinations of rights and does not correspond to an "individual set of facts."[10] Rather, the Appellant challenges the ExamTech Policy directly.

2) Courts have undertaken correctness review in similar post-*Vavilov* cases

15. After *Vavilov,* similar cases directly challenging the constitutionality of policies adopted by administrative bodies have been reviewed on a standard of correctness. In *Union of Canadian Correctional Officers v Canada (Attorney General),* the Federal Court of Appeal considered the Treasury Board's adoption of a mandatory financial inquiry requirement for correctional officers, which the applicants alleged violated s. 8.[11] In determining that correctness was the appropriate standard of review, the court emphasized that the issue before it did not concern a decision maker's interpretation and application of the requirement, but

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[6] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*], BOA, Tab 3.
[7] *Vavilov*, at para 56, BOA, Tab 3.
[8] *Vavilov*, at paras 12-15, 55-57, BOA, Tab 3.
[9] *Vavilov*, at para 57, BOA, Tab 3; *Doré v Barreau du Québec*, 2012 SCC 12 at para 3 [*Doré*], BOA, Tab 4.
[10] *Doré*, at para 36, BOA, Tab 4.
[11] *Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada – CSN (UCCO-SAAC-CSN) v Canada (Attorney General)*, 2019 FCA 212 [*Correctional Officers*], BOA, Tab 5.

rather the constitutionality of the requirement *as such*.[12] On substantially similar grounds, in *Power Workers Union v Canada (Attorney General),* the Federal Court recently selected correctness as the standard of review to assess whether the Canadian Nuclear Safety Commission's adoption of a mandatory drug testing policy violated s. 8.[13]

C. STUDENTS HAVE NOT WAIVED THEIR SECTION 8 RIGHTS

16. The College has argued that the use of ExamTech to proctor the completion of assignments and exams does not constitute a search because students have "knowingly and voluntarily" released their private information to the College by using ExamTech, thereby "relinquish[ing] any objectively reasonable expectation of privacy…in that information."[14] While the College does not expressly use the term "waiver," this is the effect of its submissions.

17. It is clear, however, that the mere fact of using ExamTech does not constitute a waiver of students' s. 8 rights. For waiver of the s. 8 right to be valid, it must be fully informed and given voluntarily.[15] To be fully informed, students must be provided with sufficient information to make a meaningful choice as to whether they will consent to a search or seizure.[16] To be considered voluntary, students must have a "real choice" as to whether to provide consent.[17]

18. In *Syndicat Northcrest v Amselem,* this court held that a valid waiver must "be explicit, [and] stated in express, specific and clear terms."[18] The court further suggested that "arguably…any document lacking an explicit reference to the affected *Charter* right" would be insufficient to establish waiver.[19] Not only does the Policy, as written, contain no reference to s. 8, but it also does not even clearly describe how ExamTech operates or what information will be exposed to and collected by the software. This is a manifestly insufficient basis on which to establish a waiver of students' *Charter* rights.[20]

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[12] *Correctional Officers,* at paras 21-22, BOA, Tab 5.
[13] *Power Workers' Union v Canada (Attorney General),* 2023 FC 793 at para 43 [*Power Workers Union*], BOA, Tab 6.
[14] Respondent Factum, at para 23.
[15] See *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 72 [*Godbout*], BOA, Tab 7; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 98 [*Amselem*], BOA, Tab 8.
[16] *Godbout,* at para 72, BOA, Tab 7; *Amselem,* at para 98, BOA, Tab 8.
[17] *Amselem,* at para 98, BOA, Tab 8.
[18] *Amselem,* at para 100, BOA, Tab 8.
[19] *Amselem,* at para 100, BOA, Tab 8.
[20] *Gillies v Toronto District School Board,* 2015 ONSC 1038 at para 67 [*Gillies*], BOA, Tab 9.

19. Students' purported consent to the ExamTech Policy is also not voluntary, because students do not have a "real choice" in the matter.[21] In *Godbout v Longueuil (City),* La Forest J held that where agreement to a term that might constitute waiver of a *Charter* right is "tantamount to a contract of adhesion," consent will not be considered voluntary.[22] A contract of adhesion is a contract where the parties are of such differential bargaining power that the weaker party has no opportunity, or ability, to bargain about the terms. Clearly, students have no opportunity to "bargain" about the terms of the College's *Code,* including the ExamTech Policy. If students want to enroll at the College, they must accept the terms of the *Code.*

D. THE EXAMTECH POLICY VIOLATES SECTION 8 OF THE *CHARTER*

20. The ExamTech Policy violates the guarantee against unreasonable search and seizure set out in s. 8 of the *Charter.* The s. 8 inquiry consists of two questions.

i. Whether the impugned state action constitutes a search. State action will amount to a search only where it intrudes upon individuals' reasonable expectations of privacy.[23]

ii. Whether the search in question is unreasonable within the meaning of s. 8. A search will be *unreasonable if* it fails to meet one or more of the following conditions: (1) the search is authorized by law; (2) the authorizing law is itself reasonable; and (3) the search is conducted reasonably.[24]

21. The College's use of ExamTech constitutes a search because it engages students' reasonable expectations of privacy. The Policy as a whole, which authorizes these searches, is unreasonable within the meaning of s. 8. Accordingly, the College's use of ExamTech to proctor the completion of assignments and exams violates s. 8, and the Policy must be set aside.

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[21] *Amselem,* at para 98, BOA, Tab 8.
[22] *Godbout,* at para 72, BOA, Tab 7.
[23] *Hunter v Southam,* [1984] 2 SCR 145 at page 159 [*Hunter*], BOA, Tab 10.
[24] *R v Collins,* [1987] 1 SCR 265 at para 23, BOA, Tab 11.

1) The use of ExamTech constitutes a search

22. The College's use of ExamTech to proctor the completion of assignments and exams constitutes a search for the purposes of s. 8 because it engages students' reasonable expectations of privacy against the College.

23. Whether a reasonable expectation of privacy exists is a function of the "totality of the circumstances."[25] This court has continually emphasized that this inquiry is normative, not descriptive. Whether ExamTech intrudes upon students' reasonable expectations of privacy is a question that must be answered considering s. 8's core interests—dignity, integrity, and autonomy—and a concern for the long-term impact of state intrusions on privacy on our democracy's wellbeing.[26]

24. While the inquiry considers the totality of the circumstances, this court has identified four factors going to whether there is a reasonable expectation of privacy:

i. The subject matter of the search;

ii. The interest held in that subject matter;

iii. Whether there is a subjectively held expectation in that subject matter; and

iv. Whether that expectation of privacy is objectively reasonable in the totality of the circumstances.

25. The Appellant acknowledges that expectations of privacy are generally diminished in the administrative context relative to the criminal context.[27] However, a reasonable, if diminished, expectation of privacy still attracts constitutional protection and may only be intruded upon pursuant to a reasonable law (or policy, as the case may be).[28]

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[25] *R v Spencer*, 2014 SCC 43 at para 16 [*Spencer*], BOA, Tab 12.
[26] *R v Dyment*, [1988] 2 SCR 417 at pages 427-429 [*Dyment*], BOA, Tab 13; *Hunter*, at page 157, BOA, Tab 10; *R v Tessling*, 2004 SCC 67 at paras 25, 42 [*Tessling*], BOA, Tab 14; *R v Plant*, [1993] 3 SCR 281 at page 293 [*Plant*], BOA, Tab 15; *Spencer*, at para 18, BOA, Tab 12.
[27] See *R v McKinlay Transport*, [1990] 1 SCR 637 at page 642 [*McKinlay Transport*], BOA, Tab 16; *Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR. 406 at page 418 [*Comité*], BOA, Tab 17; *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at pages 506-7 [*Thomson Newspapers*], BOA, Tab 18.
[28] *R v Cole*, 2012 SC 53 at para 9 [*Cole*], BOA, Tab 19; *R v M(MR)*, [1998] 3 SCR 393 at para 96 [*M(MR)*], BOA, Tab 20.

a) The subject matter of an ExamTech search

26. The subject matter of an ExamTech search is a comprehensive record of a student's behaviours, environment, interactions, location, and device use whenever they are working on an assignment or exam. Under the ExamTech Policy, students at the College must have ExamTech open and operational any time they are working on an assignment or an exam. While operational, ExamTech accesses and records the following:

i. A screen recording of the device;
ii. Video and audio from the device's camera and microphone;
iii. A scan of the entire room in which the student is situated;
iv. The device's keystrokes; and
v. The general geographic location of the device.

27. Many students will complete at least some of their assignments from home: this means that ExamTech will record the insides of students' homes, as well as their behaviour, interactions, and conversations within the home. Many students have circumstances and commitments that make it impractical, and sometimes impossible, to only work out of College facilities: e.g., students who commute long distances, have childcare commitments, or live with disabilities that require them to spend more time at home.

28. In all cases, including where a student works on an assignment or exam outside the home (e.g., in a library or coffee shop), ExamTech will record video and audio---capturing any interactions or conversations they have—and will also record their screen and keystrokes. Through screen and keystroke recording, ExamTech may also capture past or recommended searches, the content of any open files, as well as passcodes.

29. Much of the above-described information has the potential to reveal aspects of students' "biographical core[s]," constituting intimate details of students' lifestyles and personal choices.[29] When this information is considered as a whole, especially since ExamTech may be

[29] *Plant,* at page 293, BOA, Tab 15; *Spencer,* at para 27, BOA, Tab 12.

operational for hundreds of hours each semester, the potential for biographical core information to be revealed is heightened by orders of magnitude.[30]

30. In Mr. Park's illustrative case, ExamTech captured information including family photos, Christmas cards, and the titles of several books on his bookshelf—including George Orwell's *1984*.[31]

b) Students' interests in the subject matter of ExamTech searches

31. Mr. Park and the College's students both have a direct interest in the subject matter of an ExamTech search: these searches record and reveal information about students' choices and activities.[32] ExamTech searches engage two kinds of privacy interests protected by s. 8: territorial privacy and informational privacy.

32. Because ExamTech searches can reveal the location of, and look inside, students' homes, these searches engage a high degree of territorial privacy.[33] As this court held in *Evans,* the home attracts one of the highest possible expectations of privacy.[34] While not every ExamTech search will involve students' homes, territorial privacy is engaged because many students must do academic work in their homes and because the ExamTech Policy is not limited to avoid the possibility of peering into students' homes.

33. ExamTech searches also engage students' interests in informational privacy. The protection of informational privacy under s. 8 is based on the idea that all personal information is fundamentally a person's own, to be communicated or retained as they see fit.[35] ExamTech searches take away this control. In doing so, ExamTech searches stand to reveal information going to students' biographical cores. The nature of this information will vary and will depend on the student, but in many cases will reveal "specific interests, likes, and propensities"[36] -- through, for example, past or recommended internet searches, conversations and interactions,

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[30] This court has emphasized that the reasonable inferences that may be yielded through searches for more discrete pieces of information need to be accounted for in the s. 8 analysis: e.g., *Spencer,* at para 31, BOA, Tab 12; *Tessling,* at para 36, BOA, Tab 14; *R v Kang-Brown,* 2008 SCC 18 at para 175 [*Kang-Brown*], BOA, Tab 21.
[31] Official Problem.
[32] *R v Marakah,* 2017 SCC 59 at para 93 [*Marakah*], BOA, Tab 22.
[33] *Spencer,* at para 37, BOA, Tab 12.
[34] *R v Evans,* [1996] 1 SCR 8 at para 3 per the concurring reasons of La Forest J and at para 42 of the reasons given by Major J (dissenting, though not on this point) [*Evans*], BOA, Tab 23.
[35] *Tessling*, at para 23, BOA, Tab 14; See also *Spencer*, at para 40, BOA, Tab 12; *Dyment,* at para 22, BOA, Tab 13.
[36] *R v Morelli,* 2010 SCC 8, at para 105, BOA, Tab 24.

the books on students' bookshelves and the art on their walls, and where they tend to spend their time. Where an ExamTech search involves a students' home, information about their socio-economic circumstances and family status may also be revealed. As this court recognized in *Cole,* this kind of information "falls at the very heart of the biographical core protected by s. 8."[37]

c) Students have a subjective expectation of privacy in the subject matter of ExamTech searches

34. Students have a subjective expectation of privacy in the subject matter of an ExamTech search. The threshold for establishing a subjective expectation of privacy is low.[38] In this case, it is easily met, given the typically private nature of what is intruded upon (e.g., a student's home, device, and potentially conversations and interactions).[39] Additionally, the trial judge in this matter held that students had a subjective expectation of privacy regarding ExamTech searches.[40] This is a finding of mixed fact and law that is entitled to significant deference on appeal.[41]

35. Whatever extent to which students may, under the ExamTech Policy, have notice that they will be searched does not—and *cannot*—establish the absence of an expectation of privacy. The College has submitted that students cannot have a subjective expectation of privacy because they "actively and knowingly" use ExamTech. But, as this court has affirmed, the s. 8 inquiry is normative, not descriptive.[42] In other words, a "subjective belief that Big Brother is watching should not, through the workings of s. 8, be permitted to become a self-fulfilling prophecy."[43]

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[37] *Cole*, at para 48, BOA, Tab 19.
[38] *R v Patrick*, 2009 SCC 17 at para 37 [*Patrick*], BOA, Tab 25.
[39] *Spencer*, at para 19, BOA, Tab 12; *Cole*, at para 43, BOA, Tab 19.
[40] Official Problem, at para 45.
[41] *Housen v Nikolaisen*, 2002 SCC 33 at para 37, BOA, Tab 26; *Spencer*, at para 19, BOA, Tab 12.
[42] *Tessling*, at para 42, BOA, Tab 14.
[43] *R v Jones*, 2017 SCC 60, at para 21, BOA, Tab 27. See also *Patrick* at para 14, BOA, Tab 25, where Binnie J held that "a government that increases its snooping on the lives of citizens…will not thereby succeed in unilaterally reducing their constitutional entitlement to privacy protection." A similar idea was emphasized in *R v Jarvis*, 2019 SCC 10, at para 68, BOA, Tab 28.

d) Students' expectation of privacy is objectively reasonable

36. In the totality of the circumstances, students' expectation of privacy in the subject matter of an ExamTech search is objectively reasonable and warrants constitutional protection.

37. The s. 8 jurisprudence has recognized a non-exhaustive and interrelated set of factors that go to whether an expectation of privacy is objectively reasonable. These factors include:

i. The place where the alleged search occurs;

ii. Whether individuals exercise control over the subject matter of the search;

iii. The intrusiveness of the investigatory technique; and

iv. Whether the search exposes information going to the biographical core.

38. The video and audio surveillance components of an ExamTech search may take place in several locations. Many students will work on assignments in their homes, areas under their control where there is a significantly elevated expectation of privacy, including in the visual content of their surroundings and in their conversations.[44] Even where the visual and audio recording aspects of an ExamTech search take place in public (e.g., in a library or coffee shop), there is a fundamental difference between being observed by other citizens and being monitored and recorded by the state.[45]

39. Regarding ExamTech's screen and keystroke recording functions, the "place" where this aspect of an ExamTech search occurs should be understood as the device itself—including the digital spaces the device is connected to *via* the internet.[46] The search does not occur in public, in public view, or in what the Respondent has mystifyingly called the "public domain" of a computer: these searches occur in a digital space that is generally taken to be, and treated as, highly private and sensitive.[47] Personal digital devices are also under the control of their

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[44] *R v Silveira*, [1995] 2 SCR 297 at para 141 [*Silveira*], BOA, Tab 29; *R v Feeney*, [1997] 2 SCR 13 at para 13 [*Feeney*], BOA, Tab 30.

[45] For example, in *R v Duarte*, [1990] 1 SCR 30 at page 47, BOA, Tab 31, La Forest J held that "the price of choosing to speak to another human being" should not be "the risk of having a permanent electronic recording…of our words" made by the state. In *Marakah*, at para 41, BOA, Tab 22, this court held that when a text message is sent and received, even though the sender loses exclusive control over that message—that control being shared with the recipient—it is still reasonable to expect that the message will remain safe from *state* scrutiny.

[46] *R v Vu*, 2013 SCC 60 at para 51 [*Vu*], BOA, Tab 32; *Marakah*, at paras 27-30, BOA, Tab 22; *Spencer*, at para 44, BOA, Tab 12.

[47] *R v Fearon*, 2014 SCC 77 at para 51 [*Fearon*], BOA, Tab 33; *Vu*, at paras 41-44, BOA, Tab 32.

users,[48] who decide what information from the device they will share with others, and who regularly use passcodes to restrict access.

40. In addition, ExamTech searches are intrusive. While they do not fall at the highest end of this spectrum,[49] the level and specificity of the information an ExamTech search yields is very significant.[50] For instance, in contrast to the heat-sensing technology at issue in *R v Tessling*—which was limited to indicating that there were heat-generating activities taking place inside a home—the ExamTech software collects extensive and specific data about students' choices, lifestyles, and behaviour.[51]

41. This degree of intrusiveness is heightened because ExamTech operates continuously whenever students work on assignments. It may collect hundreds of hours' of information over an academic year.[52] Continued surveillance such as this—"the camera that never blinks"—poses a greater risk of exposing biographical core information compared to discrete "purpose oriented" instances of surveillance.[53]

42. Finally, ExamTech searches—which are technologically intrusive, invade domains of individual control, and occur in places generally understood as sensitive and private—stand to expose intimate biographical core information (a factor discussed further above).[54]

43. Students' expectation of privacy in relation to ExamTech searches is objectively reasonable. While the non-criminal context of these searches does attenuate students' interests, ExamTech searches still represent a significant, long-term state intrusion into students' biographical cores—that is, into the heart of s. 8.[55] While the College's purpose in performing these searches is obviously important, La Forest J emphasized in *R v Wong* that as technology develops courts "must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."[56] The intrusions provided for by the

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[48] *R v Edwards*, [1996] 1 SCR 128 at para 6 [*Edwards*], BOA, Tab 34.
[49] They are not as intrusive as a strip or body cavity search, or a forensic search of a cellphone. See *R v Golden*, 2001 SCC 83 at para 98, BOA, Tab 35; *Fearon*, at para 72, BOA, Tab 33.
[50] See *Tessling* at para 54-55, BOA, Tab 14; also *R v Chehil*, 2013 SCC 49, at para 28, BOA, Tab 36.
[51] *Tessling*, at paras 54-55, BOA, Tab 14.
[52] In an eight-month academic year, assuming students only have ExamTech open for two hours each day, ExamTech would capture four hundred and eighty-seven hours of video, audio, and screen/keystroke recordings,
[53] *R v Yu*, 2019 ONCA 942 at para 129 [*Yu*], BOA, Tab 37.
[54] *Spencer*, at para 59, BOA, Tab 12; *Plant*, at page 292, BOA, Tab 15.
[55] *Plant*, at page 293, BOA, Tab 15; *Tessling*, at paras 25-26, 62, BOA, Tab 14.
[56] *R v Wong*, [1990] 3 SCR 36 at page 47 [*Wong*], BOA, Tab 38.

ExamTech Policy must subject to constitutional justification if Flavelle is to remain a free, open, and democratic society that respects the dignity and autonomy of its citizens.[57]

2) The ExamTech Policy is unreasonable within the meaning of s. 8

44. As set out in *R v Collins,* a search must meet three requirements to be reasonable within the meaning of s. 8:

i. The search is authorized by law;

ii. The authorizing is itself reasonable; and

iii. The search is conducted reasonably.

45. In cases in the administrative context where search powers are articulated in policies, courts have essentially understood "law" and "policy" as interchangeable for the purposes of this requirement.[58] The Appellant's challenge to the ExamTech Policy focusses on the second *Collins* requirement, challenging the reasonableness of the ExamTech Policy as a whole. Because the Policy is unreasonable within the meaning of s. 8, the specific search to which Mr. Park was subjected violated his s. 8 rights.

46. There is no "hard and fast" test for the reasonableness of a law or policy under s. 8.[59] However, this court has identified certain important considerations:[60]

i. The nature and purpose of the legislative scheme;

ii. The mechanism of search employed and its potential degree of intrusiveness;

iii. The availability of judicial supervision, including after-the-fact review; and

iv. The grounds on which searches may proceed.[61]

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[57] *R v Ward*, 2012 ONCA 660, at para 87 [*Ward*], BOA, Tab 39; *Wong*, at page 46, BOA, Tab 38.
[58] See, e.g., *Correctional Officers*, BOA, Tab 5; *Power Workers Union*, BOA, Tab 6; and *Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134 [*Trinity Bible Chapel*], BOA, Tab 40.
[59] *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 57 [*Goodwin*], BOA, Tab 41, citing *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, at page 495, BOA, Tab 42.
[60] *Goodwin*, at para 57, BOA, Tab 41, citing *Del Zotto v Canada*, [1997] 3 FC 40 (CA), per Strayer J.A., in dissenting reasons aff'd by this court in [1999] 1 SCR 3.
[61] This is not a factor expressly identified in *Goodwin*, BOA, Tab 41. However, the level of grounds required for a search under a particular law or policy (e.g., no grounds, reasonable suspicion, or reasonable and probable grounds) has been a relevant factor in the s. 8 reasonableness assessment in many cases, including, *Kang-Brown*, *M(MR)*, *R v A.M*, 2008 SCC 19 [*A.M*], BOA, Tab 43, and *Chehil*, BOA, Tab 36.

a) The nature and purpose of the ExamTech Policy

47. Outside the criminal law context, this court has adopted a comparatively more flexible approach to reasonableness.[62] ExamTech searches occur in the administrative context. Still, they can lead to devastating, potentially life-altering disciplinary consequences for students. In addition, under the ExamTech and DecideAI policies, the information collected in an ExamTech search is "the sole basis"[63] for consequences under the College's academic discipline regime.[64] As this court recognized in *Goodwin,* because of the serious consequences that may flow directly from an ExamTech search, careful scrutiny should still be applied to the Policy.[65]

48. As to the Policy's purpose, it is certainly important: the misuse of AI tools poses a real risk to students' educations and to the College's ability to operate as a postsecondary institution. But the state's interest here cannot be characterized as heightened. It is not in the same order as, for example, maintaining the integrity of the national border[66] or preventing deaths caused by drunk drivers on public highways.[67] The Policy's purpose, while important, should not "weigh heavily" towards its reasonableness under s. 8.[68]

b) ExamTech searches are intrusive—even if the information is never viewed by another human

49. ExamTech searches fall at the higher end of the spectrum of intrusiveness. These searches are not as intrusive as, for example, a forensic digital search of a device or a strip search. However, they use sophisticated technology[69] over an extended period[70] to collect a wide range of information that, depending on the circumstances, may reveal core biographical information and paint a detailed and intimate portrait of students' lifestyles and choices.

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[62] *McKinlay Transport,* at pages 644-645, BOA, Tab 16.
[63] *Goodwin,* at para 62, BOA, Tab 41.
[64] Official Problem, at paras 15-27.
[65] *Goodwin,* at paras 62-63, BOA, Tab 41.
[66] *R v Simmons,* [1988] 2 SCR 495 at paras 48-49 [*Simmons*], BOA, Tab 44.
[67] *Goodwin,* at para 59, BOA, Tab 41.
[68] *Goodwin*, at para 59, BOA, Tab 41.
[69] *Tessling*, at para 55, BOA, Tab 14.
[70] *Yu,* at para 29, BOA, Tab 37.

50. An ExamTech search's intrusiveness is not attenuated by the fact that in many cases the information ExamTech collects will not be reviewed by a human. This is because control, or autonomy, is one of s. 8's animating principles.[71] Regardless of whether a human reviews the information collected in an ExamTech search, students' loss of control over their information does not change. Both informational privacy and s. 8's understanding of privacy in a broader sense reflect an understanding that, in a democratic society, there must be protected areas of personal autonomy where individuals cannot be interfered with absent constitutional justification.[72] Whether or not a human ever sees the information obtained in an ExamTech search is immaterial to the analysis of whether the Policy is reasonable. Students' loss of control is what matters.

c) The ExamTech Policy does not allow meaningful after-the-fact review

51. In *R v Mann,* this court held that where a law or policy allows the state to search citizens without prior judicial authorization, meaningful after-the-fact review *must* be possible because of such searches' heightened potential for abuse.[73] In many cases, the inquiry into after-the-fact reviewability has centered on whether judges will be able to assess whether there were objective grounds for a search.[74] In the case of the ExamTech Policy, searches proceed on no grounds whatsoever—an issue dealt with below.

52. While the presence of lawful grounds is a central concern for after-the-fact reviewability, a court's ability to assess the *reliability* of a search method is also relevant to this question. In *Goodwin v British Columbia (Superintendent of Motor Vehicles),* this court struck down a roadside breathalyzer scheme as unreasonable in part because reliability issues frustrated meaningful review.[75] And in *R v Chehil,* this court held that the fact that reviewing courts would have access to evidence about the reliability of individual sniffer dogs militated

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[71] *Plant,* at page 293, BOA, Tab 15; *Tessling,* at paras 25-26, BOA, Tab 14; *Spencer,* at paras 34, 40, BOA, Tab 12; *Dyment,* at page 429, BOA, Tab 13.
[72] *Tessling,* at para 15, BOA, Tab 14; *Hunter,* at pages 160-161, BOA, Tab 10; *Dyment,* at pages 427-428, BOA, Tab 13; *Ward,* at para 87, BOA, Tab 39.
[73] *R v Mann,* 2004 SCC 52 at para 18, BOA, Tab 45; see also *Goodwin,* at para 71, BOA, Tab 41; *Fearon,* at para 82, BOA, Tab 33.
[74] This is the sense in which this court first introduced the concept of after-the-fact review in *Hunter,* at pages 160-167, BOA, Tab 10.
[75] *Goodwin,* at paras 67-68, 72, 73-77, BOA, Tab 41.

towards the reasonableness of sniff searches conducted on the lower standard of reasonable suspicion.[76]

53. ExamTech searches cannot be subject to meaningful after-the-fact review. This is because the basis on which ExamTech flags conduct as "suspicious" is unknown: the College has offered no evidence to this effect,[77] and the Policy itself contains no evidence that could be used by reviewing courts or students seeking to challenge the basis on which they were charged with academic misconduct. The fact that the results of ExamTech searches cannot be meaningfully reviewed after the fact strongly militates against the Policy's reasonableness.

d) ExamTech searches are undertaken without grounds

54. The ExamTech Policy does not require the College to have any grounds to subject students to an ExamTech search: the Policy applies indiscriminately to all 50,000 of the College's students.

55. In *Hunter v Southam,* this court held that searches must generally proceed based on reasonable and probable grounds.[78] Since then, the lower standard of reasonable suspicion has been considered appropriate in certain circumstances, either where the state's interest is heightened—e.g., in the context of drug trafficking[79] or at the border[80]—or where a search occurs in a non-criminal context.[81]

56. The general requirement that searches proceed on some form of individualized grounds is a mainstay of the s. 8 jurisprudence.[82] Grounds requirements prevent the "indiscriminate" exercise of state power by tying state action to objective and observable characteristics connected to individuals.[83] They ensure that state intrusions into privacy are justified, and justifiable, by the state *before* they occur.[84] In this way, grounds requirements reflect the careful

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[76] *Chehil,* at para 54, BOA, Tab 36.
[77] Official Problem, at para 49.
[78] *Hunter,* at page 168, BOA, Tab 10.
[79] *Kang-Brown,* at para 60, BOA, Tab 21.
[80] *Simmons*, BOA, Tab 44.
[81] *M(MR),* at para 48, BOA, Tab 20.
[82] See, for example, *Hunter,* at page 168, BOA, Tab 10; *R v Stillman,* [1997] 1 SCR 607 at paras 34-50, BOA, Tab 46; *Kang-Brown,* at paras 25-26, BOA, Tab 21; *Fearon,* at para 83, BOA, Tab 33; *A.M,* at para 75, BOA, Tab 43.
[83] *Chehil,* at para 3, BOA, Tab 36.
[84] *Chehil,* at para 25, BOA, Tab 36; also *R v Clayton,* 2007 SCC 32*,* at para 69, BOA, Tab 47; and *Hunter,* at page 161, BOA, Tab 10.

balance that s. 8 has historically struck between individual privacy and the various public interests the state may pursue *via* a search.[85]

57. As it stands, the best the College can put to this court is that it has a general suspicion that any student might cheat because they are a student in the age of AI. This is essentially generalized suspicion, which "attaches to a particular activity…rather than a particular person."[86] This court has routinely rejected the "generalized suspicion" standard as inconsistent with s. 8.[87]

58. It is true that grounds will not always be required in the administrative context. The scheme under review in *Correctional Officers,* for instance, searched every employee falling into a certain category.[88] However, cases where random searches were found to be reasonable within the meaning of s. 8 have two features that do not apply to the case at bar:

i. First, these cases have involved highly regulated matters. These matters have included: enforcing income tax obligations,[89] investigating anti-competitive behaviour by a registered corporation,[90] ensuring the incorruptibility of front-line correctional workers,[91] ensuring that those who operate nuclear power plants are sober when they do so,[92] or enforcing comprehensive legislation governing commercial trucking, which included an express legislative authorization for random searches.[93] All these cases involve sectors that must be highly regulated to maintain the integrity of basic societal functions and infrastructure.[94] While the College's statutory mandate to provide educational opportunities to students is very important, it is not in the same regulatory order as the above examples.

ii. Second, where random administrative searches have been upheld as reasonable, the searches performed have been considered the least intrusive way of

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[85] *Hunter,* at pages 159-160, BOA, Tab 10; *Chehil,* at para 22, BOA, Tab 36: "[T]he s. 8 framework, which balances privacy interests and the public interest in providing law enforcement with the means to investigate crime…this balance must be struck on objective grounds." [Emphasis added.]
[86] *A.M,* at para 151, BOA, Tab 43.
[87] *A.M,* at para 151, BOA, Tab 43; *Chehil,* at paras 28-30, BOA, Tab 36; *Kang-Brown,* at para 60, BOA, Tab 21.
[88] *Correctional Officers,* at paras 1-7, BOA, Tab 5
[89] As in *McKinlay Transport,* BOA, Tab 16.
[90] As in *Thomson Newspapers,* BOA, Tab 18.
[91] As in *Correctional Officers,* BOA, Tab 5.
[92] As in *Power Workers Union*, BOA, Tab 6.
[93] See Respondent Factum, at paras 11-12, citing *R v Nolet,* 2010 SCC 24.
[94] *Thomson Newspapers,* at pages 506-507, BOA, Tab 18.

"adequate[ly]" achieving the purposes of the law or policy in question.[95] Nothing in the record before this court suggests that the ExamTech Policy is the least intrusive means of mitigating the risk that AI-assisted cheating poses to the College.

59. Even if this court finds that there is no less intrusive way of adequately pursuing the ExamTech Policy's purpose, this alone is far from dispositive of the Policy's reasonableness. In *R v A.M,* this court considered the constitutionality of a search that occurred when the police gathered the backpacks of an entire school's students and searched them using a sniffer dog.[96] This "random [and] speculative" search was, technically speaking, an efficient investigatory technique for the police, and advanced the school's "zero tolerance" drug policy[97] – just as searching every student using ExamTech advances the College's strict approach to AI-assisted academic misconduct with unprecedented success.[98] The *A.M* court, however, found that the search was unreasonable because it proceeded without grounds,[99] even though it could well be said that fulfilling the zero-tolerance policy's purpose required ubiquitous searches.

60. While the principles expressed in *A.M* are broadly applicable, the case did take place in the criminal context. However, outside the context of criminal law, searches of students by school authorities have required, at a minimum, reasonable suspicion. In *R v M(MR),* this court held that school authorities can search secondary school students where there are reasonable grounds to suspect that a school rule has been violated and that a search will yield evidence of that violation.[100] This standard reflects the non-criminal context of school searches and school authorities' duty to provide for students' welfare, given their age (a factor which is clearly less salient in the post-secondary context).[101] In *Gillies v Toronto District School Board,* Ontario's Divisional Court held that a Toronto high school's policy of searching all students seeking

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[95] *Johnson v Ontario (Minister of Revenue),* [1990] OJ No 1744 (CA), BOA, Tab 48. See also *Thomson Newspapers,* at pages 506-507 for the general principle that random searches *may* be appropriate where the nature of the area regulated *requires* random searches, BOA, Tab 18.
[96] *A.M,* at para 6, BOA, Tab 43.
[97] *A.M,* at para 15, BOA, Tab 43.
[98] Official Problem, at paras 48-49.
[99] *A.M,* at para 91, BOA, Tab 43.
[100] *M(MR),* at para 48, BOA, Tab 20.
[101] *M(MR),* at paras 33, 35-36, BOA, Tab 20. In contrast to *M(MR),* College authorities are not in this context required to act quickly to enforce rules to protect student safety, and the College's students are generally adults.

entrance to prom using a breathalyzer violated s. 8, because such searches required, at a minimum, reasonable suspicion.[102]

61. Given the intrusiveness of an ExamTech search (a long-term state intrusion that stands to reveal intimate, biographical information), the College should only be entitled to subject students to these searches where there are individualized and objective grounds to do so. A reasonable suspicion standard would come closer to striking an appropriate "balance"[103] between students' privacy and the College's interest in mitigating the risks of AI-assisted academic misconduct.

e) Conclusion

62. The ExamTech Policy does not strike an appropriate balance between students' privacy and the College's interest in preventing AI-assisted cheating.[104] While the Policy subjects students to intrusive, extended surveillance, it evades meaningful after-the-fact review and allows the College to search students indiscriminately and without justification. The Policy clearly violates s. 8.

E. THE EXAMTECH POLICY IS NOT A REASONABLE LIMIT UNDER SECTION 1

1) The *Oakes* test applies

63. Because the ExamTech Policy violates s. 8, it can only be upheld if it constitutes a reasonable limit under s. 1 of the *Charter,* which provides that the rights and freedoms set out in it are subject only to reasonable limits that can be demonstrably justified in a free and democratic society. The jurisprudence provides two ways of justifying *Charter*-infringing state action under s. 1: the test set out in *R v Oakes,* and the test described in *Doré.*

64. These tests differ in their forms but overlap substantially in their content. *Oakes* makes an inquiry into the presence of a pressing and substantial objective (generally assumed in the administrative context, where the *vires* of a rule is not being challenged), rational connection, minimal impairment, and proportionality in the strict sense. While *Doré* focuses on

[102] *Gillies,* at para 122, BOA, Tab 9.
[103] *Goodwin,* at para 77, BOA, Tab 41; *Hunter,* at pages 166-167, BOA, Tab 10.
[104] *McKinlay Transport,* at pages 643-644, BOA, Tab 16.

proportionality, it "works the same justificatory muscles" as *Oakes,*[105] an idea borne out by the extent to which issues going to minimal impairment were relevant in the important post-*Doré* case of *Loyola High School v Quebec (Attorney General).*[106] Furthermore, the Ontario Court of Appeal recently held that "there is little…functional difference" between *Oakes* and *Doré.*[107]

65. Despite the similarities between the two tests, however, there are two relevant distinctions between *Oakes* and *Doré* that are instructive in the present case:

i. First, *Doré* is intended to apply to reasonableness review of *Charter*-engaging adjudicated administrative decisions that concern "particular set[s] of facts"—whereas *Oakes* applies to rules of general application.[108]

ii. Second, where correctness is the appropriate standard of review—as is the case here—*Oakes* is more helpful to the reviewing court. This is because correctness review is wholly focused on outcomes and sees the reviewing court stepping into the shoes of the decision maker.[109] Under such circumstances, the step-by-step formalism of *Oakes* is of assistance and should be relied upon.

66. In similar cases, courts have held that *Oakes* is the appropriate s. 1 test. In *Correctional Officers,* discussed above, the Federal Court of Appeal applied *Oakes* because the applicants challenged a policy—a rule of general application—in its entirety.[110] Ontario's Divisional Court applied *Oakes* in *Gillies,* a judicial review of a Toronto high school's mandatory pre-prom breathalyzer test.[111] In *Trinity Bible Chapel,* the Ontario Court of Appeal applied *Oakes* to assess the constitutionality of certain Ontario public health regulations.[112]

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[105] *Doré,* at page 5, BOA, Tab 4.
[106] *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at paras 4, 40-41, 79, BOA, Tab 49.
[107] *Trinity Bible Chapel,* at para 75, BOA, Tab 40.
[108] *Doré,* at para 36, in which the court held that: "When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts…When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application." [Emphasis added], BOA, Tab 4.
[109] *Vavilov,* at paras 12-15, BOA, Tab 3.
[110] *Correctional Officers,* at para 21, BOA, Tab 5
[111] *Gillies,* at para 115, BOA, Tab 9.
[112] *Trinity Bible Chapel,* at para 89, BOA, Tab 40.

2) The ExamTech Policy is not justified under s. 1

67. The purpose of the ExamTech Policy is to mitigate the risk that students at the College will use AI to cheat on assignments and exams. This objective is pressing and substantial, and rationally connected to the s. 8 infringement in this case.

68. However, the Policy is neither minimally impairing nor proportionate as between its salutary and deleterious effects. It cannot be saved under s. 1 and must be set aside.

a) The ExamTech Policy is not minimally impairing

69. The onus is on the College to show that a less intrusive version of the ExamTech Policy would not be a reasonably effective means of mitigating the risks associated with AI-assisted academic misconduct.[113] The College has offered no evidence that it has considered and rejected alternatives to the ExamTech Policy that would have a less severe impact on students' *Charter* rights[114]—which is especially troubling considering the significance of the *Charter* infringement in this case.[115]

70. The College has provided no evidence going to why *all* of the forms of surveillance ExamTech uses—video, audio, room-scanning, keystroke logging, screen recording, and location tracking—are necessary to achieve the Policy's purpose in a real and substantial manner, or why these searches cannot be more selectively applied on a reasonable suspicion standard.[116] Yet, on its face, it seems clear that less impairing options may be available. For example, the College has not demonstrated why a Policy requiring students to submit notes and comprehensive, step-by-step drafts alongside their written assignments would not be a real and substantial way of mitigating the risk of AI-assisted cheating; nor a Policy that only applied in courses, such as first-year survey courses, where the risk and utility of cheating are highest due to the general nature of the subject matter; nor a Policy that required students whose instructors

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[113] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 54-55 [*Hutterian Brethren*], BOA, Tab 50.

[114] *Thomson Newspapers* , BOA, Tab 18; *RJR Macdonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, BOA, Tab 51.

[115] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para 152, BOA, Tab 52. See also *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, 2017 SCC 6 at para 58, , BOA, Tab 53 where this court held that: "Where the scope of the infringement is minimal… social science evidence may not be necessary." [Emphasis added].

[116] *Hutterian Brethren*, at paragraph 55, BOA, Tab 50; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 102, BOA, Tab 54.

suspected that they had cheated to undergo an oral examination on the subject matter of their assignment.

71. Ultimately, ExamTech is not a "carefully tailored" tool that demonstratively ensures that students' s. 8 rights are "impaired no more than is necessary."[117] Instead, it is a blunt instrument that is unnecessarily impairing of students' s. 8 rights.

b) The ExamTech Policy is disproportionate

72. The final stage of the *Oakes* analysis asks this court to consider whether the benefits of the ExamTech Policy "are worth the cost" of the Policy's impact on students' s. 8 rights.[118] This court must determine whether the Policy is proportionate as between its deleterious and salutary effects.[119] It is not.

73. The Policy has some undeniable salutary effects: in its significant degree of surveillance, it will likely discourage some students from using AI to cheat. But the extent of these positive effects is marginal considering ExamTech's foreseeably corrosive impact on the College's wider educational environment. ExamTech's constant surveillance undermines other important elements of the educational experience the College surely aims to offer, such as confidence, exploration, and a love of learning—not to mention a suitably critical eye for state intrusions.[120] Under the ExamTech Policy, education becomes a profoundly uncomfortable, intrusive experience to be endured as quickly as possible. And, under the Policy, the subordination of students' constitutional rights to the interests of the state becomes routine. This seriously undermines the values and goals of education in a democratic society. The Policy's ostensible salutary effects are, in this broader sense, self-defeating.

74. The Policy's deleterious effects are excessive. The Policy subjugates students to intrusive surveillance for a significant portion of their lives: potentially hours each day, for the whole academic year. This surveillance strips students of control over their private biographical

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[117] *Hutterian Brethren*, at para 145, BOA, Tab 50.
[118] *Hutterian Brethren*, at para 77, BOA, Tab 50.
[119] *R v Oakes*, [1986] 1 SCR 103 at para 71, BOA, Tab 55.
[120] See *M(MR)*, at para 3, BOA, Tab 20: "[S]chools also have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example *and may be undermined if the students' rights are ignored by those in authority*." [emphasis added]

information on a massive scale and, as such, has a chronic and caustic effect on students' dignity and autonomy.

75. In *R v KRJ,* this court emphasized that the proportionality analysis asks the court to "stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society."[121] To the ExamTech Policy's indiscriminate, extended surveillance to stand would be fundamentally at odds with the values of autonomy and dignity that breathe life into the s. 8 guarantee and the *Charter* as a whole.[122] The ExamTech Policy is not worth this cost.[123]

II. THE DECISION TO EXPEL BEN PARK AND THE DECIDEAI POLICY

A. THE DECISION TO EXPEL BEN PARK VIOLATES THE PRINCIPLES OF PROCEDURAL FAIRNESS

1) Disciplinary procedures must be fair and appropriate to the context

a) The College owes a duty of procedural fairness to students in disciplinary hearings

76. A duty of procedural fairness is owed where a decision is administrative and affects the "the rights, privileges or interests of an individual",[124] such as where a college issues a disciplinary decision.[125] Given that the disciplinary process has the potential to significantly impact students and their lives, as sanctions include the possibility of expulsion, the College owes students a duty of procedural fairness.[126]

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[121] *R v KRJ,* 2016 SCC 31 at para 79, BOA, Tab 56.
[122] *Hutterian Brethren,* at para 88, BOA, Tab 50; *Law Society of British Columbia v Trinity Western University,* 2018 SCC 32 at para 115, BOA, Tab 57 per the concurring reasons of McLachlin C.J; *Loyola,* at para 36, BOA, Tab 49 (on the applicability of *Trinity Western,* see also *Trinity Bible Chapel,* at para 77, BOA, Tab 40, where the Ontario Court of Appeal indicated that *Doré* and *Oakes* precedent could cross-pollinate).
[123] *Hutterian Brethren,* at para 77, BOA, Tab 50.
[124] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 20 [*Baker*], BOA, Tab 58.
[125] *Khan v University of Ottawa,* [1997] OJ No 2650 at paras 13-14 [*Khan*], BOA, Tab 59; *Ford v University of Ottawa*, 2022 ONSC 6828 at para 4 [*Ford*], BOA, Tab 60*; Green v University of Winnipeg*, 2018 MBQB 4 at para 49 [*Green*], BOA, Tab 61; *Telfer v University of Western Ontario*, 2012 ONSC 1287 at paras 22-23, BOA, Tab 62.
[126] *Code of Conduct*, s.23.

b) A disciplinary procedure attracts a higher duty of procedural fairness

77. The specific procedural requirements imposed with respect to the content of the duty of procedural fairness depend on the context and circumstances.[127] *Baker* provided five, non-exhaustive factors to consider when determining the limits of the duty.[128] The first factor assesses the nature of the decision and whether the administrative body bears the hallmarks of a judicial body.[129] The second factor looks to the broader statutory scheme and asks whether there is a possibility of internal review; where not, a higher duty is generally owed.[130] The third factor is a significant consideration: the more important the decision is and the greater the impact of the decision, the greater the procedural protections required.[131] A higher duty of procedural fairness has been found in cases where the decision has the potential to impact a person's reputation,[132] or their right to continue their profession or employment is impacted,[133] such as where they are required to withdraw from a university.[134]

78. The decision to expel Mr. Park is judicial in nature,[135] and the College has removed the internal appeal mechanism permitting decisions to be reviewed by a tribunal.[136] The decision is also one of extreme importance.[137] Disciplinary suspension can have "grave and permanent consequences upon a professional career,"[138] and processes that affect livelihood or ability to pursue a profession will generally attract a high level of procedural fairness.[139] Therefore, the

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[127] *Baker*, at para 21, BOA, Tab 58.
[128] *Baker,* at paras 21-22 and 28 (the nature of the decision being made; the statutory scheme and whether an appeal process is available; the importance of the decision to the individual or individuals affected; the legitimate expectations of the person making the challenge; and the procedural choices made by the administrative body), BOA, Tab 58; Affirmed in *Vavilov,* at para 77, BOA, Tab 3.
[129] *Baker*, at para 23, BOA, Tab 58; Statutory powers are considered to exist on a spectrum ranging from judicial at one end to political or legislative at the other, with administrative powers falling somewhere in between, see *Airport Self Storage and RV Centre Ltd v Leduc (City)*, 2008 ABQB 12 at para 24, BOA, Tab 63 (concerned an enactment of bylaw dealing with disputes between neighbours, the Court found the process to be closer to the judicial end of the spectrum).
[130] *Baker,* at para 24, BOA, Tab 58.
[131] *Baker,* at para 25, BOA, Tab 58.
[132] *Samatar v Canada (Attorney General)*, 2012 FC 1263 at paras 124–127, BOA, Tab 64.
[133] *Kane v Board of Governors of the University of British Columbia*, [1980] 1 RCS 1105 at page 1113 [*Kane*], BOA, Tab 65.
[134] *Yao v University of Saskatchewan*, 2014 SKQB 184 at paras 12 and 41, BOA, Tab 66; *Tsimidis v Certified General Accountants of Ontario*, 2014 ONSC 4236 at paras 30-31, BOA, Tab 67.
[135] *Code of Conduct*, s.23.
[136] Official Problem, at para 27.
[137] *Code of Conduct*, s.23.
[138] *Kane,* at page 1113, BOA, Tab 65; *Baker*, at para 25 (affirming that processes that affect livelihood or ability to pursue a profession will generally attract a high level of procedural fairness), BOA, Tab 58; *Khan*, at para 14, BOA, Tab 59.
[139] *Baker,* at para 25, BOA, Tab 58; *Khan*, at para 14, BOA, Tab 59.

decisions issued through the disciplinary process under the DecideAI Policy attract a higher level of procedural fairness, requiring the College to observe students' right to be heard[140] and their right to an impartial and independent decision maker.[141] In assessing whether there is a violation of the principles of procedural fairness, the standard of review is correctness.[142]

2) <u>The disciplinary procedure violates students' right to be heard</u>

a) The standard form inputs used by DecideAI do not constitute meaningful submissions

79. The right to be heard includes the right for individuals affected by a decision to have the opportunity to present their case fully and fairly to the relevant decision makers.[143] This includes being given the opportunity to provide meaningful submissions.[144] A violation of this right may be corrected where there is another opportunity for the individual to fully respond or where the initial error is corrected some other way,[145] however this depends on the seriousness of the error and the weight the subsequent decision maker gives the initial decision.[146]

80. In *Ford*, the Ontario Superior Court of Justice held that a student's right to be heard was violated by their university when it conducted and subsequently reviewed a grade review for a course; the course failure resulted in him losing his place in his program.[147] Throughout the process, the student was not permitted an opportunity to make meaningful submissions or challenge the evidence against him.[148] The Court noted that the process was not procedurally fair, nor was it corrected on appeal, especially given the seriousness of the decision.[149]

81. Once notified that he had been flagged by ExamTech, Mr. Park attempted to make submission by way of the DecideAI standardized input form.[150] Unable to find a drop-down option relevant to his circumstances, Mr. Park was forced to select "No Explanation".[151] Based

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[140] *Ford*, at para 73, BOA, Tab 60; *Baker*, at para 28, BOA, Tab 58.
[141] *Green*, at paras 63-64, BOA, Tab 61; *Baker*, at para 28, BOA, Tab 58.
[142] *Vavilov*, at para 23, BOA, Tab 3.
[143] *Vavilov*, at para 127, BOA, Tab 3; *Baker*, at para 28, BOA, Tab 58.
[144] *Ford*, at para 73, BOA, Tab 60; *Baker*, at para 28, BOA, Tab 58.
[145] *McNamara v Ontario (Racing Commission)*, 1998 CanLII 7144 (ON CA) at para 26 [*McNamara*], BOA, Tab 68.
[146] *Khan*, at para 41, BOA, Tab 59; *Ford*, at para 91, BOA, Tab 60.
[147] *Ford*, at para 73, BOA, Tab 60.
[148] *Ford*, at paras 41, 45, and 48, BOA, Tab 60.
[149] *Ford*, at paras 69, 73 and 87, BOA, Tab 60.
[150] Official Problem, at para 36.
[151] Official Problem, at para 36.

on this erroneous and limited submission, DecideAI predicted Mr. Park was 90% likely to be cheating.[152]

82. As in *Ford*, students are given a limited opportunity to make submissions through the pre-set, drop-down menu form used by DecideAI.[153] Students have stated that in instances where they do not recall the suspicious conduct, the standard form does not provide them with a meaningful opportunity to respond.[154] If found through the process to have cheated, students' risk being banned from the College and having their professional reputations permanently damaged.[155] Yet, the policy permits DecideAI to form predictions to be relied on by the Dean based on these limited submissions.[156] Thus, DecideAI reports contain serious errors.

b) DecideAI's errors cannot be corrected by the oral hearing with the Dean

83. Unlike in *McNamara v Ontario (Racing Commission)*, the one-hour oral hearing does not correct this defect, nor does it constitute a *de novo* review: the Dean considers the predictions of DecideAI despite the internal error, and student's ability to participate at the hearing is restricted to oral submissions and providing evidence.[157] Furthermore, the College has justified reducing the amount of time for students to make submissions from one day to one hour because of the "streamlining effect of DecideAI on the efficiency of the hearings"; this indicates that the predictions of DecideAI are given meaningful weight in the Dean's decisions.[158] Since its implementation, 71% of DecideAI's recommendations on sanctions to the Dean have been followed and, in every instance, where DecideAI determined an above 90% likelihood of academic misconduct, the Dean found that the student had committed an academic offence.[159] Indeed, this is what happened to Mr. Park. Come the oral hearing, Mr. Park informed the Dean of his explanation, but the Dean was not satisfied and found him not

[152] Appendix E, The Dean's Reasons for Expelling Ben Park.
[153] Official Problem, at para 23 and Appendix C.
[154] Official Problem, at para 23 and Appendix C.
[155] *Code of Conduct*, s.23.
[156] Official Problem, at para 25 and Appendix C.
[157] Official Problem, at paras 23-26.
[158] Official Problem, at para 26.
[159] Official Problem, at para 41.

to be credible.[160] Instead, Mr. Grondin relied on the report of DecideAI and its prediction of 90% to determine that Mr. Park had cheated.[161]

84. In addition, like the student in *Ford*, the students at Flavelle College are not provided with the reasoning for DecideAI's predictions and thus are denied the opportunity to challenge the system's logic at the oral hearing.[162] Here, Mr. Park was only provided with the final decision and recommendation of DecideAI and so could not make submissions to challenge DecideAI's prediction or sanction recommendation.[163] This is especially concerning given that DecideAI's error rate is as high as 10%, yet these students are not given an opportunity to make submissions on DecideAI's conclusions.[164] The duty of procedural fairness is breached even when the denial of the right to make submissions only concerns one aspect of the case.[165] Taken together, the oral hearing is simply insufficient to correct the serious error contained in DecideAI reports.

3) The disciplinary procedure violates students' right to an impartial and independent adjudicator

85. The duty of procedural fairness in these circumstances includes the right to an impartial and independent decision-maker.[166] Impartiality refers to a decision maker's state of mind, whereas independence refers to whether it is free from external influence or force.[167]

86. The test for bias was articulated in *Committee for Justice and Liberty v National Energy Board* and asks whether a reasonable person informed of the situation would conclude that it is more likely than not the decision maker consciously or unconsciously would not decide fairly; this test is objective.[168] An institution can also be structured in a way so as to create a

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[160] Official Problem, at para 35; Appendix E, The Dean's Decision to Expel Ben Park.
[161] Appendix E, The Dean's Reasons for Expelling Ben Park.
[162] Official Problem, at para 38.
[163] Official Problem, at paras 35-38.
[164] Official Problem, at para 48.
[165] *Nation Rise Wind Farm Limited Partnership v Minister of the Environment*, 2020 ONSC 2984 at paras 135, 141, and 154 (breach was found where submissions on the issue of the proper remedy were not permitted), BOA, Tab 69.
[166] *Green*, at paras 63-64, BOA, Tab 61; *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 62 [*Canadian Pacific*], BOA, Tab 70; *Valente v The Queen*, [1985] 2 SCR 673 at pages 684-685 [*Valente*], BOA, Tab 71.
[167] *R v Généreux*, [1992] 1 SCR 259 at pages 283–284, BOA, Tab 72; *Valente*, at page 685, BOA, Tab 71.
[168] *Committee for Justice and Liberty v National Energy Board*, [1978] 1 RCS 369 at page 394 [*Committee for Justice*], BOA, Tab 73.

reasonable apprehension of bias on an institutional level.[169] The question in that case is whether there would be reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases.[170]

87. While the College may have legitimate objectives in utilizing DecideAI, the Federal Court of Appeal has affirmed that "procedures designed to increase quality and consistency cannot be adopted at the expense of the duty of each [decision maker] to afford to the claimant before it a high degree of impartiality and independence."[171]

a) There is a reasonable apprehension that the Dean is not an impartial adjudicator

88. The duty against bias includes the duty to approach the decision with an open mind.[172] In *Committee for Justice,* the National Energy Board created a panel to hear applications for permissions to build a pipeline.[173] One of the assigned adjudicators had previously and recently been involved with a Company applying to the panel.[174] The Court found that the circumstance gave rise to a reasonable apprehension of bias.[175]

89. The Dean is in a similar position to the adjudicator in *Committee for Justice,* as the Dean must choose between believing the student charged with misconduct or DecideAI, a program developed and promoted by the College.[176] Furthermore, it has been well established by behavioral psychology that automation bias is a real phenomenon that sees individuals trusting the suggestions and decisions of machines, even when it goes against their better judgment.[177] Before going into the oral hearings with the student, the Dean will have already read DecideAI's report and been primed of the student's guilt.[178] Indeed, since the implementation of the DecideAI Policy, the Dean has adopted most of the sanctions recommended by DecideAI, and in cases involving predictions over 90% likelihood of

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[169] *Canadian Pacific,* at para 65-68, BOA, Tab 70; *R v Lippé*, [1991] 2 SCR 114 at page 140 [*Lippé*], BOA, Tab 74.
[170] *Lippé*, at page 144, BOA, Tab 74.
[171] *Kozak v Canada (Minister of Citizenship and Immigration),* 2006 FCA 124 at para 56 [*Kozak*], BOA, Tab 75.
[172] *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at page 1190, BOA, Tab 76.
[173] *Committee for Justice*, at page 374, BOA, Tab 73.
[174] *Committee for Justice*, at pages 384-385, BOA, Tab 73.
[175] *Committee for Justice,* at page 391, BOA, Tab 73.
[176] Official Problem, at paras 14 and 25-26.
[177] Hannah Ruschemeier, "The Problems of the Automation Bias in the Public Sector – A Legal Perspective", 8 May 2023, Weizenbaum Conference proceedings 2023, Forthcoming, University of Hagen - Department of Law.
[178] Official Problem, at paras 25-26.

cheating, the Dean always finds a violation.[179] A reasonable person viewing these circumstances would think that, in a substantial number of cases, it is more probable than not that the Dean will not decide the case before them fairly when utilizing DecideAI's reports, as they do not enter the process and the oral hearing with an open mind.

90. Furthermore, the Dean who heard Mr. Park's case, Mr. Grondin, like the panelist in *Committee for Justice,* had a prior and recent association with DecideAI: Mr. Grondin helped the College develop the DecideAI technology.[180] When combined with the knowledge that the College developed DecideAI, as well as the phenomenon of automation bias, this gives rise to a reasonable apprehension that Mr. Grondin was likely not an impartial adjudicator in Mr. Park's case.

b) There is a reasonable apprehension that DecideAI is not an impartial adjudicator

91. The requirement that an adjudicator be impartial extends to all subordinate individuals who play a significant role in the decision, even if the individual is not the final decision maker.[181] DecideAI has *indicia* that it itself was not an impartial decision maker in Mr. Park's case.

92. Factors like GPA and past misconduct are given weight by DecideAI based on how the factors were treated in decisions issued by the College after the year 2000.[182] In decisions issued prior to the Policy's implementation, how these factors were weighed would depend on the facts of the particular case and the discretion of the decision maker. However, DecideAI only calculates a single average weight for each factor and applies that weight to every case where the issue arises, regardless of individual circumstances.[183] Where the original training set contains an over representation of cases where harsher sanctions were issued to students with a low GPA or a history of misconduct, because of bias or even by chance, then DecideAI will contain the same bias or may have a skewed average weight.[184] These biases and variants may

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[179] Official Problem, at para 41.
[180] Official Problem, at para 24.
[181] *Baker*, at para 45, BOA, Tab 58.
[182] Official Problem, at para 24; Appendix C.
[183] Official Problem, at para 24; Appendix C.
[184] *Ewert v Canada*, 2018 SCC 30 at paras 63 and 65, BOA, Tab 77, (acknowledging AI can be biased if not attended to at the development stage); Nima Shahbazi, et al., "2021. Representation Bias in Data: A Survey on Identification and Resolution Techniques." In Woodstock '18: ACM Symposium on Neural Gaze Detection, June 03–05, 2018, Woodstock, NY. ACM, New York, NY, USA, 47 pages, at page 2.

only amplify and solidify over time given the concerns regarding the Dean's impartiality and independence: in issuing decisions that align with DecideAI's biased outputs, DecideAI's internal biases will be self-affirmed.[185]

93. In this case, the evidence indicates that students with a grade point average below 2.7 and those with a history of past misconduct are 1.5 and 2 times more likely to be given a more serious sanction, respectively.[186] A reasonable person informed of all these circumstances would believe that it is more likely than not that DecideAI was not an impartial decision maker in Mr. Park's case, as his GPA is 2.1 and he has a history of misconduct.[187] As was the case in *Baker*, given that DecideAI played a central role in forming the Dean's decision, it follows that if DecideAI carries biases, the decision of the Dean also carries this bias.[188]

c) There is a reasonable apprehension that the Dean is not an independent adjudicator

94. Adjudicators must form their decision in accordance with their own conscience and opinions.[189] The requisite level of institutional independence depends on the nature of the decision-making body and the interest at stake, and other indices of independence.[190]

95. In *Kozak v Canada (MCI)*, the Federal Court of Appeal dealt with the question of whether the Immigration and Refugee Board created a reasonable apprehension of bias by establishing a lead case format for determining a refugee claim by Hungarian Roma.[191] The Board had decided to utilize this approach in order to increase consistency and accuracy of future decisions.[192] However, there were also concerns about the number of positive decisions rendered in favor of Hungarian Roma claimants, and evidence indicated the Board sought to address these concerns through the lead case strategy.[193] Although the Court could not pinpoint a single fact on its own to establish bias, it found that nonetheless, a reasonable person would

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[185] Laleh Seyyed-Kalantari, et al., "Underdiagnosis bias of artificial intelligence algorithms applied to chest radiographs in under-served patient populations", *Nature Medicine*, 27: 2176-2182, December 2021, at page 2180.
[186] Official Problem, at para 41.
[187] Appendix E: The Dean's Reasons for Expelling Ben Park.
[188] *Baker*, at para 45, BOA, Tab 58.
[189] *Iwa v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at page 332, BOA, Tab 78.
[190] *Canadian Pacific*, at paras 83–84, BOA, Tab 70.
[191] *Kozak*, at paras 58–60, BOA, Tab 75.
[192] *Kozak*, at paras 58–60, BOA, Tab 75.
[193] *Kozak*, at paras 58–62, BOA, Tab 75.

think that the panel was biased and was not acting independently when it rejected the appellants' claims.[194]

96. The College has a similar strategy as the Board in *Kozak:* the College seeks to increase consistency and decrease variation across cases, however, it could also be said that they seek to decrease the number of academic disciplinary hearings where students "get away" with cheating.[195] Furthermore, the College itself has also received press attention for its work with DecideAI, and other colleges and universities have expressed interest in entering licensing deals for the use of technology.[196] Indeed, the success of DecideAI solidifies the College's reputation of being a "vanguard for technological advancements."[197] As in *Kozak*, a reasonable person would view the entirety of these circumstances and determine that it is more likely than not that the Dean would not be acting with the requisite degree of independence given the serious nature of the proceedings, as the College's interest would exert an external force on their decision-making process in favour of issuing decisions in accordance with DecideAI's predictions and recommendations.[198] As noted earlier, the evidence indicates that the Dean adopts the majority of sanctions recommended by DecideAI and always finds a violation when DecideAI's prediction is 90%.[199]

97. Furthermore, as in *Kozak*, where one of the Tribunal adjudicators hearing the claim had consulted with the Board in developing the strategy, Mr. Grondin helped the College develop the DecideAI technology.[200] When combined with the knowledge of the College's motivation for developing DecideAI, and its belief too many students were getting away with cheating, there is a reasonable apprehension that Mr. Grondin was likely not acting as an independent adjudicator in Mr. Park's case.

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[194] *Kozak,* at paras 58–60, BOA, Tab 75.
[195] "Since 2020, students were 90% less likely to be found guilty for TalkGBP-related allegations compared to other academic offences," see Official Problem, at paras 12 and 27.
[196] Official Problem, at para 39.
[197] Official Problem, at para 8.
[198] *Canadian Pacific,* at paras 83–84, BOA, Tab 70.
[199] Official Problem, at para 41.
[200] Official Problem, at para 24; *Kozak,* at para 59, BOA, Tab 75.

B. THE DECISION TO EXPEL BEN PARK IS UNREASONABLE

1) The standard of review is reasonableness

98. The presumptive standard of review for administrative decisions is reasonableness, unless the decision falls into one of the recognized exceptions.[201] On May 12th, 2026 the College made the decision to expel Mr. Park for academic misconduct under the DecideAI policy.[202] As none of the exceptions apply, the standard of review is reasonableness.

99. The reasonableness review is concerned with the decision-making process and its outcomes.[203] In assessing whether a decision is reasonable, courts will look to the decision maker's reasoning to determine whether the decision is rational and internally coherent.[204] The primary means through which a decision maker demonstrates that the decision meets the criteria of justification, transparency and intelligibility are through written reasons that demonstrate the rationale behind the decision.[205] What is reasonable also depends on the legal and factual context of the decision under review, which acts to constrain the scope in which the decision maker may act and the types of solutions it may adopt.[206]

2) The decision issued against Ben Park is unreasonable

a) The decision is not internally coherent

100. A reasonable decision is one that is justifiable, transparent, and intelligible.[207] A reviewing court must be satisfied that the decision maker's reasoning "adds up".[208] The Court in *Vavilov* noted that it would be inappropriate for an administrative adjudicator to provide written reasons that fail to justify its decision, but nevertheless "expect that its decision would be upheld on the basis of internal records that were not available to that party."[209]

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[201] *Vavilov*, at paras 23, 34, 36, 53, and 69-70, BOA, Tab 3 (exceptions include where another standard is explicitly intended by the legislature, in issues of jurisdiction between two administrative bodies, or in matters regarding constitutional issues or general questions of law of central importance to the legal system as a whole).
[202] Official Problem, at para 38.
[203] *Vavilov*, at para 82, BOA, Tab 3.
[204] *Vavilov*, at paras 102-104, BOA, Tab 3.
[205] *Vavilov*, at paras 79 and 81, BOA, Tab 3.
[206] *Vavilov*, at para 90, BOA, Tab 3.
[207] *Vavilov*, at para 99, BOA, Tab 3.
[208] *Vavilov*, at para 104, BOA, Tab 3.
[209] *Vavilov*, at para 95, BOA, Tab 3.

101. The lack of reasoning for DecideAI's predictions is akin to withholding internal records from the student that justify the outcome of the decision, and that without, the reasoning could not stand alone. The College has affirmed it has streamlined the process so efficiently it was able to remove several procedural safeguards.[210] In effect, DecideAI has taken a "mental load" off the Dean. If the College's position is that without DecideAI, they would not be able to catch as many cases of cheating,[211] then it follows that DecideAI's "mental work" is an essential component of the outcome. Without access to this reasoning, the reasoning provided by the Dean alone would be insufficient to justify a finding of misconduct. Indeed, after determining that Mr. Park was not credible, the deciding factor for the Dean was the report of DecideAI and its prediction.[212]

102. In addition, the reasoning provided itself is not justifiable. The Dean's reasoning is simply repeating the findings of ExamTech and DecideAI; in sum, the Dean decided to expel Mr. Park because ExamTech found the conduct suspicious, Mr. Park's answer was not credible, and DecideAI believes he likely cheated.[213] The Dean does not explain why he *thinks* the conduct is suspicious, or how Mr. Park's case relates to other cases when it came to determining the appropriate sanction.

103. The failure to provide DecideAI's reasoning is problematic regardless of whether DecideAI delivers its promised functionality in a reliable and consistent way.[214] Reasons explain to the affected individual how and why the decision was made, assuring them that the decision was made in a fair and lawful manner.[215] Reasons shield against arbitrariness and arbitrary exercise of public power, help to facilitate a meaningful judicial review, and are the primary means through which a decision maker demonstrates the rationale behind its decision and that the decision meets the criteria of "justification, transparency and intelligibility."[216] By withholding information as to how exactly DecideAI works, the decision is therefore also not transparent, nor is it justifiable, as critical reasoning is missing from the final decision.[217]

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[210] Official Problem, at para 26.
[211] Official Problem, at para 26.
[212] Appendix E, The Dean's Decision for Expelling Ben Park.
[213] Appendix E, The Dean's Decision for Expelling Ben Park.
[214] Official Problem, at para 48.
[215] *Vavilov*, at para 79, BOA, Tab 3.
[216] *Vavilov*, at para 79, BOA, Tab 3.
[217] Official Problem, at para 49.

104. This is not elevating "process over substance," as was cautioned in *Haghshenas v Canada (MCI)*.[218] In that case, the technology in question was merely a tool designed to simplify the visual representation of information and it did not utilize artificial intelligence, advanced analytics for decision-making, or built-in decision-making algorithms.[219] Although Courts have found that a high degree of deference is owed to academic decisions made by institutions,[220] the same cannot be said about decisions made in the context of disciplinary hearings, nor does deference change the requirements of justification, intelligibility, and transparency in decision making.

b) The decision is not justified in light of the legal and factual constraints

105. In evaluating this second flaw identified in *Vavilov*, it is helpful to look to a number of factors, including: the governing statutory scheme, the principles of statutory interpretation, applicable common law principles, the evidence before the decision maker and facts of which the decision maker may take notice, and the potential impact of the decision on the individual to whom it applies.[221]

106. As the ExamTech Policy unjustifiably violates the *Charter* rights of students, including Mr. Park's, the decision to expel Mr. Park is unreasonable.[222] In addition, because the Dean relied on the report of DecideAI, a non-impartial adjudicator, the Dean's decision was not formed on the evidence that was before him.[223] Furthermore, where the impact of a decision on an individual's rights and interests is severe, the reasons provided must reflect these stakes; the reasoning in Mr. Park's decision fails to meet this requirement.[224]

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[218] *Haghshenas v Canada (Citizenship and Immigration)*, 2023 FC 464 at para 24 [*Haghshenas*], BOA, Tab 79.
[219] Government of Canada, "CIMM - Chinook Development and Implementation in Decision Making", February 15 & 17, 2022.
[220] *Haghshenas*, at para 31, BOA, Tab 79.
[221] *Vavilov*, at paras 101–102 and 106, BOA, Tab 3.
[222] *Vavilov*, at para 106, BOA, Tab 3.
[223] *Vavilov*, at para 126, BOA, Tab 3; *Baker*, at para 48, BOA, Tab 58.
[224] *Vavilov*, at para 133, BOA, Tab 3.

C. THE DECISION TO IMPLEMENT THE DECIDEAI POLICY IS UNREASONABLE

1) The standard of review is reasonableness

107. The Supreme Court in *Vavilov* did away with the distinct category of jurisdictional cases, once attracting a correctness review.[225] Instead, questions concerning the scope of authority delegated to a decision maker should be assessed conducting a reasonableness review.[226] The reasonableness standard applies in reviewing a decision maker's interpretation of its authority, the Court noting that this is approach is better suited to reviewing cases where the legislature has delegated "broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute."[227] The reasonableness standard applies in a wide variety of contexts and to many types of decisions, including those issued by tribunals or matters of high policy and pure law.[228] Where an administrative decision is not accompanied by reasons, as is often the case in matters of policy, the reviewing court must still examine the decision considering the relevant legal and factual constraints.[229] Here, it is permissible for the analysis to focus more on the outcome of the decision rather than on the adjudicator's reasoning process.[230]

108. Section 97 of *Act* delegates authority to the College to establish fair procedures for resolving all disputes at the College.[231] In 2024, the College exercised this authority and made the decision to implement a new disciplinary procedure incorporating the use of DecideAI.[232] As none of the exceptions set out in *Vavilov* apply, the decision to implement the policy must be reviewed on a standard of reasonableness.

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[225] *Vavilov*, at para 66, BOA, Tab 3.
[226] *Vavilov*, at para 67, BOA, Tab 3.
[227] *Vavilov*, at paras 66 and 68, BOA, Tab 3.
[228] *Vavilov*, at para 88, BOA, Tab 3; *Portnov v Canada*, 2021 FCA 171 at paras 20, 22, 27-28, BOA, Tab 80; *Innovative Medicines Canada v Canada (Attorney General)*, [2022] FCJ No 1696 at paras 61-62, 67-70, 2022 FCA 210, BOA, Tab 81.
[229] *Vavilov*, at paras 136–138, BOA, Tab 3.
[230] *Vavilov*, at para 138, BOA, Tab 3.
[231] *Colleges Act*, s.97.
[232] Official Problem, at para 13; *Code of Conduct*, s.23.

2) The decision to implement the DecideAI Policy is unreasonable

109. Section 97 of the *Act* states that the College may establish fair procedures for resolving any and all disputes at the College.[233] Section 23 of the *Code* outlines the disciplinary procedure that follows when a student is flagged by ExamTech.[234] The *Act* indicates that the purpose of giving the College powers was to permit the College to assist individuals in finding and keeping employment, and to support the economic and social development of the local community.[235] Given these important objectives and the plain language of the act, a reasonable interpretation of section 97 would be that in setting out their disciplinary procedures the College must ensure that it abides by basic common law principles of procedural fairness, including the right to be heard and the right an independent and impartial adjudicator.[236]

110. However, as it stands, the DecideAI Policy permits chronically procedurally unfair disciplinary process for academic offences.[237] In administering its powers under the *Act*, the College is not permitted to disregard its governing statutory scheme or the authority granted under it.[238] Nor is the College permitted to interpret the scope of its regulation-making authority in a manner that is inconsistent with applicable common law.[239] As observed in *Roncarelli v Duplessis*, there is no such thing as absolute and untrammeled discretion; any exercise of discretion by an administrative body must accord with the purposes for which the discretion was given.[240] Where an administrative body strays beyond the limits set by the statutory language it is interpreting, the decision will be impossible to justify.[241] Therefore, the decision to implement the DecideAI Policy is unreasonable, as it is not tenable in light of relevant legal constraints placed on the College.

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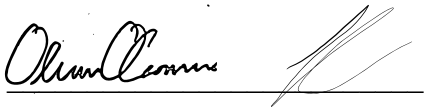
[233] *Colleges Act*, s.97.
[234] Official Problem, at para 19; *Code of Conduct*, s.23.
[235] *Vavilov*, at para 120, BOA, Tab 3; *Colleges Act*, s.2(2).
[236] "By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution." See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28, BOA, Tab 82.
[237] For an example of a case where a policy challenge was brought in the absence of individual decisions, see *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at paras 49-55, BOA, Tab 83.
[238] *Vavilov*, at paras 107–108, 111, 133–135, BOA, Tab 3.
[239] *Vavilov*, at para 111, BOA, Tab 3.
[240] *Roncarelli v Duplessis*, [1959] SCR 121 at page 140, BOA, Tab 84.
[241] *Vavilov*, at para 110, BOA, Tab 3.

PART IV – ORDER SOUGHT

111. The Appellant seeks an order striking down both the ExamTech Policy and the DecideAI Policy.

112. The Appellant also seeks an order setting aside the decision to expel Ben Park from Flavelle College.

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



Olivia O'Connor and Julia Cappellacci
Counsel for the Appellant

PART IIV – AUTHORITIES

JURISPRUDENCE

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20	*R v M(MR)*, [1998] 3 SCR 393	**3, 33, 35-37, 48, 96**
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22	*R v Marakah*, 2017 SCC 59	**27-30, 41, 93**
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39	*R v Ward*, 2012 ONCA 660	**87**
40	*Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134	**75, 77, 89**
41	*Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46	**57, 59, 62, 63, 67-68, 71, 72, 73-77**
42	*Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877	**118-119**
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47	*R v Clayton*, 2007 SCC 32	**69**
48	*Johnson v Ontario (Minister of Revenue)*, [1990] OJ No 1744 (CA)	**22**
49	*Loyola Highschool v Quebec (Attorney General)*, 2015 SCC 12	**4, 36, 40-41, 79**
50	*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37	**54-55, 77, 88, 145**
51	*RJR Macdonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199	**160**
52	*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27	**152**
53	*B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General)*, 2017 SCC 6	**58**
54	*Carter v Canada (Attorney General)*, 2015 SCC 5	**102**
55	*R v Oakes*, [1986] 1 SCR 103	**71**
56	*R v KRJ*, 2016 SCC 31	**79**

57	*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32	**115**
58	*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817	**20-21, 23, 24-25, 28, 45, 48**
59	*Khan v University of Ottawa*, [1997] OJ No 2650	**13-14, 41**
60	*Ford v University of Ottawa*, 2022 ONSC 6828	**4, 41, 45, 48, 69, 73, 87, 91**
61	*Green v University of Winnipeg*, 2018 MBQB 4	**49, 63, 64**
62	*Telfer v University of Western Ontario*, 2012 ONSC 1287	**22-23**
63	*Airport Self Storage and RV Centre Ltd v Leduc (City)*, 2008 ABQB 12	**24**
64	*Samatar v Canada (Attorney General)*, 2012 FC 1263	**125–127**
65	*Kane v Board of Governors of the University of British Columbia*, [1980] 1 RCS 1105	**1113**
66	*Yao v University of Saskatchewan*, 2014 SKQB 184	**12, 41**
67	*Tsimidis v Certified General Accountants of Ontario*, 2014 ONSC 4236	**30, 31**
68	*McNamara v Ontario (Racing Commission)*, 1998 CanLII 7144 (ON CA)	**26**
69	*Nation Rise Wind Farm Limited Partnership v Minister of the Environment*, 2020 ONSC 2984	**135, 141, 154**
70	*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3	**62, 65, 66, 67, 68, 83, 84**
71	*Valente v The Queen*, [1985] 2 SCR 673	**684, 685**
72	*R v Généreux*, [1992] 1 SCR 259	**283, 284**
73	*Committee for Justice and Liberty v National Energy Board*, [1978] 1 RCS 369	**384, 385, 391, 394**
74	*R v Lippé*, [1991] 2 SCR 114	**140, 144**
75	*Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124	**56, 58, 59, 60, 61, 62**
76	*Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170	**1190**
77	*Ewert v Canada*, 2018 SCC 30	**63, 65**
78	*Iwa v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282	**332**
79	*Haghshenas v Canada (Citizenship and Immigration)*, 2023 FC 464	**24, 31**
80	*Portnov v Canada*, 2021 FCA 171	**20, 22, 27, 28**
81	*Innovative Medicines Canada v Canada (Attorney General)*, 2022 FCA 210	**61, 62, 67, 68, 69, 70**
82	*Dunsmuir v New Brunswick*, 2008 SCC 9	**28**
83	*Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17	**49, 50, 51, 52, 43, 54, 55**
84	*Roncarelli v Duplessis*, [1959] SCR 121	**140**

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, 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.
…
Crown agent
(4) A college established under subsection (1) is an agency of the Crown.
...
Policy directives
4(1) The Minister of Training, Colleges, and Universities may issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs.
Binding
(2) The policy directives are binding upon the colleges and the colleges to which they apply shall carry out their objects and conduct their affairs in accordance with the policy directives.
...
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.

THE EXAMTECH AND DECIDEAI POLICIES

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
1. 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 must consider the DecideAI reports when determining whether a student is guilty of an academic offence or when determining the contents of an order.
…